

Chapter 8: Violations of Investor Rights Under Customary International Law

Customary international law has long provided for the protection of aliens, including the protection of their investments in the territory of other states. Indeed, Max Huber, in *Island of Palmas*, suggested that the converse consideration in return for the recognition by other states of the sovereignty of a state over its territory was its obligation to ensure the customary international law rights of nationals of other states. In this chapter, we review the key forms of violations under customary international law of investor rights. The reader will appreciate from the review of bilateral investment treaties, earlier in this book, that BITs may play some role in the formation of customary international law. Hence, there may be certain overlaps, insofar as a pattern of treaty practice indicates that the practice concerned is accompanied by an *opinio juris sive necessitas* and has become customary.

§8.01. RELATIONSHIP BETWEEN CUSTOMARY INTERNATIONAL LAW AND THE INTERNATIONAL INVESTMENT LAW REGIME

[A]. José E. Alvarez, *The Public International Law Regime Governing International Investment*, 94, 105-108, 114-117 (*Hague Academy of International Law* 2011)⁽¹⁾

(Citations selectively omitted)

The investment regime... is a creature of treaty and as will be addressed in subsequent chapters, is deeply intertwined with other traditional sources of international law, particularly custom. The regime was nurtured and established during and partly as a reaction to the process of decolonization that has structured so much of contemporary public international law and its institutions, including those of the UN system.

* * *

The United States, like its European allies that had established BIT programmes decades before, sought BITs with LDCs and not developed countries because these were the States that had caused the most problems to their investors for decades. As Vandevelde suggests was true for the United States, developed States also sought to conclude such treaties in order to affirm traditional rules of customary international law that protected aliens from ill treatment.

 [page "583"](#)

Today's norms for the protection of international investment as affirmed in BITs stem from customary rules of State responsibility towards aliens formulated during the colonial era, such as the "international minimum standard" that was viewed as reflecting the rule of law among civilized nations. Conflicts over the legitimacy and content of the standards that should govern the conduct of States in relation to foreign investors emerged at least by the late nineteenth and early twentieth centuries. Between 1829 and 1910 the United States alone entered into some 40 arbitrations with Latin American countries resulting from diplomatic "espousal" efforts on behalf of US investors. These efforts generated predictable resistance from the periphery vis-à-vis the metropole, most famously in the form of the Calvo and Drago Doctrines espoused by Latin American jurists. The response by the United States – that it was permissible to use force to collect its nationals' debts in the Western Hemisphere – suggests the vehemence of positions on both sides.

North/South disputes over the applicable legal rules only grew in intensity as decolonization progressed after World War II, when many newly independent States re-examined the merits of investment contracts concluded under prior regimes, while others opted for socialist models for development that eschewed the market altogether, encouraged massive expropriations of the private sector, or sought to close their economies to foreign influences. Some developing States came to adhere to import substitution models that often proved to be nearly as hostile to the entry of foreign investors. This was the "larger context of world social events and processes" that culminated in the actions of the UN General Assembly in 1973, where over 100 nations proclaimed that all States have "full permanent sovereignty" over their natural resources and economic activities, including the right to nationalize or transfer

Source


» Chapter 8: Violations of Investor Rights Under Customary International Law in R. Doak Bishop, James Crawford, et al. (eds), *Foreign Investment Disputes: Cases, Materials and Commentary* (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law International 2014) pp. 583 - 752

ownership of assets to their nationals, without mention of an international legal obligation to pay compensation; and led to the adoption, with the support of 120 nations, in 1974, of a Charter of Economic Rights and Duties of States.....

The United States, which was a relative latecomer to signing BITs, developed its BIT model in reaction to the challenge at the United Nations to traditional norms of State responsibility to aliens.

* * *

The United States' view that the BIT's requirements were but minimal intrusions on a Government's ability to regulate in the public interest was also based on the belief that much of what the US BIT provided was already contained in the traditional principles of international law regarding the treatment of aliens, drawn from principles of State responsibility. These included the rule proclaimed by US Secretary of State Cordell Hull against Mexico on behalf of prompt, adequate, and effective compensation upon expropriation (the "Hull Rule"), the international minimum standard of treatment, and the requirement to ensure "full protection and security" to aliens and avoid "denials of justice." US BITs entrenched these customary rights by providing an arbitral forum for their enforcement, thereby also entrenching the underlying private law regimes necessary to support market transactions. As this suggests, the US BIT uses international law to dismantle public law regulations inimical to the market.

The US Model BIT of 1987 explicitly or implicitly relies on general international law in a number of provisions. Thus, the US Model provides in Article II (2) that "[i]nvestment shall at times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law".  [page "584"](#) Secondly, it provides that in cases of expropriation, investors have the right to be treated "in accordance with due process of law and the general principles of treatment provided for in Article II (2)". Thirdly, it states that investors subject to expropriation have the right to prompt review by the appropriate judicial or administrative authorities of the host State... .. Finally, it asserts that the treaty does not derogate from any better treatment accorded under, among other things, "international legal obligations... .."


As these clauses demonstrate, the US Model BIT of 1987, like many other BITs, is, at least in part, an explicit effort to provide investors with the traditional protections of customary law, including the international minimum standard and protections against denials of justice and assurances of full protection and security. Clauses such as those enumerated above are not efforts to *exclude* these ordinarily applicable general legal rules, as does *lex specialis*, but *on the contrary to affirm them*. This is certainly what the US BIT negotiators have confirmed was their intent. Of course, as noted, the incorporation of customary legal protections into BITs was not a useless or superfluous act. By including these clauses in a BIT and making these the basis of an investor-State claim – alongside other BIT rights that are not customary but based only on the treaty, such as the right to national treatment and most favourable treatment – rights that would otherwise depend, for enforcement, on the political intercession of Governments (and once led to gunboat diplomacy) would now also be subject to ostensibly "apolitical" dispute settlement. To this end, these treaties defined "investment disputes" that could be brought to international arbitration as including breaches of any right "*conferred*" by the treaty (that is where merely the forum is supplied by the treaty but that forum is applying pre-existing rights under CIL or an investment contract) and not merely those "created" by the treaty.

[B]. Stephen M. Schwebel, *Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law*, 98 Am. Soc'y Int'l L. Proc. 27, 27-30 (2004)⁽²⁾

(Citations selectively omitted)

... Customary international law governing the treatment of foreign investment has been reshaped to embody the principles of law found in more than two thousand concordant bilateral investment treaties. With the conclusion of such a cascade of parallel treaties, the international community has vaulted over the traditional divide between capital-exporting and capital-importing states and fashioned an essentially unified law of foreign investment.

For some two hundred years, the international community was divided over what law governed the treatment of foreign investment and over the content of that law. In large and loose terms, capital-exporting countries maintained that international law, which

indisputably related to the treatment of aliens, related to the treatment and taking of their property as well. The standard of that treatment could not lawfully fall below the minimum standard of international law. If the property of a foreigner was expropriated by a state, the expropriation was lawful only if it was for a public purpose, not discriminatory, and accompanied by the payment of prompt, adequate, and effective compensation.  [page "585"](#)

Capital-importing countries tended to have another perspective. The foreign investor was governed by the law of the host state and the remedies afforded by that law alone; he was entitled to no more than national treatment, the treatment accorded by the host state to the investments of its own nationals.


This fundamental doctrinal division, illustrated by the Calvo Clause, the Russian Revolution, and the famous exchanges between Cordell Hull and the Mexican Foreign Minister over Mexican oil expropriations, was carried into the post-World War II world – so much so that when the Supreme Court of the United States in the Sabbatino case in 1964 invoked the act of state doctrine to decline to pass upon Cuban expropriation of American property, it stated that:

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.... The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system.⁽³⁾

Attempts to restate or rework the law for the most part correspondingly divided the United Nations. While Resolution 1803 (XVII) of the General Assembly on Permanent Sovereignty over Natural Resources in 1962 brought together a large majority of the organization in recognition of the place of international law in the treatment of foreign investment, subsequent resolutions asserted the dominance, indeed the exclusivity, of national law. So did General Assembly resolutions on the New International Economic Order and the Charter of Economic Rights and Duties of States...

* * *

Thus that charter excluded international law and directed that national law be taken into account. Major capital-exporting states voted against it. As a General Assembly resolution not adopted as declaratory of international law, which plainly was not declaratory of international law, and terms of which were vigorously contested, the charter could neither make nor reflect international law. Nevertheless, it demonstrated that the majority of the states of the international community were not, collectively, then prepared to sustain the more traditional rules of international law respecting the treatment and taking of foreign property. The numerical majority did not equate with economic power. It evidenced bloc voting rather than sovereign decision making. But it was sufficient to raise a question: If the UN General Assembly cannot make international law, can it unmake it?

The Charter of Economic Rights and Duties was the high water mark of disregard, if not denigration, of the international law relating to foreign investment. At the time, much was made of it and of the so-called New International Economic Order; for years, the latter was invoked unendingly in UN resolution after resolution. But today one hardly hears of either; relatively little of them seems to be said in the rhetoric of United Nations debate, and my impression  [page "586"](#) is that virtually nothing is said in exchanges between states, in the negotiation of treaties of related subject matter, and in judgments of international courts and arbitral tribunals.

For not long after 1974, the tide turned. Universal, multilateral agreement, expressed in a single international instrument, on which law governs foreign investment and on the content of that law remained unachievable, not only in the United Nations, but through the Organisation for Economic Cooperation and Development. What is remarkable is that, in the last quarter century, more than 2000 bilateral investment treaties (BITs) have been concluded.

BITs specify in terms more explicit, detailed, * * * and far-reaching than was ever advanced under what was customary international law in the time of Cordell Hull what may be described as an ideal law of international investment. They reflect the fact that states round the world seek to attract rather than to repel foreign investment.

By the terms of these treaties, foreign investment is assured of fair and equitable treatment and full security and protection, as well as no less than national and most-favored-nation treatment. Foreign investment is assured of management authority and control. The terms of contracts governing the investment are to be respected. If there is a taking by the state of foreign investment, direct or indirect, it must pay prompt, adequate, and effective compensation reflecting the full market value of the investment before the taking. If there is a dispute, the investor is authorized to pursue a direct, binding international arbitral remedy against the host government. Diplomatic interposition is not debarred by the Calvo Clause; it is displaced by affording the foreign investor standing to invoke an international arbitral remedy without the uncertain and sometimes politicized espousal of his own government. A few multilateral treaties of regional reach, like the European Energy Charter and the North American Free Trade Agreement, contain comparable provisions.

As it was articulated in an international arbitral award of March 13, 2003:

The requirement of compensation to be "just" and representative of the "genuine value of the investment affected" evokes the famous Hull Formula, which provided for the payment of prompt, adequate and effective compensation for the taking of foreign owned property. That formula was controversial. Capital exporting countries viewed it as an expression of customary international law. Developing countries and the Communist States maintained that the foreign investor was entitled to no more compensation than provided by the law of the host government however and whenever amended and applied. The controversy came to a head with the adoption by the General Assembly of the United Nations of the "Charter of Economic Rights and Duties of States." The major capital exporting States voted against the Charter. But in the end, the international community put aside this controversy, surmounting it by the conclusion of more than 2,200 bilateral (and a few multilateral) investment treaties. Today these treaties are truly universal in their reach and essential provisions. They concordantly provide for payment of "just compensation," representing the "genuine" or "fair market" value of the property taken... ..

The possibility of payment of compensation determined by the law of the host State or by the circumstances of the host State has disappeared from contemporary international law as it is expressed in investment treaties in such extraordinary numbers, [page "587"](#) and with such concordant provisions, as to have reshaped the body of customary international law itself.⁽⁴⁾

This award went on to quote the NAFTA Award of October 11, 2002, in *Mondev International v. United States of America*:

[T]he vast number of bilateral and regional investment treaties (more than 2000) almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments. Investment treaties run between North and South, and East and West, and between States in these spheres inter se. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.⁽⁵⁾

The process by which provisions of treaties binding only the parties to those treaties may seep into general international law and thus bind the international community as a whole is subtle and elusive. It is nevertheless a real process known to international law. As the UN International Law Commission put it:

An international convention admittedly establishes rules binding the contracting States only, and based on reciprocity; but it must be remembered that these rules become generalized through the conclusion of other similar conventions containing identical or similar provisions.


It is submitted that this is a process of which more than 2,000 BITs

are the contemporary exemplar.

The result is that, when BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs. The minimum standard of international law is the contemporary standard.

[C]. Patrick Dumberry, Are BITs Representing the “New” Customary International Law in International Investment Law?, 28 Penn St. Int’l L. Rev. 675, 701 (2010)⁽⁶⁾

The conclusions of this paper can be summarized as follows.

1. The question of the treatment to be accorded to foreign investors under customary international law has long been contentious between developed and developing states. As a result, no broad international consensus emerged as to the existing basic legal protections for foreign investors. Consequently, States have entered into BITs, containing comprehensive protection for foreign investors, precisely because of the  [page "588"](#) lack of development of relevant custom rules in the field of the international investment law.
2. What is the impact of these 2,500 BITs on the development of customary international law in this area? Some authors argue that these BITs represent the “new” customary international law and that their content is basically the same.
3. This paper rejects this proposition. The main reason for rejecting it is based on the fact that BITs are missing the two necessary elements of customary international law. First, these BITs do not represent any consistent State practice. For instance, the inconsistency of State practice is undeniable with respect to the definition of corporate nationality under these BITs. Second, BITs also lack any *opinio juris*. States sign BITs clearly not out of a sense of legal obligation, but for economic motive, i.e. to attract foreign investments and to offer protection to their investors doing business abroad.
4. It nevertheless remains that BITs will necessarily influence customary international law. Thus, BITs will contribute to the consolidation of *already existing* custom rules. BITs will also contribute to the *crystallisation of new rules* of customary international law *in the future*.
5. In this age of BITs proliferation, the determination of the content of customary rules of international investment law remains of fundamental importance. Thus, custom is the applicable legal regime between a foreign investor and the host State in the absence of any BIT. The content of custom remains also essential in cases where BITs make explicit reference to custom. Finally, custom has a gap-filling role whenever a BIT is silent on a particular legal issue.

§8.02. EXPROPRIATION

[A]. Introduction

One of the more significant risks that foreign investors take into account in making investment decisions is the risk of investments being expropriated, whether directly or indirectly, by the States in which they are situated. In customary international law, States are permitted to exercise sovereign powers to expropriate investments, subject to some limits – namely, that any expropriation must be for a public purpose, be pursued on a non-discriminatory basis, be in accordance with the due process of law, and with just compensation. Before the proliferation of bilateral investment treaties, foreign investors seeking relief were limited to two comparatively unattractive options: trying to lobby their own States to take diplomatic actions against the States hosting their investments or pursuing compensation through the local courts of the States hosting their investments.

[1]. Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens – Measures Affecting Acquired Rights: Fourth Report by F. V. García Amador, [1959] 2 Y.B. Int’l L. Comm’n 1, 11-12, 14-16, U.N. Doc. A/ CN.4/119

(Citations selectively omitted)

 [page "589"](#)


41. The right of “expropriation”, even in its widest sense, is recognized in international law, irrespective of “the patrimonial rights

involved or of the nationality of the person in whom they are vested". This international recognition has been confirmed on innumerable occasions in diplomatic practice and in the decisions of courts and arbitral commissions, and, more recently, in the declarations of international organizations and conferences. Traditionally this right has been regarded as a discretionary power inherent in the sovereignty and jurisdiction which the State exercises over all persons and things in its territory, or in the so-called right of "self-preservation", which allows it, *inter alia*, to further the welfare and economic progress of its population. In its resolution 626 (VII) of 21 December 1952 relating to the under-developed countries, the General Assembly has stated that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations".

* * *

44. Even though it has been contended that international law places limits on the State's power to impose taxes, rates and other charges on the property, rights or other interests of aliens, particularly when the measures taken discriminate against the latter, the fundamental lawfulness of this class of measures in the international context, regardless of their nature or scope, has very seldom been disputed. The possibility of the State incurring international responsibility can only arise if the measure is of a discriminatory nature, and practical experience has shown this eventuality to be highly unlikely. The same rule can be said to apply to rights of importers and exporters and to prohibition on the import or export of specified merchandise: the State can only be held internationally responsible if the measure is not general but personal and arbitrary. Nor are there any restrictions of an international character on the State's right to control the rate of exchange of its currency and to devalue it, although the contrary view has been advanced also on this point. In a case which arose after the Second World War, it was held that creditors who had made bank deposits before the devaluation of the legal currency were not entitled to claim the original value.

* * *

46. There is no doubt that some of the measures to which reference has been made result in a direct economic benefit to the State at the expense of the owners of the property concerned. But this does not occur in every instance and such benefit is not always the purpose which affords the legal grounds and justification for the measure. In the case of expropriation *stricto sensu*, the situation is, however, perfectly well defined. Within the definition, formulated at the beginning of this chapter, of the State's right to "affect" private property generally, this specific measure can be characterized and distinguished from others as the act whereby the State appropriates patrimonial rights vested in private individuals in order to put them to a public use or to provide a public service. It should be noted that this definition, which is complementary to the earlier one, concentrates solely on the two essential component elements of expropriation: the "appropriation" of private patrimonial rights and the purpose to which the expropriated property is to be put. A more explicit definition, mentioning not only the content and purpose of the State's action but also the grounds on which it may be based, the methods or procedures through which it may be effected, the individual or general and impersonal character which may be attributed to it, the direct or indirect form which it may assume and the scope of the  page "590" obligation to compensate for the expropriated property, besides being difficult in the present context, might provoke unnecessary complications from the point of view of international law. Moreover, the distinction between a State's acts of expropriation founded on the right of "eminent domain" and those which fall within the exercise of its police power—a distinction which originally stems from differences in grounds and purposes and also has a bearing on the question of compensation—is daily becoming more difficult to make, because of the evolution which the conception of the State's social functions has undergone in both those areas.

* * *


52. There is a tendency, of relatively recent origin but shared by some authoritative writers, to extend the notion of "unlawful" expropriation to cases in which the State and the alien individual are bound by a contractual relationship. Where such a relationship exists, one of two things may occur in practice: the expropriation may simply affect (annul, rescind or modify) the contract or concession agreement under which the expropriated property or undertaking was acquired, or there may be non-observance of a specific obligation not to expropriate or otherwise to affect the stipulations contained in such an instrument. The tendency referred to above is based on the idea that, by analogy with treaties, the non-

observance by the State of the obligations which it has assumed in those contracts or concession agreements constitutes a "wrongful" act, which gives rise to direct and immediate international responsibility. In brief, the premise is that the principle *pacta sunt servanda* applies equally to treaties and to contractual relationships between States and alien private persons.

* * *

57. In distinguishing between expropriation *stricto sensu* and the other forms in which the State's right to "affect" the property of private individuals may be exercised, it was shown that the "destination" which the expropriated property is given, in other words, the motives and purposes of the action taken by the State, is one of the essential component elements of expropriation. The question that must now be considered is the extent to which international law regulates this aspect of expropriation.

* * *

59. It is undeniable that, in principle at least, the test of "arbitrariness" is applicable to the motives and purposes of expropriation, for plainly, if international law recognizes the undoubtedly very wide power of the State to appropriate the property of aliens on the ground that, as under municipal law, the interests of the individual must yield to the general interest and public welfare, the least that can be required of the State is that it should exercise that power only when the measure is clearly justified by the public interest. Any other view would condone and even facilitate the abusive exercise of the power to expropriate and give legal sanction to manifestly arbitrary acts of expropriation. In certain circumstances it may, as will be shown below, be thought proper to exempt the State from the fulfilment of requirements which are in appearance as essential as this one, but in such cases the exception will be based on good grounds. In no circumstances, however, could a measure of this kind taken by the State capriciously or for reasons other than public utility, be regarded as valid at international law. This statement is not at variance with the view correctly advanced by various writers that the discretionary powers of the State in the matter are in practice unlimited, provided that the  [page "591"](#) latter view is understood to mean only that it is for municipal law, and not for international law, to define in each case the "public interest" or other motive or purpose of the like character which justifies expropriation. Particularly at the present time, when regimes of private property vary widely, it would be idle to attempt to "internationalize" any one of them, however generally accepted it might seem to be, and to impose it upon States which have adopted another system in their own constitutional law. It is accordingly sufficient to require that all States should comply with the condition or requirement which is common to all; namely, that the power to expropriate should be exercised only when expropriation is necessary and is justified by a genuinely public purpose or reason. If this *raison d'être* is plainly absent, the measure of expropriation is "arbitrary" and therefore involves the international responsibility of the State.

60. International law allows States greater freedom of action with regard to the method of expropriation than with regard to the motives and purposes of expropriation. For example, the system of expropriation resulting from the constitutional law of the State concerned or, as is usual in cases of "nationalization", from special acts of the legislature, is totally irrelevant from the point of view of international law. Nevertheless, as is recognized even by the authors who most strongly maintain the primacy of municipal law in matters of expropriation, an expropriatory act "must, in this respect, exhibit the same characteristics as acts habitually falling within the exercise of governmental power. It must be the normal result of the working of the machinery of political life, that is to say, of a smooth and regular functioning of the governmental machine. Failing this it would amount to an unlawful act".

61. ... If an act of expropriation is contrary to the minimum standard, its illegality is not affected even by the payment of an adequate compensation. Provisions of this kind are embodied in certain treaties...

62. It would therefore seem clear that the test of "arbitrariness" can also be applied to the methods and procedures employed in expropriating alien property. Like any other measure affecting the patrimonial rights of aliens taken by the State, expropriation may in the course of the procedure by which it is effected result in a "denial of justice" and, in such case, the international responsibility of the State is undoubtedly involved. The most obvious example is, of course, that of procedures which unjustifiably discriminate between nationals and aliens to the detriment of the latter. Apart, however, from this eventuality, which is highly unlikely in the case of

measures of individual expropriations, a “denial of justice” may result from grave procedural irregularities or, in its broadest sense, may be established on many other grounds. Subject to these reservations, which seem inescapable in the light of the general but none the less fundamental principles governing the international responsibility of States, it may be said that a State is under no obligation to adopt a method or procedure other than those provided for in the relevant provisions of municipal law. A State may even, where special circumstances require and justify such a course, depart from the usual methods and procedures, provided that in so doing it does not discriminate against aliens or commit any other act or omission which is manifestly “arbitrary”. In short, the State’s freedom of action in regard to methods and procedures is in a sense wider than that it enjoys in regard to the grounds and purposes of expropriation.

[B]. General Distinction

Expropriation may be both direct and indirect. Direct expropriation would involve measures that result in a State gaining control over an investment or obtaining the economic benefit of an investment. Indirect expropriation, which today is the common form of expropriation, is a more nebulous concept. Examples would include measures that result in an investor effectively losing control over an investment or losing the economic benefit of an investment even if management and control are retained – this being, in some instances, gradual or “creeping” over a period of time. The Tribunal in *Metalclad v. United Mexican States* (ICSID Case No. ARB AF/97/1) summarized the differences between these types of expropriation as follows: “Expropriation can take various forms. Direct expropriation involves the seizure of the investor’s property. But expropriation may also be indirect, as where, without the taking of property, the measures of which complaint is made substantially deprive the investment of economic value. Moreover, it is not necessary to show a single act or group of acts committed at one time... [T]here may be ‘creeping’ expropriation involving a series of acts over a period of time none of which is itself of sufficient gravity to constitute an expropriatory act but all of which taken together produce the effects of expropriation.”

[1]. Direct – De Jure

[a]. *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Final Award of 17 February 2000⁷⁹ [L. Yves Fortier (pres.), Elihu Lauterpacht, Prosper Weil]

[Compañía del Desarrollo de Santa Elena (“CDSE”) was formed in 1970 for the purpose of purchasing property in Santa Elena and developing it into a tourist resort and residential community. A majority of CDSE’s shareholders were U.S. citizens. In May 1978, Costa Rica issued an expropriation decree for Santa Elena and proposed to pay CDSE \$1.9 million as compensation, in accordance with an appraisal conducted one month earlier by one of its agencies. While CDSE did not object to the expropriation, it contested the compensation price and claimed that it should be paid \$6.5 million according to an appraisal of the property conducted three months earlier by the Chief Appraiser of the Banco de Costa Rica. The dispute in the case arose over the compensation price.]

76. As is well known, there is a wide spectrum of measures that a state may take in asserting control over property, extending from limited regulation of its use to a complete and formal deprivation of the owner’s legal title. Likewise, the period of time involved in the process may vary – from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership. It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title. What has to be identified is the extent to which the measures taken have deprived the owner of the normal control of his property. A decree which heralds a process of administrative and judicial consideration of the issue in a manner that effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property, can, if the process thus triggered is not carried out within a reasonable time, properly be identified as the actual act of taking.

[b]. *Martin Domke, Foreign Nationalizations: Some Aspects of Contemporary International Law*, 55 Am. J. Int’l L. 585, 587-590 (1961)

(Citations selectively omitted)

Although a clear-cut definition cannot easily be formulated, it was tentatively adopted by the *Institut de Droit International* in 1952:

Nationalization is the transfer to the State, by a legislative act and in the public interest, of property or private rights of a designated character, with a view to their exploitation or control by the State, or to their direction to a new objective by the State. (*Trans.*)

"Nationalization differs in its scope and extent rather than in its juridical nature from other types of expropriation." The term "expropriation," though usually applied to measures taken in individual cases, is sometimes used in instances where the word "nationalization" as a measure of general change in the state's economic and social life would be more appropriate. The doctrinal viewpoint of distinguishing "nationalization" from "expropriation" may indeed have little practical effect in the reality of international legal relations. It might be preferable to use the more general term of "taking of property," including, as stated in Article 10, paragraph 3 (a) of Harvard Draft No. 12, of February 18, 1961:

not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

Thus, a recent agreement between the United States and Poland, dealing with claims "on account of the nationalization or other taking by Poland of property and of rights and interests in and with respect to property," encompasses also in Article II (b) claims for

the appropriation or the loss of use or enjoyment of property under Polish laws, decrees or other measures limiting or restricting rights and interests in and with respect to property.

Although from a conceptual viewpoint, there will be numerous borderline cases where "taking" will signify a peculiar form of preventing the exercise of rights to property, including intangibles such as patents and trademarks, and also of contractual rights, the proper characterization of factual situations will not be too difficult. "Interventions" are often the forerunner of a formal and retroactive nationalization. An outright transfer of title may no longer constitute the foremost type of "taking" property in the technique of modern nationalization. There are various other means of "creeping" or "disguised" nationalization through regulations of foreign governments. Some of them were considered by the Foreign Claims Settlement Commission of the United States in cases of arbitrary and excessive taxation in Yugoslavia and Bulgaria. Confiscatory taxation, imposed by the Cuban Mining Law No. 617 of October 27, 1959, also caused the suspension of the operation of the U.S. Government-owned Nicaro Nickel Plant, after Cuba offered a purchase price which the State Department termed "so ridiculously low as to bring into question the good faith of the government of Cuba in making it." Among the many measures which ultimately deprive the owner of his property rights is the appointment of custodians, especially for absentee owners, as recently threatened in the Congo against Belgian business interests. Nationalization of property of absentee owners has indeed played a role as retaliation against émigrés hostile to new regimes, such as in Eastern European countries and more recently also in Cuba.

Whether nationalization took place effectively may become a question to be determined by foreign courts. Section 977(b) of the New York Civil Practice Act provides for the appointment of a receiver to liquidate New York assets of a foreign corporation which has been "dissolved, liquidated or nationalized... or has ceased to do business... by revocation or annulment of its organic law or by dissolution or otherwise." This statutory provision has been applied to nationalization measures in Czechoslovakia, and, more recently, to Cuban nationalizations...

[c]. *The Oxford Handbook of International Investment Law*, 408-409 (Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), Oxford University Press 2008)^[8]

(Citations selectively omitted)

In recent times, there have been few cases of direct expropriation in the sense of an outright taking of property. Of course there is the important exception of the 1979 Iranian nationalization of banks and insurance companies which gave rise to a number of cases brought

before the Iran-US Claims Tribunal. In the course of the new wave of investment arbitration since the mid-1990s, the *Sedelmayer* case, in which an arbitral tribunal found that a Russian presidential decree constituted an act of direct expropriation, appears to be the exception proving the rule. Recent developments in Bolivia and Venezuela concerning governmental plans to expropriate foreign investors in the energy sector may illustrate a move back to direct expropriations.

[2]. Indirect – de facto – Creeping

[a]. Errol P. Mendes, *The Canadian National Energy Program: An Example of Assertion of Economic Sovereignty or Creeping Expropriation in International Law*, 14 Vand. J. Trans. L. 475, 498-501 (1981)⁽⁹⁾

(Citations selectively omitted)

If expropriation is governmental activity resulting in the deprivation of the wealth of an alien investor, new terminology such as “de facto expropriation,” “disguised expropriation,” or “creeping expropriation” must be introduced. Such indirect expropriation generally is achieved through restrictions and infringements upon: (1) the entry of foreign wealth into the country; (2) the use of foreign wealth; and (3) the revenues produced from the investment of that wealth. Within the first category are situations in which the host country prohibits the entry of foreign capital into certain sectors of industry, or the expansion of foreign capital from one sector of industry to another or within one particular sector of the industry. In the National Energy Program, the Government stated:

[T]he Foreign Investment Review Act (FIRA) would also continue to play a key role in ensuring the Government's Canadianization goals. Firms that are foreign-controlled will continue to be noneligible firms for FIRA purposes. Moreover, the Foreign Investment Review Agency will vigorously enforce its investment criteria in the energy sector. The Government does not want to see the oil companies use their cash flow to expand into the non-energy part of the economy. Nor does it want foreign-controlled firms to buy already-discovered oil and gas reserves.

The second category involves situations in which the host state decreases the use of foreign wealth by increasing public sector ownership in a particular industry. Through taxation and exclusive rights and concessions, the host state gives the public sector an overwhelming and arguably unfair competitive edge in the marketplace. The host government may also provide the same advantage to its nationals. The National Energy Program is replete with these governmental actions. Petro-Canada, the state oil company, already had tremendous competitive advantages and will also benefit from the twenty-five percent carried interest in the federal lands and the requirement of Canadian participation in fifty percent of all oil and gas production in these areas...

Under the last category of methods for achieving indirect expropriation of foreign wealth, the host government can use exorbitant taxation policies or retroactive reevaluation of existing rights and contracts. In response, the foreign-controlled firms could allege that the National Energy Program constitutes creeping expropriation. Through taxation, administrative policies, and other governmental programs that do not require the absolute transfer of foreign wealth to the state or its nationals, a host country can make operating unprofitable by imposing severe burdens and inferior competitive status on foreign corporations, thus creating de facto expropriation. Such governmental regulations could be designed to depress the trading shares of foreign-controlled firms so that a voluntary takeover by the public sector becomes more attractive. There is a lack of global consensus as to whether the use of creeping expropriation breaches the minimum international legal standard and gives rise to a requirement for compensation. Since most of the firms affected by the National Energy Program are controlled by the United States, definitions of expropriation formulated by United States entities are particularly salient. The Overseas Private Investment Corporation (OPIC), which administers the American Foreign Investment Guarantee Program, defines expropriatory action as follows:

The term 'Expropriatory Action' means any action which is taken, authorized, ratified or condoned by the Government of the Project Country commencing during the Insurance Period, with or without compensation therefore, and for a period of one year

directly results in preventing:

* * *

- (b) the investor from effectively exercising its fundamental rights with respect to the Foreign Enterprise either as a shareholder or as a creditor, as the case may be, acquired as a result of the investment, provided, however, that rights acquired solely as a result of any undertaking by or agreement with the government of the project country, shall not be considered fundamental rights merely because they are acquired from such undertaking or agreement; or
- (c) the Foreign Enterprise from exercising effective control over the use or disposition of a substantial portion of its property or from constructing their Project or operating the same.

The general terms and conditions of OPIC go on to list exceptions to the above definition of expropriatory action:

Notwithstanding the foregoing, no such action shall be deemed an expropriatory action, if it occurs or continues in effect, during the aforesaid period, as the result of:

- 1) any law, decree, regulation or administrative action of the Government of the Project Country which is not by its express terms for the purpose of nationalization, confiscation or expropriation (including but not limited to intervention, condemnation or other taking), is reasonably related to constitutionally sanctioned governmental objectives, is not arbitrary, is based upon a reasonable classification of entities to which it applies and does not violate generally accepted principles of international law...

Under OPIC's definition, an investor is a multinational parent company or an individual who makes a guaranteed investment in the host country in the form of a subsidiary company organized under the host country's laws. The subsidiary company is referred to as the foreign enterprise in OPIC's general terms. Some of the National Energy Program policies may constitute expropriatory actions as defined by OPIC, especially the twenty-five percent carried interest. Additionally, a retroactive interest in oil and gas production in the Canada lands could constitute an infringement of the foreign enterprise's fundamental rights. The federal government could argue, however, that the National Energy Program falls within exceptions to the definition of expropriatory action. Ensuring Canadian participation in the development of the oil and gas industry may be viewed as a constitutionally sanctioned government objective that conforms with international law.

Richard Baxter and Louis Sohn have established guidelines for creeping expropriation in international law. In the Draft Harvard Convention on the International Responsibility of States for Injuries to Aliens, they provide a definition of "the taking of property":

- 3(a) 'A taking of property' includes not only an, outright taking of property, but also any such unreasonable interference with the use, enjoyment or the disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference.

* * *

- 5. An uncompensated taking of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of their belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided:

- (a) It is not a clear and discriminatory violation of the law of the State concerned; * * *
- (c) It is not an unreasonable departure from the principles of justice recognized by the principle legal systems of the world; and

- (d) It is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

[b]. *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2), *Arbitral Award of 2 June 2000 – Dissenting Opinion of Keith Highet of 8 May 2000*⁽¹⁰⁾ [Bernardo M. Cremades (pres.), Keith Highet, Eduardo Siqueiros T.]

[In 1998, Waste Management, Inc. initiated proceedings at ICSID against Mexico for alleged expropriation and other violations of its concession rights with respect to public waste management services. The majority of the Tribunal declined jurisdiction on the grounds that the claimant did not fulfill the waiver requirement set forth in NAFTA Article 1121. Even though Waste Management subsequently expressed its waiver in writing, satisfying the formal requirements of waiver, the Tribunal held that the material requirements of waiver were not fulfilled because the claimant had also brought the same claim which it was seeking in ICSID in a Mexican court. Mr. Keith Highet, in his dissent, provided the following definition of “creeping expropriation.”]

17. ... [A] “creeping expropriation” is comprised of a number of elements, none of which can – separately – constitute the international wrong. These constituent elements include non-payment, non-reimbursement, cancellation, denial of judicial access, actual practice to exclude, non-conforming treatment, inconsistent legal blocks, and so forth. The “measure” at issue is the expropriation itself; it is not merely a sub-component part of expropriation.

18. A nationalization or expropriation – in particular a “creeping expropriation” comprised of numerous components – must logically be more than the mere sum of its parts.

[c]. *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), *Award of 29 July 2008*⁽¹¹⁾ [Bernard Hanotiau (pres.), Marc Lalonde, Stewart Boyd]

[In 1998, Rumeli Telekom A.S. (Rumeli) and Telsim Mobil Telekomunikasyon Hizmetleri A.S. (Telsim) won a bid to hold a license to operate the second mobile telephone network in Kazakhstan through their 60% shareholding in the Kazakh company KaR-Tel. Later that year, KaR-Tel and the Kazakh State Committee on Investment concluded an investment contract, which was to expire on July 31, 2009, granting KaR-Tel investment incentives. But in 2001, various differences arose between the parties to the agreement. These disputes culminated in the unilateral termination of the investment contract by the Kazakh investment committee. Rumeli and Telsim commenced arbitral proceedings, alleging that the Republic of Kazakhstan devised a scheme to expel them from KaR-Tel in a definitive manner once the company's success was assured, and that Kazakhstan had therefore breached obligations it owed to foreign investors under international law and the Kazakhstan-Turkey BIT. An ICSID tribunal unanimously decided for the Turkish claimants. Although the Republic of Kazakhstan applied for annulment of the award, the *ad hoc* Committee dismissed the application in its entirety. The excerpt below is from the Tribunal's discussion of creeping expropriation.]

(Citations selectively omitted)

683. [I]t is generally accepted that a State can expropriate an investment in a number of ways, including through acts of harassment. One of the methods is when a State forces an alien to dispose of his property at a price representing only a fraction of what it would have been had not the alien's use of its property been subjected to interference by the State.

684. An expropriation may also be ‘creeping’, i.e. a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts which are attributable to the State over a period of time culminate in the expropriatory taking of such property.⁽¹²⁾

685. A distinction is indeed made in public international law between two types of expropriation: either a direct and deliberate formal act of taking, such as an outright nationalization, or an indirect taking that substantially deprives the investor of the use or enjoyment of its investment, including deprivation of the whole or a significant part of the economic benefit of property.

708. In summary, the conclusion of the Tribunal is that this was a case of 'creeping' expropriation, instigated by the decision of the Investment Committee which was then collusively and improperly communicated to Telcom Invest and its shareholders before Claimants were made aware of it, and which proceeded via a series of court decisions, culminating in the final decision of the Presidium of the Supreme Court. The decision of the Investment Committee was moreover unfair and inequitable in itself, as the Tribunal has found.

* * *

737. In case of creeping expropriation such as this one, the precise date of expropriation is difficult to ascertain since various events can be deemed expropriatory in nature. Arbitral tribunals have considered that, in cases of creeping expropriation, the date of expropriation is not necessarily the date of the first or of the last expropriatory event, but can be any point in time within that range when the owner has been irreversibly deprived of its property. The exact date on which this moment is deemed to have occurred is left to the discretion of the Arbitral Tribunal.

**[d]. *Walter Bau AG v. Thailand (ad hoc arbitration under the 1976 UNCITRAL Rules), Award of 1 July 2009, IIC 429 (2009)*⁽¹³⁾
*[Ian Barker (pres.), Marc Lalonde, Jayavadh Bunnag]***

[The German construction firm Walter Bau initiated arbitration against Thailand under the German-Thai BIT, claiming that Thailand had unlawfully interfered with investments made by its predecessor in interest in a tollway project in Thailand. By agreement of the parties, the arbitration was conducted under UNCITRAL Rules. The tribunal found that the government's treatment of the Claimant failed to protect the Claimant's reasonable and legitimate expectations relating to the assurances given, resulting in a breach of the BIT. Walter Bau was awarded €21.9 million in damages; the U.S. Court of Appeals for the Second Circuit rejected the application for annulment of the award in August 2012.⁽¹⁴⁾ The following is the arbitral tribunal's assessment of Walter Bau's "creeping expropriation" claim.]

(Citations selectively omitted)

10.1 The Claimant's pre-hearing submissions were extensive as to whether the conduct of the Respondent, viewed cumulatively over the years, amounted to "creeping" expropriation of its rights as an investor. Professor Crawford referred to this topic in oral submissions. However, in its post-hearing submissions, the Claimant focussed on establishing that the Respondent had breached the "fair and equitable treatment" ("FET") requirements of the 2002 Treaty, whilst not abandoning the expropriation argument.

10.2 The 1961 Treaty in Article 3(2) offered protection against expropriation. The 2002 Treaty did likewise, but more expansively, in Article 4(2). Article 2(3) of the 2002 Treaty promised investments by investors and their returns "FET" and "full protection". The 1961 Treaty did not have any equivalent provision obliging it to accord FET to investors and/or investments.

10.3 Given the Tribunal's decision that there is no jurisdiction *ratione temporis* in respect of disputes prior to October 2004, the Tribunal concentrates on examining alleged breaches under the 2002 Treaty – particularly, the alleged situations when a series of actions pre-Treaty is said to have crystallised into a dispute on a date after the Treaty had come into force. The Tribunal considers it necessary, nevertheless, first to consider the legal concepts involved in the concept of "creeping" or "indirect" expropriation.

10.4 Counsel cited various formulations of indirect expropriation, which are all dependent on the circumstances of the particular case. In *Metalclad Corp. v Mexico*, it was said that an expropriation occurs where the state's actions have "... 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".

10.5 In *Vivendi v Argentina*, the Tribunal said: "The weight of authority... appears to draw a distinction between only a partial deprivation of value (not an expropriation) and a complete or near complete deprivation (expropriation)".

10.6 In *Vivendi*, the purpose of a State's interference was noted by the tribunal thus: "A state's purpose in implementing measures alleged to amount to indirect expropriation is irrelevant to a finding of whether expropriation has occurred".

10.7 In *LG & E Energy Corp. v Argentine Republic*, the tribunal

stated that interference with an investor's capacity to carry on business is not sufficient to establish expropriation where the investment continues to operate, even if profits are diminished.

10.8 Professor Crawford for the Claimant in oral submissions acknowledged that an indirect expropriation requires a substantial deprivation to have taken place, although such deprivation does not need to be complete. He likened what happened to the Claimant here to *"death by a thousand cuts"*.

10.9 In *Generation Ukraine v Ukraine*, the tribunal described "creeping" expropriation as: *"A form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates a situation whereby a series of acts attributable to the state over a period of time culminates in the expropriatory taking of such property."* There does not have to be a formal taking of property or rights (see *CME Czech Republic DV v Czech Republic*).

10.10 "Creeping" expropriation was described in *Pakerings v Lithuania* as *"The negative effect of government measures on the investors' property rights which does not involve transfer of property but a deprivation of the enjoyment of the property"*.

10.11 Taking all the above formulations into account – and they all say much the same thing – the Tribunal finds difficulty in categorising the conduct of the Respondent post-October 2004 – and its conduct leading up to that date – *"creeping expropriation"* of the Claimant's investment.

10.12 Indirect or *"creeping"* expropriation against the Respondent has not been proved for the following reasons.

10.13 There was no expropriation of the Claimant's contractual rights as a shareholder in DMT. The Tollway is still operating and will continue to operate for many years to come with DMT as the concessionaire. As in the *LG & E Energy* case, the investment continued to operate, even though profits may have been diminished by the actions or inaction of the Respondent.

10.14 The Respondent did try (maybe not all that effectively) by means of MoA2, to redress some of the alleged wrongs done to the Claimant, as it had acknowledged in the Preamble to that document. It later conducted – albeit painfully slowly – negotiations which culminated in MoA3 – which, again, contained in its provisions acknowledgment by the Respondent's Council of Ministers of an agreement on a solution to the loss problem of DMT.

10.15 Even at the time of the Toll Plaza incident or *"Opera"* in December 2004, the then Prime Minister told the Claimant's representatives that DMT's problems would be "solved". Although Messrs Trapp and Kramer treated this statement with scepticism, eventually, MoA3 contained the statement noted earlier. MoA3 attempted to remedy the negative effects on DMT's financial position by means of toll adjustments and an extension of the concession period. Toll adjustments no longer needed the Respondent's approval obtained through the rather tortuous and uncertain medium of Clause 25 of the Concession Agreement. By the time the Claimant sold its shares in DMT, the negotiations which culminated in MoA3 were on foot.

10.16 Nor was there the deprivation of the investor's control of the investment to the degree stated in *PSEG Global v Turkey* (ICSID ARB/02/5, 19 January 2007), viz.

"There must be some form of deprivation of the investor in the control of the investment, the management of day-to-day-operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part." (Emphasis added)

10.17 None of the actions of the Respondent reaches the level described in *PSEG Global* above. More than *"many things wrongly handled"* is required to justify a finding of expropriation. A strong interference with contractual rights needs to be shown – see *Sempra Energy International v Argentina*. Many of the alleged misdeeds of the Respondent were inaction rather than affirmative action.

10.18 Accordingly, the Tribunal cannot find *"creeping"* expropriation proved and proceeds to consider alleged breaches of the FET standard.

(Citations selectively omitted)

There have been efforts to draw distinction between expropriation and nationalization as these terms are used in customary international law. In one view, for example, "nationalization" refers to the seizure of an entire industry of an economy as part of a change in economic policy, while "expropriation" refers to seizure of a particular property by a country.

While the terms "expropriation" and "nationalization" are generally left undefined in BITs, these treaties do not appear to have been drafted with such a distinction in mind. Rather, BIT provisions on expropriation typically apply to actions by a country that substantially impair the value of an investment, regardless of whether they amount to an isolated event or whether they are part of a major structural change in the economy. Many BITs make this clear by expressly stating that expropriation includes measures "tantamount" or "equivalent" to expropriation...

As a result of this broad language, most BITs also apply the expropriation provisions to "indirect expropriations". In fact, some treaties make explicit reference to indirect expropriation... Indirect expropriation occurs when the country takes an action that substantially impairs the value of an investment without necessarily assuming ownership of the investment. Accordingly, indirect expropriation may occur even though the host country disavows any intent to expropriate the investment and characterizes its actions as something other than expropriation. Where the action is equivalent to expropriation, however, the conditions imposed by the expropriation provision apply...

Certain countries are more explicit about the meaning of indirect expropriation. Thus, while the model treaty prepared by Germany mentions "any other measure the effects of which would be tantamount to expropriation or nationalization" (article 4 (2)), the protocols of many treaties concluded by Germany add the following definition of expropriation:

Expropriation shall mean any taking away or restricting tantamount to the taking away of any property right which in itself or in conjunction with other rights constitutes an investment.

In addition, the protocols specify that any government measure severely impairing the economic situation of an investment gives rise to an obligation to pay compensation.

Some BITs concluded by the United States specify that such measures include, in particular, but are not limited to, "the levying of taxation, the compulsory sale of all or part of the investment, or impairments of the management, control or economic value of a company... .."

Most BITs are also understood to apply the expropriation provision to "creeping expropriations". This term refers to an expropriation carried out by a series of acts over a period of time. Any of these acts taken in isolation may appear to be a legitimate regulatory action, but ultimately their cumulative effect is to destroy substantially the value of an investment. In that situation, BITs generally regard an investment as having been expropriated.

[f]. Comments and Questions

1. Other investment arbitration decisions discussing "creeping expropriations" include *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), IIC 169 (2002); *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of 16 September 2003, 44 I.L.M. 404 (2003); *Siemens A.G. v. The Argentine Republic Award* (ICSID Case No. ARB/02/8), IIC 227 (2007); *Glamis Gold Ltd. v. United States*, IIC 380 (2009); and *Roussalis v. Romania* (ICSID Case No. ARB/06/1), IIC 517 (2011).
2. See generally Burns H. Weston, "Constructive Takings" under International Law: A Modest Foray Into the Problem of Creeping Expropriation, 16 Va. J. Int'l L. 103, 106 (1975); George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 A.J.I.L. 585 (1994); Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law* in III Recueil des Cours 259 (1983); Restatement (Third) of Foreign Relations Law Section 712 CMT(g) (1989).

3. For a comprehensive discussion on “creeping expropriations,” see W. Michael Reisman and Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 Brit. Y.B. Int’l L. 115 (2004).

[C]. Initial Precepts – Government is not a Guarantor or Insurer of the Investment

There is no general principle of law that a State hosting an investment should be a guarantor or insurer of the profitability of that investment, without more.

[a]. *United Kingdom v. Belgium (The Oscar Chinn case)*, Judgment of 12 December 1934, 3 World Court Reports 416, 436, 439 (1932-1935) (Manley O. Hudson (ed.) with the collaboration of Ruth E. Bacon, By the Carnegie Endowment for International Peace, Rutherford Press, 1938)

(Citations selectively omitted)

The Government of the United Kingdom maintains that the reduction in transport rates together with the Belgian Government’s promise temporarily to make good losses enabled Unatra to exercise a *de factomonopoly* inconsistent with freedom of trade.

The Court must therefore consider whether the alleged concentrations of transport business in the hands of Unatra, of which the Government of the United Kingdom complains, and the fact that, because of this concentration, it was commercially impossible for Mr. Chinn to carry on his business, are inconsistent with the conception of freedom of trade...

* * *

... In what the Government of the United Kingdom describes in this case as a “*de facto monopoly*”, the Court, however, sees only a natural consequence of the situation of the services under State supervision as compared with private concerns. The Court also sees therein, in some respects, a possible effect of commercial competition; but it cannot be argued from this that the freedom of trade and the freedom of navigation, provided by the Convention of Saint-Germain, imply an obligation incumbent on the Belgian Government to guarantee the success of each individual concern...

* * *

No enterprise – least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rates – can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State.

[b]. *Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4)*, Award of 8 December 2000⁽¹⁵⁾ [Monroe Leigh (pres.), Ibrahim Fadlallah, Don. Wallace, Jr.]

[For summary of the facts, see p. 454]

84. ... In interpreting a similar [fair and equitable treatment] provision from the bilateral investment treaty between Zaire and the United States, another ICSID panel has recently held that “the obligation incumbent on [the host state] is an obligation of vigilance, in the sense that [the host state] shall take all measures necessary to ensure the full enjoyment of protection and security of its [sic] investments and should not be permitted to invoke its own legislation to detract from any such obligation.”⁽¹⁶⁾ Of course, as still another ICSID panel has observed, a host state’s promise to accord foreign investment such protection is not an “absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a ‘strict liability’ on behalf of the host State.”⁽¹⁷⁾ A host state “is not an insurer or guarantor... [i]t does not, and could hardly be asked to, accept

an absolute responsibility for all injuries to foreigners.”⁽¹⁸⁾ ...

[D]. Property Expropriated

Expropriation is determined on a case-by-case basis. Measures affecting tangible property, real property, stock and shares, bank

accounts, dividends, bonds, management of business, contractual rights, intangible property, shares and use of property have, for instance, been the subject of expropriation claims.

[1]. Tangible Property

[a]. *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran* (IUSCT Case No. 129), Award No. 309-129-3 of 2 July 1987⁽¹⁹⁾ [Nils Mangård (chairman), Charles N. Brower, Parviz Ansari Moin]

[This dispute, as will be recalled, arose over six oil drilling rigs which Sedco, International, S.A. ("SISA") operated for the Oil Service Company of Iran ("OSCO"). During the period of unrest preceding the Iranian revolution, all of SISA's expatriate personnel left Iran, and SISA suspended operation of the rigs in question. While SISA attempted to arrange for the export of the rigs, the National Iranian Oil Company ("NIOC") began operating them, alleging that SISA had breached its contractual duties.

The Tribunal held that NIOC appropriated the rigs and owed Sedco compensation for them. Consequently, the Tribunal did not need to determine whether Iran's policy of nationalizing the oil drilling industry amounted to expropriation of the rigs.]

[b]. *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran, National Iranian Oil Company (Iran-United States Claims Tribunal Case No. 43), Award No. 258-43-1 of 8 October 1986⁽²⁰⁾ [Karl-Heinz Böckstiegel (chairman), Richard M. Mosk, Mohsen Mostafavi]*

[In 1975, the claimant, Oil Field of Texas, leased four systems of blowout preventers to Oil Services Company of Iran ("OSCO"). The lease required OSCO to pay Claimant a daily rate for the use of the devices, and made OSCO liable for any loss or damage to the equipment.]

(Citations selectively omitted)

41. NIOC has retained possession of the three existing blowout preventers leased pursuant to the Lease Agreement, despite the fact that the Claimant demanded their return if rent was not paid on them. NIOC asserts it can retain possession of the equipment as long as its claims against the Claimant are not settled, and it has not made any rental payments for the period beginning January 1979 and thereafter. In a telex dated 12 July 1979, Iranian Oil Services Limited quoted to Oil Field the contents of a telex dated 3 July 1979 from OSCO to it, in which OSCO stated "that the Islamic Court of Ahwaz has instructed NIOC to stop any payment to [Oil Field] until further instructions. It will be helpful if you nominate a lawyer to pursue and resolve outstanding matters here." In answer to questions at the Hearing, NIOC confirmed that this Court order prohibited NIOC not only from making payments, but also from returning the equipment to Oil Field...

42. It is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court....

43. The interference with the use of the three blowout preventers as caused by the Ahwaz Court order amounts to a taking of this equipment. NIOC's representative stated unequivocally that it was prohibited by the order of the Ahwaz Court to make further payments or to return the equipment. The Government's representative did not object to this statement. The Court order did not only have temporary effect, but, as evidenced by NIOC's continued retention of the equipment, amounted to a permanent deprivation of its use. In these circumstances, and taking into account the Claimant's impossibility to challenge the Court order in Iran, there was a taking of the three blowout preventers for which the Government is responsible. It is concluded that the date of the taking was not later than the beginning of July 1979, as reflected in the telex from Iranian Oil Services Limited to the Claimant. Consequently, the Claimant must be compensated for this expropriation in an amount equivalent to the full value of the equipment. The Claimant asserts that it is entitled to the replacement value of the three blowout preventers. The Tribunal finds that the replacement value, in the circumstances of this Case, is an appropriate measure of the value of the equipment.

44. The question whether the equipment at issue was used or new is not as such determinative as to its value. Rather, as the Claimant seeks and is entitled to its replacement value, what has to be

determined is the amount it would have cost to replace the three blowout preventers that had been leased to and were retained by NIOC, based on the market conditions for such equipment at the time....

[2]. Real Property

[a]. *Metalclad Corporation v. The United Mexican States (ICSID Case No. ARB/ (AF)/97/1), Award of 30 August 2000*²¹⁾ [Elihu Lauterpacht (pres.), Benjamin R. Civiletti, José Luis Siqueiros]

[Metalclad, a U.S. corporation, purchased a Mexican corporation which had acquired federal and state permits to build a landfill, but had been denied a municipal permit to do so. The landfill was to be located in Guadalucazar, in the Mexican state of San Luis Potosi. Shortly after Metalclad began work on the landfill, the city ordered the construction stopped because Metalclad had not obtained a municipal construction permit. While the approval of its permit application was still pending, Metalclad completed construction, but was prevented from operating the landfill due to intense local opposition. Thirteen months after the application was filed – and nine months after the landfill was completed – the city denied the municipal construction permit. Metalclad was never able to operate the landfill. Nineteen months later, the Governor of San Luis Potosi issued an Ecological Decree declaring an area including the landfill site to be a Natural Area for the preservation of a rare cactus.]

(Citations selectively omitted)

C.. NAFTA, Article 1110: Expropriation

102. NAFTA Article 1110 provides that “[n]o party shall directly or indirectly... expropriate an investment... or take a measure tantamount to... expropriation... except: (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation... ” “A measure” is defined in Article 201(1) as including “any law, regulation, procedure, requirement or practice”.

103. 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.

104. By permitting or tolerating the conduct of Guadalucazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).

105. The Tribunal holds that the exclusive authority for siting and permitting a hazardous waste landfill resides with the Mexican federal government....

106. As determined earlier, the Municipality denied the local construction permit in part because of the Municipality's perception of the adverse environmental effects of the hazardous waste landfill and the geological unsuitability of the landfill site. In so doing, the Municipality acted outside its authority. As stated above, the Municipality's denial of the construction permit without any basis in the proposed physical construction or any defect in the site, and extended by its subsequent administrative and judicial actions regarding the *Convenio*, effectively and unlawfully prevented the Claimant's operation of the landfill.

107. These measures, taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation.

* * *

109. Although not strictly necessary for its conclusion, the Tribunal also identifies as a further ground for a finding of expropriation the Ecological Decree issued by the Governor of SLP on September 20,

1997. This Decree covers an area of 188,758 hectares within the "Real de Guadalcazar" that includes the landfill site, and created therein an ecological preserve. This Decree had the effect of barring forever the operation of the landfill.

110. The Tribunal is not persuaded by Mexico's representation to the contrary. The Ninth Article, for instance, forbids any work inconsistent with the Ecological Decree's management program. The management program is defined by the Fifth Article as one of diagnosing the ecological problems of the cacti reserve and of ensuring its ecological preservation. In addition, the Fourteenth Article of the Decree forbids any conduct that might involve the discharge of polluting agents on the reserve soil, subsoil, running water or water deposits and prohibits the undertaking of any potentially polluting activities. The Fifteenth Article of the Ecological Decree also forbids any activity requiring permits or licenses unless such activity is related to the exploration, extraction or utilization of natural resources.

111. The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110. However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation.

112. In conclusion, the Tribunal holds that Mexico has indirectly expropriated Metalclad's investment without providing compensation to Metalclad for the expropriation. Mexico has violated Article 1110 of the NAFTA.

[b]. *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Final Award of 17 February 2000⁽²²⁾ [L. Yves Fortier (pres.), Elihu Lauterpacht, Prosper Weil]

[As will be recalled (p. 593 *supra*), claimant Compañía del Desarrollo de Santa Elena ("CDSE") is a company formed in 1970 primarily for the purpose of purchasing and developing the region. A majority of its shareholders are citizens of the United States. CDSE purchased the property for U.S. \$395,000 and began to plan its development program. In 1978, Costa Rica issued a decree expressing intent to expropriate the Santa Elena property.

While both parties agreed that there was an expropriation, they disagreed on the date as of which the property must be valued and on the value as of that date. The Tribunal held that the expropriation occurred on the day of the 1978 Decree, even though it was only the first step of the expropriation process. It also held that the value of the property will be assessed as the fair market value based on all of the relevant factors that occurred up to that date.]

[c]. *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability of 14 December 2012⁽²³⁾ 111-113 [Gabrielle Kaufmann-Kohler (pres.), Brigitte Stern, Francisco Orrego Vicuña]

[After Ecuador imposed a 99% windfall profits tax on its production sharing agreement, Burlington created a foreign escrow account into which it paid the tax. When Ecuador began attachment procedures against Burlington's oil fields and facilities to satisfy the unpaid tax, Burlington suspended production, at which point Ecuador enacted a *Caducidad* decree and entered the fields and took them over.]

529. For these reasons, the Tribunal deems that Ecuador's entry and taking of possession of the Blocks was not justified under the police powers doctrine because (i) At the time of the taking of possession of the Blocks, Burlington's decision to suspend operations was legally justified as a matter of Ecuadorian law and (ii) the evidence does not show that Ecuador's immediate intervention in the Blocks was necessary to prevent serious and significant damage to the Blocks...

* * *

537. For the foregoing reasons, the Tribunal concludes that Ecuador's physical occupation of Blocks 7 and 21 expropriated Burlington's investment as of 30 August 2009. This being so, the next question that arises is whether this expropriation was unlawful...

* * *

543. It is undisputed that Ecuador has neither paid nor offered

compensation to Burlington. Many tribunals have held that the lack of payment is sufficient for the expropriation to be deemed unlawful. Ecuador asserts that it offered no compensation to Burlington because it was disputed whether there was expropriation at all. While this may have been true at the time of Law 42 and the coactiva, there can be no legitimate dispute that Ecuador appropriated for itself the benefits of Burlington's investment from the time of the physical takeover. There can be no dispute either that Ecuador was aware that compensation was due, for it offered to pay compensation to other oil companies when it took over their operations.

544. In spite of these considerations, Ecuador made no offer of compensation. The fact thus remains that Ecuador made no "prompt, adequate and effective" payment to compensate for the expropriation of Burlington's investment. Ecuador's reliance on *Goetz v. Burundi*, 906 in which the Tribunal gave the State the option between paying compensation or withdrawing the expropriatory measure, does not change this fact. At any rate, nothing prevents Ecuador from making an offer after this decision, and possibly reaching a settlement with Burlington which would put an end to this arbitration.

545. Accordingly, the Tribunal cannot but conclude that Ecuador's expropriation was unlawful.

[3]. Stocks and Shares

[a]. Dr. Horst Reineccius, First Eagle SoGen Funds, Inc., Mr. Pierre Mathieu and la Société de Concours Hippique de la Châtre v. Bank of International Settlements, Arbitral Tribunal of the Bank of International Settlements (Permanent Court of Arbitration), Partial Award of 22 November 2002 on the Lawfulness of the Recall of the Privately Held Shares on 8 January 2001 and the Applicable Standards for Valuation of Those Shares, 74-75, 77-81 [W. Michael Reisman (pres.), Jochen A. Frowein, Mathias Krafft, Paul Lagarde, Albert Jan van den Berg]⁽²⁴⁾

[Although shares in the Bank of International Settlements ("BIS" or "Bank") are held primarily by governments, as of 2000 13.73% of these shares were held by private investors. In early 2001, the Board of Governors of the BIS amended the BIS Statutes to require the recall of all privately-held shares with compensation determined by the Bank. Private investors who had owned BIS shares challenged this decision.]

(Citations selectively omitted)

161. In situations of expropriation of the shares of foreign investors, the practice of international law rather consistently has valued the shares by reference to their market value, in circumstances in which an efficient market operated.

162. In *American Int'l Group, Inc.*, the claimant sought compensation for its minority shareholding in an Iranian insurance company that was nationalized by the Government of Iran. The claimant requested the "full value" of its interest as of the date of nationalization and the tribunal concluded that the compensation due was the claimant's share of the fair market value of the property nationalized. In calculating the fair market value, the tribunal ascertained the "higher and lower limits of the range within which the value of the company could reasonably be assumed to lie," and then arrived at a compensation value by way of an "approximation of that value, taking into account all relevant circumstances of that case."

163. In the case of *James Saghi*, the claimants were the majority shareholders of two Iranian companies that were put under management of the Iranian Government. The claimants alleged deprivation of ownership rights in the companies even though there was no formal expropriation. The tribunal observed that fair market value would be the applicable standard of compensation and summarized the state of customary international law with respect to fair market value as follows:

Fair market value may be defined as "the amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalization itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares." On the other hand, while any diminution of value caused by the deprivation of property itself should be regarded, "prior changes in

the general political, social and economic conditions which might have affected the enterprise's business prospects as of the date the enterprise was taken should be considered."

The tribunal applied a method of "reasonable approximation" in arriving at the fair market value, taking into account the impact of the Iranian Revolution and currency inflation.

164. International jurisprudence supports finding fair market value by reference to a share trading price when available.... ..

168. Furthermore, the Tribunal is not persuaded by the Bank's conception of the international legal standard of compensation as one of "appropriate" compensation. While it is true that the jurisprudence of the European Court of Human Rights has adopted a flexible standard, described as one of "appropriate" compensation for takings by a state of the property of its nationals, the analogy of the Bank to a state taking the property of the shareholders, who are to be deemed its "nationals" is unpersuasive. The issue of the general relevance of regional Human Rights law aside, the mainstream of general international law, were it to apply to this case, has required full compensation. While that standard may have been qualified during the Cold War and may have been adjusted in some cases in which certain developing countries, particularly with respect to petroleum, nationalized their single or primary resource, it is clear that it has been reestablished in the recent jurisprudence.

* * *

172. The Tribunal has found that the Bank is an international organization. While the Bank is, thus, subject to international law, all Parties agree that the rights of shareholders are, in the first instance, determined by the Constituent Instruments.... ..

173. Thus the Parties agree that the issue that falls to be decided here must be resolved by reference to the Bank's Constituent Instruments and only by international law should the Constituent Instruments fail to provide an answer. Because the Parties agree that the questions posed to the Tribunal should be resolved in the first instance by reference to the Constituent Instruments of the Bank, the relationship of the Statutes to international law must be clarified. The Constituent Instruments of the Bank constitute a *lex specialis* as between the Parties. Insofar as the *lex specialis* in this case – the 1930 Agreement, the Charter and the Statutes – provides an answer to the questions arising in this case, the Tribunal would not be permitted to turn to international law – unless the *lex specialis* purported to incorporate an explicit *renvoi* to general international law or would have violated a fundamental principle of international law.

174. In fact, neither the applicable law clause of the 1907 Convention for the Pacific Settlement of International Disputes nor the 1930 Hague Agreement incorporate a *renvoi* to international law, as such... In sum, the *lex specialis* of this case – the 1930 Agreement, the Charter and the Statutes – was conceived as self-contained and not incorporating general international law, except insofar as the *lex specialis* failed to provide an answer to a question that might arise or violated a fundamental principle of international law. In that eventuality, a Tribunal seised of the case was to turn to general international law.

175. The right to compensation is part of both general international law and the specific area of Human Rights law and it is quite possible that an action purporting to abrogate such a right might be held to be invalid for violation of international law. If the Statutes had purported to deny shareholders compensation, a general international law problem could have arisen. But in the instant case, the Statutes did require compensation and the fact that the *lex specialis*, because of the specific provisions of the Statutes establishing the equal rights of the shares, might prescribe a higher amount than would general international law cannot be considered a breach of international law. Hence there is no ground for the Tribunal to depart from the *lex specialis* applicable to the Parties and to use the international law standard which would apply market value for the shares.

[4]. Bank Accounts

[a]. American Bell International, Inc. v. The Islamic Republic of Iran, The Ministry of Defense of the Islamic Republic of Iran, the Ministry of Post, Telegraph and Telephone of the Islamic Republic of Iran, and The Telecommunications Company of Iran (IUSCT Case No. 48), Award No. 255-48-3 of 19 September 1986⁽²⁵⁾ [Michel Virally (pres.), Charles N. Brower, Parviz Ansari

[In 1975, American Bell International, Inc. ("ABII") won a contract to assist the Iranian government in a program for the modernization of its military and civilian telecommunications system. During the period of political unrest proceeding the revolution the government stopped paying ABII's invoices, and ABII stopped its work on the program soon afterward. ABII quickly removed its personnel from Iran. The excerpt below concerns the smallest of ABII's five categories of claims.]

(Citations selectively omitted)

E.. Expropriation of Bank Account

147. ABII's final claim is for \$283,964, the value of funds held in a bank account in Iran which were allegedly expropriated by the Government of Iran. The ABII funds in question were held in a joint ABII/TCI account established at Bank Melli by virtue of an arrangement of 19 March 1979 to which ABII apparently only reluctantly agreed. The funds in this account, originally 61,000,000 rials, were used to satisfy ABII's outstanding affairs with creditors subsequent to its departure. Transactions on the account were to be made subject to the joint signature of TCI and ABII's representatives at Price Waterhouse. Proceeds of sales of ABII's assets were to be deposited into this account and then reapplied to the satisfaction of any outstanding obligations.

148. It appears that by June 1979 a substantial amount of the outstanding obligations of ABII had been settled. In that month ABII's representative telexed the Minister of Post, Telephone and Telegraph, Dr. Islami, objecting to the fact that, despite contrary assurances, the balance of the funds, about 20,000,000 rials had not been released to ABII. This request for the release was subsequently repeated at least in letters addressed to Dr. Islami in October and November 1979, when almost all of the obligations had been satisfied. These requests were not complied with. Instead, on 10 August 1980 the Minister, in a letter personally forwarded by a TCI representative to ABII's Iranian representative at Price Waterhouse with the authority to sign on behalf of ABII, requested that Price Waterhouse transfer the funds to a TCI account at Bank Melli. In a letter dated 19 August 1980 to ABII the representative reported that he was informed that "non-compliance with the payment request would have serious personal consequences for [him] and would in any case not stop TCI obtaining access to ABII's funds." The representative then authorized the transfer of the 19,976,850 rials which was effected on 11 August 1980. Since then ABII has not had any access to the funds.

149. Claimant contends that the above actions constitute expropriation under international law for which Iran is responsible. Respondents do not deny the appropriation of the funds, but contend that the acts in question do not amount to expropriation or usurpation under Iranian law, the governing law of the contracts.

150. The Tribunal notes that in the circumstances of the present case there is no need to discuss the applicable law at length. Where, as here, both the purpose and effect of the acts are totally to deprive one of funds without one's voluntarily given consent, the finding of a compensable taking or appropriation under any applicable law – international or domestic – is inevitable, unless there is clear justification for the seizure. The only conceivable justification for the taking of the funds would have been the settlement of outstanding accounts with landlords and creditors of ABII. Although ABII's letters from as late as October and November 1979 indicate that at that time some minor portion of such accounts remained unsettled, there is no evidence provided by Respondents that any outstanding obligation remained unsettled in the following August.

151. In view of the above, the Tribunal concludes that Claimant was wrongfully deprived of its bank account of 19,976,850 Rials. Therefore ABII is entitled to an award of U.S.\$283,964, i.e, the value of the property as of the date of the taking.

[5]. Dividends

[a]. Foremost Tehran, Inc., et al. v. The Government of the Islamic Republic of Iran, et al. (IUSCT Case Nos. 37 and 231), Award No. 220-37/231-1 of 11 April 1986^[26] [Gunnar Lagergren (pres.), Koorosh-Hossein Ameli, Howard M. Holtzmann]

[Foremost, a family of U.S. companies, owned between 30 and 31

percent of Pak Dairy, an Iranian dairy company. For a period of time, Foremost held a majority interest in Pak Dairy. Even after that interest was reduced in 1976 to a minority holding, one of Foremost's representatives continued to serve as managing director of the company until his resignation in November 1979. By mid-1979, entities controlled by the Iranian government had come to control a majority interest in Pak Dairy, but representatives of Foremost continued to exercise their right to serve on Pak Dairy's board of directors. The major issue in the excerpt below is whether the Pak Dairy board's decision not to pay Foremost its share of the cash dividend in 1979 and 1980, and not to deliver Foremost its stock dividend in 1980, deprived Foremost of a sufficient amount of its ownership rights to amount to an expropriation.]

(Citations selectively omitted)

... After Mr. Fisher resigned from that office in November 1979, Mr. Asghari, a colleague of long standing, was appointed to succeed him as managing director at a board meeting held on 15 November 1979, when the board accepted Mr. Fisher's resignation "after thanking him for his efforts during several years in office". Foremost maintained its two places on the board in the person of Mr. Fisher, who appointed a proxy, and Mr. Neil Dinaut, who represented Foremost Shir. The minutes of that meeting record that Dr. Ameli appended a note urging that all "foreign contracts" entered into by Pak Dairy should be "reconsidered" and that no further payments should be made in respect of them.

There followed a board meeting on 17 February 1980, held at the offices of the Financial Organisation and chaired by Mr. Haghshenas of IMDBI. The object of the meeting was to discuss the year's accounts and decide on the distribution of the company's profits. On behalf of the Financial Organisation, Dr. Ameli proposed that "the minimum amount of the legal dividend be paid to the shareholders and the balance be appropriated for the purpose of creating a reserve fund for severance pay" for the company's workers. The proposal as to severance pay was based on the recommendation of Pak Dairy's auditor, and it was extensively debated at the meeting. Mr. Vahdati, who by now was serving as proxy for both Foremost directors, was absent from the meeting. He was, however, present when the discussion was resumed at the next meeting, held at Dr. Ameli's office on 10 March 1980, again under the chairmanship of Mr. Haghshenas. A decision was taken at that meeting to set up the severance pay reserve fund. In the ensuing discussion about dividends, the minutes state that

the representatives of the Financial Organization... ..
... expressed their opinion that the minimum dividend should be divided among the shareholders; that the balance [of the profit] be credited to the company's reserve fund and that no stock dividend be issued. Their reason for this action was the presence of foreign shareholders in the company. By this action, they wanted to hold the amount paid to the foreigners to the minimum.

One of the factors taken into consideration in arriving at the dividend was that

the profits made by the company under current laws and regulations belong to the company and, the shareholders have a right thereto in proportion to their capital investment, therefore, whether there is a distribution in cash, or a stock dividend, or a reservation of a portion as undivided profit, it will not in principle change the rights of the shareholders to the profits earned; especially because due to the existing dispute between the governments of Iran and the United States, *the payment of profits to the foreign shareholders has been suspended for the time being*... ..

A dividend of eighteen percent of the profit in cash and ten percent in stock was declared on 15 April 1980.

The next development of significance occurred when Foremost wrote a letter to Mr. Asghari on 21 May 1980 requesting that the amount of the dividend payable to the Foremost companies, 29,864,280 Rials, be placed in a separate bank account to be opened in the name of Foremost-McKesson. Mr. Asghari replied by telex dated 27 May 1980 in the following terms:

I have to inform you that due to decision and instruction of the board of directors, Pak Dairy can not pay any sums of money for any reason to foreign share holders. So I cannot take any action regarding

your request.

Foremost's request for written confirmation of this decision met with no response. Despite Pak Dairy's assertion in its pleadings that the telex was unauthorised, it was in fact never specifically retracted.

* * *

Having examined the totality of the evidence in the present Cases, the Tribunal reaches the conclusion, on balance, that the interference with the substance of Foremost's rights did not, by 19 January 1981, and still less by 27 May 1980, amount to an expropriation.

The above conclusion is not altered by consideration of the effect of the departure of Foremost's personnel from Iran. While this contributed to the diminution of the enjoyment of Foremost's rights, it did not affect their fundamental nature. In this context, it is significant that after Foremost withdrew its two directors in October 1981, Pak Dairy replied with a telex of 11 November 1981 suggesting that the resignation be withdrawn and new directors designated. It should also be noted that Foremost has not proved the existence of any statutory restriction on its right to sell or otherwise dispose of its shares, and the report of Standard Research Consultants does not indicate any such restrictions. The report instead concludes that "the going-concern fair market value" of Foremost's 31% interest in Pak Dairy was \$11 million on 27 May 1980.

The legal characterisation of the interference suffered by Foremost appears rather to be on the same footing as that suffered by the Claimants in the Case of Sporrong and Lönroth, European Court of Human Rights, Judgment of 23 September 1982, Series A no. 52. There, the grant of long-term expropriation permits (twenty-three and eight years respectively), accompanied by prohibitions on construction (twenty-five and twelve years respectively), over two pieces of real property in Stockholm, resulted in a serious impairment of the enjoyment and disposition of the Claimants' property which, however, fell short of affecting the legal title. The measures were held not to be expropriatory.

* * *

It is open to the Tribunal to make a similar finding in the present Cases to the extent that the level of interference established here constitutes "other measures affecting property rights" as contemplated by Article II, paragraph 1, of the Claims Settlement Declaration, though it may not have risen to the level of an actual taking.

Such interference, attributable to the Iranian Government or other state organs of Iran, while not amounting to an expropriation, gives rise to a right to compensation for the loss of enjoyment of the property in question.

The Tribunal is also satisfied that Foremost's claim for expropriation must be taken to include a claim for a lesser degree of interference with its rights.

Pak Dairy was, and is, obliged to pay declared dividends to all its shareholders. Faced with a clear breach of this duty in the form of the withholding by Pak Dairy of the cash dividends declared in 1979 and 1980 and due to Foremost, the Tribunal determines that an interference of the type described above exists, and that the amount of these dividends represents the correct level of compensation payable by the Government.

* * *

Foremost's enjoyment of its shareholding was further infringed by Pak Dairy's failure to deliver the certificate representing the stock dividend declared in 1980. The certificate representing the stock dividend declared in 1979 had been collected by Mr. Fisher in person. In the light of Pak Dairy's repeated assurances that Foremost's rights of ownership subsist, the Tribunal assumes that Pak Dairy will promptly deliver to Foremost the stock certificates for the stock dividend declared in 1980.

[6]. Bonds

Historically, bondholders suffering expropriation organized in private committees or relied on their own governments, causing costly politicization of disputes.

[a]. Edwin Borchard, *State Insolvency and Foreign Bondholders*, Vol. I, *General Principles*, 193, 200-202 (Yale

(Citations selectively omitted)

The Foreign Bondholders Protective Council, Inc... was initiated by the Department of State. The exchange and bank crash of 1929-31, followed by the great drop in the price level and the resulting depression, brought about an avalanche of defaults, both in Europe and in Latin America...

The absence of a central protective agency had stimulated a mushroom growth of private committees, either self-constituted or organized by issuing houses, which were not always as responsible or disinterested in personal gain as might have been wished. This had concerned the Department, for it was often in doubt whether and when to make representations on behalf of or lend support to a particular committee.

* * *

The advantages of a centralized, experienced, permanent Council over the ephemeral, *ad hoc* protective committee are overwhelming. It is for that reason that the Securities and Exchange Commission unhesitatingly endorsed the Council as the most appropriate organ for the negotiation of bond adjustments, not only in saving money for the bondholders but in prompt attention to a case of prospective default...

* * *

Since bond defaults usually have political repercussions and are likely to affect diplomatic relations, it is a great advantage to the Department of State to be able to escape responsibility for the adjustment while having the assurance that the interests of the bondholders have been safeguarded by a council in which it has confidence, a condition hardly likely to prevail when only self-appointed private protective committees are in operation and making demands for diplomatic support... The Department has little control over the actions of private committees, including charges exacted for their services, whereas it has some control over the Foreign Bondholders Protective Council, a control made more definite by the fact that the Council submits an accounting of its activities during the year to a board of visitors made up of State Department and SEC officials... The Council constitutes an excellent coordinator of the interests of the bondholders and of the United States Government, protecting the bondholders while relieving the Government of responsibility.

[b]. *Abaclat and Others v. Argentine Republic (formerly Giovanna A. Beccara and Others v. The Argentine Republic)* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility of 4 August 2011⁽²⁷⁾ [Pierre Tercier (pres.), Georges Abi-Saab, Albert Jan van den Berg]

[In a mass claim of Italian purchasers of Argentine bonds, the tribunal, by majority, addressed the question of whether bonds constituted "Investments" within the meaning of the relevant BIT.]

352. According to the Tribunal's own English translation of Article 1(1) BIT, the term "investment includes, without limitation":

- lit. (a): "movable and immovable goods, as well as any other right in rem, including – to the extent usable as investment – security rights on property of third parties;"
- lit. (b): "shares, company participations and any other form of participation, even if representing a minority or indirectly held, in companies established in the territory of a Contracting State;"
- lit. (c): "obligations, private or public titles or any other right to performances or services having economic value, including capitalized revenues;"
- lit. (d): "credits which are directly linked to an investment, which is constituted and documented in accordance with the provisions in force in the State where the investment is made;"
- lit. (e): "copyrights, intellectual or industrial property rights – such as invention patents, licenses, registered trademarks, secrets, industrial models and designs – as well as technical processes, transfer of technology, registered trade names and goodwill;"
- lit. (f): "any right of economic nature conferred under law or contract, as well as any license and concession granted in compliance with the applicable provisions applicable to the concerned economic activities, including the prospection, cultivation, extraction and exploitation of natural resources."

353. Analysing the structure of the various subsections of Article 1(1), it appears that they reflect a categorization of various types of investments from the perspective of rights and values that they generate: lit. (a) refers to property rights on movable and immovables, lit. (b) relates to participations into companies, lit. (c) refers to financial instruments, lit. (d) refers to credits, lit. (e) to rights on immaterial property and technology transfer, and lit. (f) to all kinds of further rights of economic value.

354. Firstly, this list covers an extremely wide range of investments, using a broad wording and referring to formulas such as “independent of the legal form adopted,” or “any other” kind of similar investment. It even contains a residual clause in lit. (f), encompassing “any right of economic nature conferred under law or contract.” In other words, the definition provided for in Article 1(1) is not drafted in a restrictive way. Based on its wording, as well as on the broader aim of the BIT as described in the Preamble, Article 1(1) cannot be seen to have intended to adopt a restrictive approach with regard to what kind of activity or dealing was meant to qualify as an investment.

355. Secondly, lit. (c) specifically addresses financial instruments. It is true that the term “obligations” is a broad term and can refer to any kind of contractual obligation, i.e., debt, and it is also true that the term “title” is also very broad. However, put in the context of the further terms listed in lit. (c) such as “economic value” or “capitalized revenue,” as well as considering that lit. (f) already deals with the more general concept of “any right of economic nature,” lit.

(c) is to be read as referring to the financial meaning of these terms. Thus, the term “obligation” may be understood as referring to an economic value incorporated into a credit title representing a loan. This kind of obligations would in the English language more commonly be called “bond,” rather than “obligation.” Similarly, the term “title” in Spanish and Italian would be more accurately translated into the English term of “security,” which means nothing more than a fungible, negotiable instrument representing financial value.

356. Thus, the Tribunal finds that the bonds, as defined above in § 11, constitute “obligations” and/or at least “public securities” in the sense of Article 1(1) lit. (c) of the BIT.

357. With regard to the security entitlements that Claimants hold in these bonds, they also represent “securities” in the sense of Article 1(1) lit. (c), since they constitute an instrument representing a financial value held by the holder of the security entitlement in the bond issued by Argentina.

358. The question now is whether the connection between the security entitlements and the bonds could be seen as so remote as to consider that the dispute is not “directly” related to an investment, since the dispute related primarily to the rights arising from Claimants' security entitlements. The Tribunal sees no valid reason that would support such conclusion:

- The bonds at stake were always meant to be divided into smaller negotiable economic values, i.e., securities. It has been sufficiently demonstrated by Claimants that the underwriters would not have subscribed to any of the bonds, without having previously ensured that the bonds were re-sellable to the intermediaries and their end customers;
- The security entitlements are the result of the distribution process of the bonds through their division into a multitude of smaller securities representing each a part of the value of the relevant bond. The security entitlements have no value per se, i.e., independently of the bond;
- The fact that the distribution process happens electronically, without the physical transfer of any title, does not change anything to the fact that rights effectively passed on to acquirers of security entitlements in the bonds.

359. In other words, whatever the technical nuances between bonds and security entitlements may be, they are part of one and the same economic operation and they make only sense together.

[7]. Management of Business

[a]. *Sedco, Inc. for itself and on behalf of Sedco International, S.A., and Sediran Drilling Company v. National Iranian Oil Company and The Islamic Republic of Iran (IUSCT Case No. 129), Award No. ITL 55-129-3 of 28 October 1985*²⁸⁾ [Nils Mangård (pres.), Charles N. Brower, Parviz Ansari Moin]

[For summary of facts, see *supra* p. 498. One of the issues in the dispute was the date at which Iran expropriated SEDIRAN. While Iran claimed that the appropriate date was the enactment of the Act Concerning the Protection and Expansion of Industries, SEDCO dated the actual taking earlier, when Iran appointed "temporary directors" to control and manage SEDIRAN and prevented SEDCO accessing the firm's funds or participating in its control and management. The Tribunal held that the expropriation occurred at the earlier date, as SEDCO claimed, since there was no reasonable prospect of return of control to SEDCO. With this finding, the Tribunal did not preclude the possibility that, during the valuation of SEDIRAN, it may find that the assets of SEDIRAN were taken at the earlier date.]

[b]. *Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc., v. The Government of the Islamic Republic of Iran, Bank Omran, Bank Mellat, Bank Markazi* (USCT Case No. 24), Interlocutory Award No. ITL 32-24-1 of 19 December 1983⁽²⁹⁾ [Gunnar Lagergren (pres.), Mahmoud M. Kashani, Howard M. Holtzmann]

[Starrett Housing Corporation agreed to participate in a project to develop a residential community on an area of unimproved land northwest of Tehran. The first phase of this project for which claimants were responsible was construction of a 1600 unit apartment complex consisting of eight, 26-story buildings (the "Zomorod Project"). In order to secure necessary permits, Starrett assigned the basic project agreement to an Iranian subsidiary, Shah Goli Apartment Company.]

(Citations selectively omitted)

It is undisputed in this case that the Government of Iran did not issue any law or decree according to which the Zomorod Project or Shah Goli expressly was nationalized or expropriated. However, it is recognized 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.

In one respect the situation in this case is comparatively simple. There can be little doubt that at least at the end of January 1980 the Claimants had been deprived of the effective use, control and benefits of their property rights in Shah Goli.

* * *

It has, however, to be borne in mind that assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law. In this case it cannot be disregarded that Starrett has been requested to resume the Project. The Government of Iran argues that it would have been possible for Starrett to appoint managers from any country other than the United States, but the evidence does not in other respects indicate on what conditions Starrett has been afforded any possibility to resume the Project. The completion of the Project was dependent upon a large number of American construction supervisors and subcontractors whom it would have been necessary to replace and the right freely to select management, supervisors and subcontractors is an essential element of the right to manage a project. Further, given the contents of the Construction Completion Bill it must be taken for granted that Starrett can only resume the Project subject to the provisions of that Bill, which entail far-reaching restrictions in the right of former owners to manage housing projects. Indeed, the language of that Bill seems to indicate that the right to manage such projects ultimately rests with the Ministry of Housing and Bank Maskan. Lastly, nothing in the evidence submitted in the case gives reason to believe that Starrett would be offered compensation for any reduction in the value of its shareholding and contractual rights caused by the managers appointed by the Government.

It has therefore been proved in the case that at least by the end of January 1980 the Government of Iran had interfered with the Claimants' property rights in the Project to an extent that rendered these rights so useless that they must be deemed to have been taken.

There is an allegation that Starrett abandoned the Project for economic reasons. The Tribunal does not go into this issue because it is notorious that at least after 4 November 1979, the date when the hostage crisis began, all American companies with projects in Iran

were forced to leave their projects and had to evacuate their personnel.....

However, in this case the Claimants assert that the effects of what is referred to as “virulent anti-American and other policies and actions of the Revolutionary Group and the Islamic Republic” – both before and after the establishment of the new Government – rendered it impossible for Starrett to continue operations at the Project and that this amounted to an unlawful expropriation under general principles of international law and under the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran of 15 August 1955.

Thus the Claimants' argument is that they were deprived of the effective use, control and benefits of its property rights in the Project much earlier than by the end of January 1980.

There is no reason to doubt that the events in Iran prior to January 1980 to which the Claimants refer, seriously hampered their possibilities to proceed with the construction work and eventually paralysed the Project. But investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of the economic and political system and even revolution. That any of these risks materialized does not necessarily mean that property rights affected by such events can be deemed to have been taken. A revolution as such does not entitle investors to compensation under international law. Therefore, when considering the events prior to January 1980 to which the Claimants have referred, the Tribunal does not find that any of these events individually or taken together can be said to amount to a taking of the Claimants' contractual rights and shares. The Tribunal therefore concludes that 30 January 1980 must be considered as the date of the taking. However, for ease of accounting the Tribunal decides that 31 January 1980 shall be considered as the date of the taking. The next question for the Tribunal is to determine the exact nature of the property rights that were taken. The Claimants contend that it was neither the land and the buildings only nor their shares in Shah Goli that were taken. The Claimants assert that the expropriated rights comprised the assets and contractual rights and the other property of, in the first instance, Shah Goli as a controlled subsidiary of Starrett Housing. The Claimants define the principal assets of Shah Goli as the buildings and the principle contractual rights as including the rights to complete the Project and to earn reasonable profits which Starrett anticipated, and to recover the funds which it loaned and which were used to build the Project.

There is nothing unique in the Claimants' position in this regard. They rely on precedents in international law in which cases measures of expropriation or taking, primarily aimed at physical property, have been deemed to comprise also rights of a contractual nature closely related to the physical property. In this case it appears from the very nature of the measures taken by the Government of Iran in January 1980 that these measures were aimed at the taking of Shah Goli. The Tribunal holds that the property interest taken by the Government of Iran must be deemed to comprise the physical property as well as the right to manage the Project and to complete the construction in accordance with the Basic Project Agreement and related agreements, and to deliver the apartments and collect the proceeds of the sales as provided in the Apartment Purchase Agreements.

[8]. Contractual Rights

[a]. *Phillips Petroleum Company Iran v. The Islamic Republic of Iran and The National Iranian Oil Company (IUSCT Case No. 39), Award No. 425-39-2 of 29 June 1989*^[30] [Robert Briner (pres.), Seyed K. Khalilian, George H. Aldrich]

[In 1964, Phillips Petroleum Company, AGIP (an Italian company) and the Oil and Natural Gas Commission of India (Commission) entered into a Joint Structure Agreement (JSA) with the National Iranian Oil Company (NIOC) covering four blocks in the Persian Gulf. Together, the three foreign entities and NIOC created a non-profit joint-stock company, the Iranian Marine International Oil Company (IMINOCO), to carry out all operations under the JSA.

Claimant Phillips Petroleum Company of Iran is a wholly-owned subsidiary of Phillips Petroleum Company. For further factual details, see p. 904.]

(Citations selectively omitted)

75. The Claimant's principal contention is that the Respondents are

liable for the expropriation of contract rights stemming from the JSA, and that, alternatively, they are liable for breach and repudiation of that contract. The Tribunal considers that the acts complained of appear more closely suited to assessment of liability for the taking of foreign-owned property under international law than to assessment of the contractual aspects of the relationship, and so decides to consider the claim in this light.

76. As the Tribunal has held in a number of cases, expropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as the contract rights involved in the present Case.

* * *

105. That contract rights, such as those taken by the Respondents in the present Case, are "interests in property" protected by the Treaty of Amity is clear from the above-quoted text and from the negotiating history of the provision, which indicates that the reference to "interests in property" was included at the insistence of the United States for the stated purpose of ensuring that contract rights in the petroleum industry would be protected by the Treaty in the same way as would the older type of property represented by a petroleum concession.

106. Thus, the Claimant is entitled by the Treaty to "just compensation", representing the "full equivalent of the property taken".

[b]. *Amoco International Finance Corporation. v. The Government of the Islamic Republic of Iran, et al. (IUSCT Case No. 56), Award No. 310-56-3 of 14 July 1987⁽³⁴⁾ [Michel Virally (pres.), Charles N. Brower, Parviz Ansari Moin]*

[In 1966, Amoco and the National Petroleum Company ("NPC") of Iran agreed to form a joint-venture company Kharg Chemical Company Limited ("Khemco") to build and operate a plant for the production and marketing of substances derived from natural gas. During 1978, strikes by workers in the oil industry disrupted production and hampered operation of oil processing facilities, including those of Khemco. By November 1978 there were total stoppages of oil exports. The Claimant contended that by the end of December 1978 the increasing levels of anti-American sentiment caused Amoco to propose to Khemco that the Amoco personnel working for Khemco should be temporarily permitted to evacuate Iran. According to the Respondents, the withdrawal of Amoco's personnel was made without NPC's approval or consent and was the cause for the reduced production at the Khemco plant to "negligible levels" during the first quarter of 1979. See also *supra* p. 260.]

(Citations selectively omitted)

174. From the previous finding of the Tribunal that Iran was not party to the Khemco Agreement it is apparent that only NPC or Khemco could be held responsible for breach of contract. The facts of this Case demonstrate, however, that although NPC acted only for itself when it concluded the Khemco Agreement, it acted as an instrument of the Iranian Government when it took, together with NIOC [National Iranian Oil Company], the measures characterized by the Claimant as breach and repudiation of the Khemco Agreement....

175. For the reasons just set forth, NPC (or Khemco) cannot be held liable for breach of contract for taking measures attributable to NIOC and, through NIOC, in the final analysis, to the Iranian Government. Such a conclusion is fully consistent with the previous finding of the Tribunal that these measures constituted the first steps of a process which, after the failure of the attempt to purchase Amoco's shares in Khemco, became a process of nationalization. It is, therefore, in this context that they have to be considered.

* * *

176. Article V of the CSD obliges the Tribunal to "decide all cases on the basis of respect for law." According to Article II of the CSD, the Tribunal's jurisdiction extends to claims of nationals of the United States or Iran which arise, inter alia, out of contracts. To decide such cases "on the basis of respect for law" means to decide them on the basis of respect for the contracts validly entered into and binding the parties at the time the claims arose. Such has been the consistent approach of the Tribunal in all the cases decided up to now.

177. It is worthwhile to emphasize that the CSD, concluded in

dramatic circumstances between two States with very different political and judicial beliefs and traditions, thus contributed, to a greater extent than any other international compact, to the consolidation of the rule of international law that a State has the duty to respect contracts freely entered into with a foreign party. As is well known, this rule was spelled out by the United Nations General Assembly in 1962 in G.A. Res. 1803 (XVII) on Permanent Sovereignty Over Natural Resources, reprinted in Basic Documents in International Law 141 (I. Brownlie 2d ed. 1972). While the rule has been questioned since then, the CSD constitutes an implied but unequivocal recognition of this rule, which has been constantly confirmed by the abundant case law of the Tribunal and is not disputed by the Parties in this Case.

178. The quoted rule, however, must not be equated with the principle *pacta sunt servanda*, often invoked by claimants in international arbitrations. To do so would suggest that sovereign States are bound by contracts with private parties exactly as they are bound by treaties with other sovereign States. This would be completely devoid of any foundation in law or equity and would go much further than any State has ever permitted in its own domestic law. In no system of law are private interests permitted to prevail over duly established public interest, making impossible actions required for the public good. Rather private parties who contract with a government are only entitled to fair compensation when measures of public policy are implemented at the expense of their contract rights... To insist on complete immunity from the requirements of economic policy of the government concerned would be the most certain way to cause the repudiation of the quoted rule.

179. In international practice, and notably in the cases submitted to international arbitration, the dispute has focused on the question of the so-called "stabilization clauses." For the reasons set forth in the preceding paragraph, it is not seriously questioned that, in the absence of such a stabilization clause, a contract does not constitute a bar to nationalization. That is one aspect of the evolution of international law in this area and of the general recognition of the right of States to nationalize. As a fundamental attribute of state sovereignty, this right, commonly used as an important tool of economic policy by many countries, both developed and developing, cannot easily be considered as surrendered. The award in the AMINOIL case, rightly in the view of the Tribunal, held that while contractual limitations on a State's right to nationalize are undoubtedly possible, "what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for and be within the regulations governing the conclusion of State contracts; and it is to be expected that it should cover only a relatively limited period." In the present Case, the Khemco Agreement was concluded for a shorter period (35 years) than the concession in the AMINOIL case (60 years), but in economic and legal terms 35 years cannot be considered a "relatively limited period." Neither the Law concerning the Attraction and Protection of Foreign Investment in Iran of 28 November 1955 nor the Act concerning the Development of Petrochemical Industries of 15 July 1965, referred to in Article 2 of the Agreement, exclude nationalization. Furthermore, it would be particularly adventurous to construe any provision of a contract to which the State is not named as a party as forbidding nationalization.

180. To sum up, the Tribunal finds that the expropriation in this Case cannot be characterized as unlawful as a breach of a contract, since Iran, the expropriating State, was not a party to the Khemco Agreement and, therefore, not bound by any stabilization clause allegedly contained herein. Moreover, even if Article 21, paragraph 2 could be considered as binding upon the government, that clause does not expressly prohibit nationalization of the contract.

* * *

182. For the reasons set forth above, the Tribunal finds that Amoco's rights and interests under the Khemco Agreement, including its shares in Khemco, were lawfully expropriated by Iran, through a process starting in April 1979 and completed by the decision of the Special Commission, notified by telex on 24 December 1980.

[c]. Mobil Oil Iran Inc., et al. v. Government of the Islamic Republic of Iran and National Iranian Oil Company (IUSCT Case Nos. 74, 76, 81, 150), Award No. 31174/76/81/150-3 of 14 July 1987⁽³²⁾ [Michel Virally (pres.), Charles N. Brower, Parviz Ansari Moin]

[In 1954, following the overthrow of the Mossadegh government and the return of the Shah to Iran, a group of major oil companies (Consortium) reached an agreement with the new Iranian government whereby Iran would retain ownership of its oil reserves but the

Consortium would have the right to purchase Iranian oil at favorable rates until 1979. The agreement required the consortium to operate the oil industry in Iran, on behalf of the National Iranian Oil Company (NIOC), and required each member of the consortium to establish a "Trading Company" for the purchase of oil products in Iran.

By 1973, changes in the oil industry had allowed Iran to negotiate a more favorable Sales and Purchase Agreement (SPA) to replace the Consortium Agreement. Pursuant to this agreement, the Consortium companies established a non-profit, private joint-stock company known as the Oil Service Company of Iran (OSCO) to carry out certain activities in Iran.

Additional, rapid changes in the oil industry followed the conclusion of the agreement, leading to a series of unilateral acts by both the Consortium and NIOC which prevented the SPA from being implemented according to its original terms. In 1975, the Consortium and NIOC began negotiating toward a revised agreement, but these negotiations had not resulted in an agreement by the time of the Iranian Revolution.]

(Citations selectively omitted)

110. In sum, the Tribunal notes that, by the end of 1975, the terms of the Agreement no longer governed essential aspects of the relationship between the parties. Many fundamental changes had been added to this framework through various devices, either in conformity with, or in violation of, the procedures set forth in the Agreement. In no case, however, did either party choose to treat the Agreement as terminated, but rather confined itself, in some instances, to registering its objections and to entering into negotiations with the other one. These negotiations were conducted in order to resolve specific disputes, but also in view of drafting a complete revision of the Agreement or a new agreement designed to replace it.

* * *

126. A close scrutiny of the exchange of letters of 10 and 23 March 1979, as well as of the conduct of the Parties prior to and after this exchange, demonstrates that the Parties agreed at this time not to revive the Agreement, then suspended by force majeure. This agreement, however, was not unconditional. Both parties recognized that a reconciliation of interest was to take place between them, and that this reconciliation, as well as the other issues arising from the termination of the Agreement, was to be the object of subsequent negotiations, as spelled out in the 23 March letter. Such negotiations eventually took place and, undoubtedly, would have resulted in compensation for the loss sustained by the Consortium alluded to in the same letter. Any other outcome of the negotiation, in the absence of other counterparts acceptable to the Companies, would have amounted to an unjust enrichment of Iran and NIOC and an unjust loss for the Companies.

127. The fact that the negotiations did not succeed before November 1979 and were interrupted by the events which took place during that month does not relieve the Respondents from their obligation to compensate the loss sustained by the Consortium. This holds true irrespective of the legal characterization of these events: *force majeure*, as the Respondents contend, or acts of the Iranian Government entailing the international responsibility of Iran, as alleged by the Claimants. In the present context the Tribunal, therefore, neither must pronounce itself on this issue nor need it consider the Single Article Act, which entered into force at a time when the Agreement was already dead. In any event, such an Act has been characterized by Iran as an expropriation and must be analyzed in this context.

* * *

CONCURRING OPINION OF JUDGE BROWER

1. The Award proceeds from an erroneous premise by mistaking Claimants' practical acceptance of the political realities in Iran in March 1979 for a conditional surrender of their legal rights under the 1973 Sale and Purchase Agreement ("SPA"). The Award nonetheless appears to reach the right concrete result and thus enjoys my concurrence. An elaboration of the route by which I have arrived at these conclusions may be instructive and in any event is compelled by my professional conscience.

I.

2. To say that the Parties in their exchange of correspondence of 10 and 23 March 1979 mutually "agreed... .. not to revive the" SPA is to suppose that a condemned man who spurns the ritual proffer of

a blindfold when marched before the firing squad thereby consents to his execution. An unwanted but inevitable fate is no less unilaterally imposed by virtue of its being gracefully accepted than if it had been less decorously confronted. Style never has been a matter of legal consequence.

* * *

4. It simply defies common sense to suppose that the Claimants' diplomatically stated willingness "to meet NIOC to reach an agreement in respect to the termination of the" SPA, while "[p]ending agreement" they "reserve all their rights and cannot accept" NIOC's contention that material breaches of the SPA by them had rendered it "inoperative" years before, constituted an abandonment of any of their rights under that agreement.⁽³³⁾ As is implicit in the Award's contrary conclusion, the absence of such a voluntary act renders Respondents liable, for the 10 March letter unequivocally puts an end to the SPA.⁽³⁴⁾ In my view the reasonable reading of events is that Respondents as of that date subjected Claimants to an actionable deprivation of rights.

5. The Award's conclusion that the Parties in March 1979 made a legally binding "agreement to agree" on a completely new arrangement elevates the concept of an obligatory "renegotiation clause" to improbable heights. It is one thing for parties to enter into an agreement providing that certain of its terms remain to be established, or must be renegotiated upon the occurrence of described events". It strains credulity, however, to suggest that such commercially sophisticated enterprises as major international oil companies would trade established legal rights for an "agreement" consisting entirely of an undertaking to negotiate in good faith towards a future agreement whose basic financial terms are far from precise.

[d]. Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004⁽³⁵⁾ [James Crawford (pres.), Benjamin R. Civiletti, Eduardo Magallón Gómez]

(Citations selectively omitted)

(iii). Was there conduct tantamount to an expropriation of Acaverde's contractual rights?

* * *

168. In the Tribunal's view, the outright refusal by a State to honour a money order or similar instrument payable under its own law may well constitute either an actual expropriation or at least a measure tantamount to an expropriation of the value of the order. There was no suggestion that Cook as the beneficiary of the money order was not entitled to be paid. Like other instruments of similar character the money order was not just an ordinary contract; it was an instrument representing a certain value which the State was *ex facie* committed to pay under its own law.

* * *

171. Subsequent authorities have sought to make a distinction between mere failure or refusal to comply with a contract, on the one hand, and conduct which crosses the threshold of taking or expropriation, on the other hand. The Tribunal is sympathetic to the view expressed in *Azinian* that such a distinction is not adequately made by the addition of adjectives ("egregious", "gross", "flagrant" or whatever). But *some* distinction must be made: if certain cases of contractual non-performance may amount to expropriation, it must be possible to say, in principle, which ones, otherwise the distinction between contractual and treaty claims disappears.

172. On analysis it appears that the cases fall into a number of groups. First and perhaps best known are the cases where a whole enterprise is terminated or frustrated because its functioning is simply halted by decree or executive act, usually accompanied by other conduct.⁽³⁶⁾ This was so in many of the oil cases;⁽³⁷⁾ and in many cases before the Iran-United States Claims Tribunal.⁽³⁸⁾

173. Secondly, there are cases where there has been an acknowledged taking of property, and associated contractual rights are affected in consequence. In such cases the bundle of rights requiring to be compensated includes all the associated contractual and other incorporeal rights,⁽³⁹⁾ unless these are severable and retain their value in the hands of the claimant notwithstanding the seizure of the related property.

174. Thirdly, there is the much smaller group of cases where the only right affected is incorporeal; these come closest to the present claim of contractual non-performance.... In such cases, simply to assert that "property rights are created under and by virtue of a contract" is not sufficient.⁽⁴⁰⁾ The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts, as is envisaged by the use of the term "measure" in Article 1110(1). It is true that, having regard to the inclusive definition of "measure",⁽⁴¹⁾ one

could envisage conduct tantamount to an expropriation which consisted of acts and omissions not specifically or exclusively governmental. All the same, the normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. It is only where such access is legally or practically foreclosed that the breach could amount to an definitive denial of the right (i.e., the effective taking of the chose in action) and the protection of Article 1110 be called into play.

175. The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum. The law of breach of contract is not secreted in the interstices of Article 1110 of NAFTA. Rather it is necessary to show an effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent.

176. In the present case, in the Tribunal's view, this has not been shown. The question here is not one of final refusal to pay (combined with effective obstruction and denial of legal remedies); it is one of neglect and failure at the contractual level in the context of a marginal enterprise. That does not pass the test for an expropriatory taking of contractual rights as it emerges from the decisions analysed above.

[e]. *Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Award of 30 June 2009⁽⁴²⁾ [Gabrielle Kaufmann-Kohler (pres.), Christoph H. Schreuer, Philip Otton]

[The claimant, an Italian company operating in the oil and gas industry, complained of a violation of the Italo-Bangladeshi BIT as a consequence of an allegedly unlawful interference with the investment contract by the combined action of Petrobangla, a Bangladeshi public instrumentality, and Bangladeshi courts. The contract concerned the construction of a natural gas pipeline, which was significantly delayed because of strong opposition by the local population. A dispute had arisen over contract performance. Saipem initiated arbitration proceedings under the rules of the International Chamber of Commerce (ICC). Petrobangla responded by filing an application before the court of Dacha seeking revocation of the ICC's authority to deal with the case, as well as an injunction to stay all further arbitration proceedings. The Supreme Court of Bangladesh granted Petrobangla's requests. The ICC tribunal proceeded with the arbitration regardless of the orders issued by the Supreme Court of Bangladesh and awarded damages to Saipem. Petrobangla subsequently filed an action before the High Court division of the Supreme Court of Bangladesh seeking the annulment of the award. The Court held that there was no award to annul because the ICC arbitration had proceeded in violation of the Bangladeshi restraining order, and thus the award had to be considered null and void. Saipem then filed an ICSID claim invoking the bilateral investment treaty between Italy and Bangladesh and claiming that Bangladesh had violated its obligations towards the foreign investor under Article 5 of the BIT.]

(Citations selectively omitted)

126. Hence, the question that the Tribunal must answer is whether the disputed actions constitute an expropriation within the meaning of Article 5 of the BIT. This presupposes that "property" has been "taken" by the State.

127. It is Saipem's position that "an illegal action of the judiciary which has the effect of depriving an investor of its contractual or vested rights constitutes an expropriation which engages the State's international responsibility". This position relies on the presently

prevailing view pursuant to which any interference with the exercise of property (or “expropriable” rights), however defined, can amount to an expropriation, including indirect and *de facto* expropriation, provided that the deprivation is irreversible.

128. Turning first to the identification of the property at stake, the Tribunal considers that the allegedly expropriated property is Saipem’s residual contractual rights under the investment as crystallised in the ICC Award. Bangladesh has not put forward convincing arguments that such rights should not be considered expropriable rights.

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.

130. It is true that one could object – Bangladesh did not – that in theory Saipem can still benefit from the ICC Award (or from the ICC arbitration agreement). Yet, Bangladesh itself acknowledges that Petrobangla has “no assets outside Bangladesh”. Hence, the perspective that the ICC Award could possibly be enforced under the New York Convention outside Bangladesh despite having been declared “a nullity” by the Bangladeshi courts has no realistic basis. Because, by the Respondent’s own admission, the ICC Award could not be enforced outside Bangladesh, the intervention of the Bangladeshi courts culminating in the declaration of the Supreme Court that the ICC Award was “non-existent” substantially deprived Saipem of its rights and thus qualifies as a taking.

131. In contrast to the actions of the courts, the conduct of Petrobangla does not qualify as a “taking”. Indeed, it is generally accepted that an act must be governmental in nature to constitute an expropriation... In the present case, it is undisputable that Petrobangla did not act in a governmental capacity in connection with the ICC proceedings. Therefore, Petrobangla’s actions in the course of the ICC proceedings, whether justified or not, cannot amount to an expropriation.

[f]. Comments and Questions

1. A number of cases confirm these principles of law. The fountainhead of the law of expropriation is set forth in the *Case Concerning the Factory at Chorzów* (Claim for Indemnity) (The Merits) on Sept. 13, 1928. See discussion *infra* p. 967. The Permanent Court of International Justice observed that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. It also held that the damage is assessed on the basis of the value of property, rights and interests which have been affected, excluding damages inflicted on a third party but not excluding debts and other obligations for which the injured party is responsible.
2. In the interwar case of *Norwegian Claims* (1922), the Permanent Court of Arbitration (PCA) considered a dispute between the United States and Norway. After the declaration of war by the U.S. against Germany in August 1917, the U.S. Shipping Board Emergency Fleet Corporation, established pursuant to the Shipping Act, sent orders to nearly all shipyards around the U.S. requisitioning all ships, related material, and building contracts. Among the requisitioned property were 15 shipbuilding contracts of several Norwegian citizens. Because the Fleet Corporation did not take any steps until 1919 to pay just compensation to the shipbuilders, the Norwegian government submitted a claim against the U.S. The PCA held that although the U.S. was entitled to requisition foreign property within American jurisdiction, it had to ensure that just compensation was duly assessed and paid without undue delay. It also held that the U.S. did not have sufficient reason for withholding payment after the signing of the Treaty of Versailles in November 1918.

* * *

4. In *Biloune v. Ghana Investments Centre*, Award on Jurisdiction and Liability, (October 27, 1989), 95 Int'l L. Rep. 183, an UNCITRAL Tribunal viewed an investor's contractual rights as constituting a potential object of indirect expropriation by the government's actions and inactions. The Tribunal stated, "such prevention of [the investor] from pursuing its approved project would constitute constructive expropriation of [the investor's] contractual rights in the project... unless the respondents can establish by persuasive evidence sufficient for these events." More recently, the UNCITRAL Tribunal in *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* (2001), similarly held that the contractual rights of an investor had been expropriated by the host state, stating, "[t]he Respondent's view that the Media Council's actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State... is irrelevant."
5. 22 U.S.C. § 2198 (b) provides the following definition of expropriation. "[T]he term 'expropriation' includes, but is not limited to, any abrogation, repudiation, or impairment by a foreign government, a political subdivision of a foreign government, or a corporation owned or controlled by a foreign government, of its own contract with an investor with respect to a project, where such abrogation, repudiation, or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project."

[9]. Intangible Property (e.g., Intellectual Property, Goodwill)

[a]. Case Concerning the Factory at Chorzów (Claim for Indemnity) (The Merits), P.C.I.J. Judgment No. 13 of 13 September 1928, P.C.I.J. Series A – Nos. 10-17 Recueil Des Arrêts (Chorzów Series A-No. 17 at p. 51)

[For summary of facts, see *infra* p. 967. With respect to the issue of goodwill, the Court indicated that it could be valued.]

(Citations selectively omitted)

... [I]n order to obtain further enlightenment in the matter, the Court, before giving any decision as to the compensation to be paid by the Polish Government to the German Government, will arrange for the holding of an expert enquiry, in conformity with Article 50 of its Statute and actually with the suggestions of the Applicant. This expert enquiry, directions for which are given in an Order of Court of to-day's date, will refer to the following questions:

I. A. What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzów in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?

[b]. Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, et al. (IUSCT Case No. 56), Award No. 310-56-3 of 14 July 1987⁽⁴³⁾ [Michel Virally (pres.), Charles N. Brower, Parviz Ansari Moin]

[For summary of facts, see *supra* p. 260.]

(Citations selectively omitted)

201. Of paramount interest is the list of the components enumerated by the Court as included in the value of the undertaking. They appertain to three categories: corporeal properties (lands, buildings, equipment, stocks), contractual rights (supply and delivery contracts) and other intangible valuables (processes, goodwill and "future prospects"). Using today's vocabulary, this would mean "going concern value", which is not a new concept after all. Only one component relates to the future: "future prospects." Since, for the reasons set forth in the preceding paragraph, future prospects does not mean lost profits, we safely can say, using the traditional vocabulary of international arbitration, that all these components pertain to *damnum emergens*.

* * *

228. As used by the Claimant in the present Case, however, the DCF method goes even further: it amounts to a complete departure from, and a reversal of, the approach traditionally adopted in international practice, notably, by international tribunals. Under the

traditional approach, in case of expropriation of an enterprise the compensation to be paid is calculated according to the net value of the transferred – that is, expropriated – assets. As we have seen this can extend to physical properties, movable and immovable, as well as to intangibles, including profitability in the case of an ongoing enterprise: the “going concern” value. To this element of *damnum emergens*, a complementary one is added where the expropriation is unlawful: the value of the revenues that the owner would have earned if the expropriation had not occurred, i.e., *lucrum cessans*.

* * *

255. More generally, the theory that net book value is the appropriate standard of compensation in all cases of lawful expropriation overlooks the fact that a nationalized asset is not only a collection of discrete tangible goods (equipments, stocks and, possibly, grounds and buildings). It can include intangible items as well, such as contractual rights and other valuable assets, such as patents, know-how, goodwill and commercial prospects. To the extent that these various components exist and have an economic value, they normally must be compensated, just as tangible goods, even if they are not listed in the books. Furthermore, nationalization does not take place in order to disperse, by auction, the assets of the expropriated undertaking, or to use them for other purposes. On the contrary, the undertaking is nationalized as a going concern to be placed as such under State control, with a view to developing its activity and allowing the community to benefit fully from its returns. Therefore, the fact that the expropriated assets form a going concern can certainly not be disregarded at the time of the valuation of the compensation to be paid.

[c]. Comments and Questions

1. Since goodwill may be a projection based upon certain market assumptions, some tribunals have awarded compensation for lost goodwill in circumstances in which the prospective market is very uncertain. See in this regard *Sola Tiles, Inc. v. Government of the Islamic Republic of Iran*, 14 Iran-US CTR 223, excerpted *infra* p. 654.

[10]. Use of Property

[a]. Thomas Waelde and Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 *Int'l & Comp. L. Q.* 811, 839-840, 846-847 (2001)⁽⁴⁴⁾

(Citations selectively omitted)

To require compensation for every diminution in the value of property caused by regulation will render public governance almost impossible as governments will be economically crippled by claims for compensation. This is particularly so to the extent regulation responds to changes in evolving technology and public expectations. A doctrine of compensation for expropriation cannot impose on the community the normal commercial risk which is associated with every business. On the other hand, to allow the State very extensive regulatory powers without any attention to compensation would result in over-regulation uninhibited by the economic costs of the State's actions. Hence the need to strike a balance between the two competing rights. The Iran-US claims tribunals have taken the position that in commercial undertakings, a regulation or interference becomes a compensable taking when it denies the owner of the property 'fundamental rights of ownership, use, enjoyment or management of the business' (e.g. the right to take part in management decisions or to derive profits from the investment) even though title might still remain with the investor. While the jurisprudence of the Iran-US claims tribunal is of general precedential value, it is of less use to our specific discussion of environmental regulation. Hence, guidance should be sought from the jurisprudence of national courts and the European Court of Human Rights.

A look at the relevant cases suggests that most courts have been reluctant to award compensation where the regulation did not render the property totally valueless and where the regulated property still had some economic value even though it might not be the kind of value preferred by the owner. But they have found a 'regulatory taking' when the economic value was reduced to zero: in the *Pennsylvania Coal* case, the US Supreme Court held a state law which prohibited the mining of coal in a manner that could cause subsidence of residence on the surface, amounted to a taking because it rendered the underlying mineral rights economically valueless. That position was reiterated by the court in the leading

case of *Lucas v South Carolina Coastal Council*, in which the majority held that a regulation which deprived the owner of 'all economically beneficial uses' of the property amounted to a taking except if the activity constituted a noxious or nuisance-like use of the property under the state's common law rules. In this case, *Lucas* sought to challenge the constitutionality of legislation which had the effect of barring him from constructing houses on his lots close to a beach, and which he acquired prior to the legislation coming into force. One should note that in the *Lucas* case there had been a legitimate expectation that housing would be permitted and this expectation had led to substantial prior investment.

* * *

The codification of customary international law on investor protection in modern MITs is no unreasonable fetter on governmental policies. It places international law controls over the tendency of governments to discriminate against and squeeze foreign investors to the benefit of domestic competitors or special interest groups which are able to capture the regulatory power of national governments – often to the detriment of the people at large. Such controls can be seen as a desirable constraint over the domestic political process to maintain the benefits that a country and its people gain from their integration with the wealth-generating global economy. It is also wrong to infer from the recent cases of direct investor-State litigation (primarily under NAFTA) that foreign investors can keep governments from pursuing legitimate policies. In these cases, as in all litigation, one need not to look at exaggerated claims made in adversarial proceedings or investor-State bargaining, but at the ultimate award. What the litigation rights now available to foreign investors against host States do is to erect a warning sign to governments that uncontrolled submission to domestic competitor and special interest group pressure can lead to undesirable international sanctions-thus in fact support governments to stand firm against domestic pressure for discrimination and protectionism. These modern treaty-rules support the national forces of 'good governance' in their conflict and bargaining with special interest groups. The direct investor State litigation rights are a step towards good governance in international economic relations. Modern multinational economic treaties provide protoconstitutional elements of governance for the global economy. It is hard to see how the trend towards international regulation of the global economy should not be conducive to a global environmental agenda: creating a well functioning global economy will create the resources for environmental protection which are not available in closed economies.

[i]. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Paris, 20 March 1952. Article 1– Protection of Property (Council of Europe, European Treaty Series – No. 009, page 3)⁽⁴⁵⁾

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[aa]. Legitimate Aims


In *Reineccius, First Eagle et al. v. Bank of International Settlements* (see *supra* p. 610), the Tribunal observed that the public interest requirement in expropriation is to be understood, whether in reference to a state or another international actor, as "an action rationally, proportionately and necessarily related to the performance of one of the legitimate international purposes of the actor undertaking it."

[bb]. Control is Proportionate to the Aims

[See *Pine Valley Developments Ltd. Ors v. Ireland*, 14 Eur. H.R. Rep. 319 (1992) ¶ 79.]

[b]. *Katte Klitsche de la Grange v. Italy (Development ban on private land), before the European Court of Human Rights, Series A, No. 293-B, Application No. 12539/86, Judgment of 27 October 1994, 19 Eur. H.R. Rep. 368 (1995)*

[The owner of a large area of park land in Rome received permission

from the district council for development. Subsequently, however, the council adopted a land-use plan imposing a development ban on part of the land. The owner filed an application with the Commission, which declared admissible his complaints of violations of Article 1 of Protocol No. 1 and Article 6(1) of the Convention on the basis of the lack of compensation for the damage. The European Court of Human Rights dismissed the claims, and held that there was no de facto expropriation and that a fair balance was struck between the interests of the community and the requirements of the protection of the individual's fundamental rights.]  page "745"

[c]. Trustees of the Late Duke of Westminster's Estate v. United Kingdom (The Leasehold Reform Acts case), before the European Commission of Human Rights, Application No. 8793/79, Decision as to Admissibility of 28 January 1983, 5 Eur. H.R. Rep. 440, 441, 463-464 (1983)

(Citations selectively omitted)

The applicants complained that the operation of the Leasehold Reform Acts had forced them to sell certain freehold interests against their will and for inadequate compensation. They alleged violations of Article 1 of Protocol No. 1 and of Articles 13 and 14 of the Convention.

* * *

The applicants are trustees acting under the Will of the Second Duke of Westminster. The applicants, as trustees, are owners of residential property in London. Their application relates to property transactions under the Leasehold Reform Act 1967, as amended, under which a number of their properties have been purchased by tenants.

* * *

The applicants complain that they have been deprived of certain property which has been compulsorily acquired by tenants exercising rights of enfranchisement under the Leasehold Reform legislation. They allege the breach of Article 1 of Protocol No. 1 to the Convention alone and in conjunction with Article 14 of the Convention. They also complain that no remedy is available to them in respect of their complaints and invoke Article 13 of the Convention.

The respondent Government deny that the relevant legislation gives rise to any breach of the Convention. They maintain that the application is inadmissible under Article 27(2) of the Convention on the ground that it is incompatible with the Convention since it misconceives the role of the convention organs and delves into matters which are properly the province of the domestic legislation.

* * *

It is not in dispute that the transactions complained of by the applicants have involved interferences with their property rights under this provision. Nor is it in dispute that the respondent Government is responsible for the interferences in question, since they are authorised by legislation. In principle therefore the subject matter of the complaint is within the scope of the Commission's competence *ratione materiae* and *ratione personae*. The questions which arise are therefore whether the interferences with the applicants' property rights were justified under Article 1 of the Protocol itself and whether they were discriminatory in breach of Article 14 of the Convention.

Having made a preliminary examination of the parties' submissions on these questions the Commission finds that the case raises important issues concerning the interpretation and application of the relevant provisions of the Convention and protocol.

In particular it is necessary in the first place to consider, in the light of the Commission's decision in the case of *Bramelin and Malmström* whether the rule concerning deprivation of possessions set out in the second sentence of Art. 1 of the Protocol is applicable to the interferences in question here, which arose from legislation governing private rights and obligations. If that provision is applicable it will be necessary for the Commission to consider whether the interferences in question were compatible with it. If not it is still necessary to consider whether there has been an infringement of the applicants' right to peaceful enjoyment of their possessions guaranteed by the first sentence of Article 1.

Issues of substance also arise under Article 14 of the Convention in conjunction with Article 1. In particular in so far as the legislation distinguishes between different classes of property, both in relation to the applicability of the legislation and in relation to the terms of

compensation, an issue arises as to whether such distinctions amount to differential treatment as between different property owners on grounds of 'property... or other status' for the purposes of Article 14. If so it will be necessary for the Commission to consider whether there was an objective and reasonable justification for the distinction in question.

The Commission finds no ground on which it could hold the present application to be incompatible with the Convention for the purposes of Article 27(2). It concerns interferences with the applicants' property rights, protected by Article 1 of the Protocol, for which the respondent Government is admittedly responsible as legislator. The applicants' criticisms of the legislation go beyond mere expressions of dislike of or disagreement with the legislation, and include substantial argument to the effect that it is contrary to the Convention. In particular the applicants maintain that the legislation exceeds any margin of appreciation relative to the concept of 'public interest' under Article 1 of the Protocol and that it fails to draw a 'fair balance' between their property rights and the general interest.

Having regard to the nature of the issues which arise under Article 1 of the first Protocol and Article 14 of the Convention, and the close connection between those issues and the applicants' complaint under Article 13, the Commission does not find that any part of the application can be considered manifestly ill-founded. No other ground of inadmissibility has been established and the case must therefore be declared admissible.

[E]. Expropriatory Intent

In general, there is no requirement for a government to have explicitly fashioned measures with the intention to expropriate for an expropriation claim to be upheld. Rather, the effects of measures have been deemed to be more important.

[1]. Question of the Necessity of Expropriatory Intent

[a]. *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, et al. (IUSCT Case No. 7), Award No. 141-7-2 of 29 June 1984*⁴⁶ [Willem Riphagen (pres.), Shafie Shafeiei, George H. Aldrich]

(Citations selectively omitted)

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.

[b]. *Phillips Petroleum Company Iran v. The Islamic Republic of Iran, The National Iranian Oil Company (IUSCT Case No. 39), Award No. 425-39-2 of 29 June 1989*⁴⁷ [Robert Briner (pres.), Seyyed K. Khalilian, George H. Aldrich]

[For summary of facts, see *supra* p. 621.]

(Citations selectively omitted)

98. Although a government's liability to compensate for expropriation of alien property does not depend on proof that the expropriation was intentional, there seems little doubt in this Case that the new Islamic Republic intended to bring the JSA to an end and to place NIOC [National Iranian Oil Company] fully in charge of all oil production and sales. Even though it can readily be observed that NIOC made unequivocal statements during 1979 regarding the timing and the terms for termination of the JSA, the refusal to permit the Claimant to exercise any rights under the JSA is more relevant to such a finding than any of these pronouncements. Notwithstanding the ambiguity of some of these statements and the Claimant's continued efforts to arrive at an agreed solution of the problems with the JSA, there is in this Case no evidence of any such agreed termination of the JSA nor of a waiver by the Claimant of its rights under that Agreement (as the Tribunal found in the *Consortium Cases* based on the evidence there).

[c]. Comments and Questions

1. The formula “measures tantamount to expropriation” which is found in Chapter 11 of NAFTA and in the BITs (see Chapter 2 and Chapter 4 *supra*) largely discards any requirement of intention, replacing it with a criterion of consequentiality, *i.e.*, that it is the effect of the measures (without regard to whether such an effect was intended by the state) that determines the existence of an expropriation.
2. The Iran-U.S. Claims Tribunal has repeatedly held that “[t]he intent of the government [concerning expropriation] is less important than the effects of the measures on the owner and the form of the measures of control or interference is less important than the reality of their impact.”⁽⁴⁸⁾ For further discussion on expropriatory intent, see W. Michael Reisman and Robert D. Sloane *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 Brit. Y.B. Int’l L. 115 (2004) (“What matters is the effect of governmental conduct – whether malfeasance, misfeasance, or nonfeasance, or some combination of the three – on foreign property rights or control over an investment, not whether the state promulgates a formal decree or otherwise expressly proclaims its intent to expropriate.”).

[2]. Effect of Act on Interests

[a]. *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, et al. (IUSCT Case No. 7), Award No. 141-7-2 of 29 June 1984*⁽⁴⁹⁾ [Willem Riphagen (pres.), Shafie Shafeiei, George H. Aldrich]

(Citations selectively omitted)

In light of these facts, the Tribunal concludes that the Claimant has been subjected to “measures affecting property rights” by being deprived of its property interests in TAMS-AFFA since at least 1 March 1980 and that the Government of Iran is responsible, by virtue of its acts and omissions, for that deprivation. The Claimant is entitled under international law and general principles of law to compensation for the full value of the property of which it was deprived...

[F]. Standards

[1]. Direct Expropriation: the Government Acquires Title and Benefits from It

[a]. *Eudoro Armando Olguín v. Republic of Paraguay (ICSID Case No. ARB/98/5), Decision on Objections to Jurisdiction of 8 August 2000*⁽⁵⁰⁾ [Rodrigo Oreamuno (pres.), Eduardo Mayora Alvarado, Francisco Rezek]

[b]. *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, UNCITRAL Arbitration Proceedings, Partial Award of 13 September 2001 (UNCITRAL Ad Hoc Trib. 2001)* [Wolfgang Kühn (pres.), Stephen M. Schwebel, Jaroslav Hándl]⁽⁵¹⁾

[For summary of facts, see *infra* p. 1029.]

(Citations selectively omitted)

(i). The obligation not to deprive the Claimant of its investment (Treaty Article 5)

591. The Claimant's expropriation claim under Article 5 of the Treaty is justified. The Respondent, represented by the Media Council, breached its obligation not to deprive the Claimant of its investment. The Media Council's actions and omissions, as described above, caused the destruction of CNTs' operations, leaving CNTS as a company with assets, but without business. The Respondent's view that the Media Council's actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State or because the original Licence granted to CET 21 always has been held by the original Licensee and kept untouched, is irrelevant. What was touched and indeed destroyed was the Claimant's and its predecessor's investment as protected by the Treaty. What was destroyed was the commercial value of the investment in CNTS by reason of coercion exerted by the Media Council against CNTS in 1996 and its collusion with Dr. Železný in 1999.

601. The basic breach by the Council of the Respondent's obligation not to deprive the Claimant of its investment was the coerced amendment of the MOA in 1996. The Council's actions and omissions in 1999 compounded and completed the Council's part in the destruction of CME's investment.

602. The Media Council, by its actions and omissions in 1996 and 1999, caused the damage suffered by the Claimant. Causation arises because the Media Council intentionally required CNTS to give up the right of the exclusive use of the Licence under the MOA. The Media Council's possible motivation for such action – to obtain regulatory control again over the broadcasting operation of CET 21 after the new Media Law came into force in 1996 – is irrelevant. A change of the legal environment does not authorize a host State to deprive a foreign investor of its investment, unless proper compensation is granted. This was and is not the case. Furthermore, it must be noted that the change of the 1993 legal arrangement in 1996 as required by the Media Council, for whatever reasons, does not justify the Council's collaboration in the assault on CME's investment by supporting CET 21's breach of the Service Agreement in 1999. The Respondent, therefore, is obligated to remedy the damages which occurred as a consequence of the destruction of Claimant's investment.

603. Of course, deprivation of property and/or rights must be distinguished from ordinary measures of the State and its agencies in proper execution of the law. Regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the (host) State. The Council's actions and inactions, however, cannot be characterized as normal broadcasting regulator's regulations in compliance with and in execution of the law, in particular the Media Law. Neither the Council's actions in 1996 nor the Council's interference in 1999 were part of proper administrative proceedings. They must be characterized as actions designed to force the foreign investor to contractually agree to the elimination of basic rights for the protection of its investment (in 1996) and as actions (in 1999) supporting the foreign investor's contractual partner in destroying the legal basis for the foreign investor's business in the Czech Republic. The actions and inactions affected the value of CME's shares in CNTS, such shares being clearly a "foreign investment" in accordance with the Treaty, as already dealt with above (see also the TRADEX case as cited above).

604. The expropriation claim is sustained despite the fact that the Media Council did not expropriate CME by express measures of expropriation. *De facto* expropriations or indirect expropriations, i.e. 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. This is undisputed under international law...

605. Furthermore, it makes no difference whether the deprivation was caused by actions or by inactions.....

* * *

607. Expropriation of CME's investment is found as a consequence of the Media Council's actions and inactions as there is no immediate prospect at hand that CNTS will be reinstated in a position to enjoy an exclusive use of the licence as had been granted under the 1993 split structure (even if the Czech Supreme Court would re-instate the Regional Commercial Court decision). There is no immediate prospect at hand that CNTS can resume its broadcasting operations, as they were in 1996 before the legal protection of the use of the licence was eliminated.

[2]. Indirect Expropriation

[a]. G. C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 Brit. Y.B. Int'l L. 307, 322-324, 330-333, 336-338 (1962) ⁽⁵²⁾

(Citations selectively omitted)

It has already been noted that a seizure which, owing to its original temporary nature, is not considered a sufficient taking to justify a claim for full compensation, may, nevertheless, in course of time be deemed to ripen into an expropriation. In one case, that of *Sabine G. Helbig*, the question before the United States Foreign Claims Settlement Commission was whether the claimant's property had been taken before she became a United States national; for if this were in fact the case, she was not entitled, under the applicable statute, to the allowance of her claim. It appeared that in 1939 the claimant had stored certain items of personal property with a

storage concern in Hungary and she claimed that the Hungarian authorities seized the property subsequent to the date of her naturalization as an American citizen in April 1946. The record showed, however, that the Hungarian Government seized the claimant's property in February 1946 and that the claimant had immediately appealed to the Hungarian authorities for the return of her property. On 7 February 1947 the Hungarian authorities ordered that a portion of the property be returned. No action was taken with respect to the other portion of the property, and in fact none of the property was ever returned to the claimant. The Commission found that the property had been taken prior to the claimant's naturalization as an American citizen on 15 April 1946. It held that the claimant was permanently deprived of possession, control and dominion over her property at the time of the seizure by the Office of the Commissioner for Abandoned Property. The fact that the authorities subsequently ordered that a portion of the property be returned to the claimant, which order was never executed, did not constitute a change in the date when the property was actually taken (from the claimant). This case suggests that, if property is seized under circumstances in which it is unclear whether expropriation is intended, the eventual ripening of the taking into an expropriation will make the initial seizure the act of expropriation. This will be so even if during the intervening period the offending Government expressly recognizes the alien's title.

This issue was also considered by the Commission in subsequent Panel Opinions issued to provide general guidance to its staff and to future claimants. In one such Opinion the Commission considered a situation where, although the claimant could not establish transfer of title, the proofs showed that land in Czechoslovakia was turned over to a farm co-operative. As has already been indicated, the Commission declared such claims to be compensatable on the ground that under such circumstances the claimant's property must be considered to have been permanently taken from him. With respect to the question of the date of the expropriation, the Commission was of the opinion that the date of physical transfer to the farm cooperative should be used as the date of taking.

A somewhat different tack, however, was pursued by the Commission in its Opinion dealing with claims based on the placing of property under 'national administration'. The Commission was asked by its staff to furnish a ruling as to what was the date of 'taking' in cases where the restitution of property under 'national administration' was denied, or where restitution proceedings were still pending, or where restitution was not even applied for. In a partial response to this request, the Commission replied that where restitution had been denied, or where restitution proceedings had been suspended, the property should be considered 'taken' at the date of the order denying restitution or suspending the proceedings. This Opinion of the Commission would seem somewhat inconsistent with its decision in the Helbig case in which it was indicated that where restitution is denied the taking should be retroactively regarded as having occurred on the date of the initial seizure. The Commission's Opinion, however, would not necessarily be inconsistent with the views it had expressed in its Collective Farm Opinion where the taking was also deemed to have occurred at the time of the initial transfer of possession to a farm co-operative. For, in this latter situation, it could be argued that it was readily apparent Czechoslovakian agricultural policy being what it was—that the land transferred was actually being expropriated and would never be returned. But, where it is doubtful what effect is intended, it seems sensible to date the expropriation from the time the offending Government refuses to return the property or to set a date for its return, and not to refer the date of expropriation back to the date of initial seizure. In so far as the Helbig case suggests a contrary rule, it seems to have been wrongly decided. In several recent decisions dealing with property which had been placed under 'national administration', the Commission followed the rule enunciated in its Panel Opinion.

* * *

Both the importance and the extreme difficulty of deciding what constitutes a sufficient taking so as to warrant a demand for full compensation for the property taken have been recognized. In hearings before the Committee on Foreign Relations of the United States Senate, the Committee on Foreign Law of the Association of the Bar of the City of New York proposed that definitions of the word 'taken' might be included in future bilateral treaties of trade and navigation in the provisions dealing with the expropriation or other taking of property. This was an admirable suggestion. Unfortunately, the Committee did not go further than to suggest that this definition should be such as to make it clear that 'taking' would include...
... measures which, though falling just short of the seizure of the full title to the property, effectively deprive its owner of the use and

enjoyment thereof, for example, the appointment of a custodian'.

The recent Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens also shows an awareness of the difficult nature of the problem, as does the American Law Institute's Draft Restatement of the Foreign Relations Law of the United States, which, in its provisions dealing with State responsibility for economic injury to aliens, greatly relied on the Harvard Draft. In Article 10, paragraphs 1 and 2, of the Harvard Draft, the taking under the authority of the State of an alien's property is, with certain exceptions, made wrongful. A 'taking of property' is defined in paragraph 3 (a) as follows

A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

In the comments accompanying this article, Professors Sohn and Baxter state that they recognize that there are a variety of methods by which a State may interfere with an alien's right to use and enjoy his property and that this interference may even go to the extent of the 'State's forcing the alien to dispose of his property at a price representing only a fraction of what its value would have been had not the alien's use of it been subjected to interference by the State...'. In the opinion of the draftsmen the crucial consideration in determining what constitutes a taking will be the duration of the interference. They conclude that 'considerable latitude has been left to the adjudicator of the claim to determine what period of interference is unreasonable and when the taking therefore ceases to be temporary'. The unreasonableness of an interference must be determined 'in conformity with the general principles of law recognized by the principal legal systems of the world'. No attempt was made to particularize on the expression because the matter seemed one 'best worked out by international tribunals'.

* * *

All this having been said, there is still a long way to go before one can come to any reasonably concrete conclusions on the subject. General rent control, for example, is normally not considered to amount to expropriation. But what if that control is long continued and the general inflationary trend to which all modern States seem to be subject makes the return on property woefully inadequate? Such situations have, of course, arisen in the industrially advanced States of the West, i.e. the States whose usual role is as plaintiff in expropriation cases. How does this situation differ, other than in the period of time it took to develop, from the conditions in Czechoslovakia which, as noted above, were considered by the Foreign Claims Settlement Commission and seemingly rightly found, according to the general principles enunciated by most of the commentators, to amount to a complete taking of the property in question for which full compensation was appropriate? It will be recalled that the facts underlying the Commission's Opinion were that in addition to requiring owners of real property to lease to whomsoever the State directed, the total gross income of property bringing in over a certain annual amount had to be deposited into a special account from which about 80 per cent was deducted for real estate taxes and contributions to a building repair fund. This would seem a very difficult case.

* * *

Granting, then, that what is considered a reasonable restriction on the use of property will depend to a very large extent on the social and economic views prevailing at any given time, one may hazard the following general conclusions.

(1) Although most interference with property, particularly if it is at all general in nature, can be clothed under the rubric of some recognized social purpose, the cases have clearly indicated that a State's mere declaration that expropriation is not intended is not determinative of the issue. Even when these protestations are made in good faith the cases have shown that expropriation can be an unintended result of a State's action. For example, when the use of certain property is so intimately connected with the control of other property which has been expropriated as to be useless without it, then the former property may itself be said to have been 'taken' or expropriated.

(2) Almost any outright seizure of property, if not initially an expropriation, will eventually ripen into an expropriation. An initial

statement that the taking is only 'temporary', provisions prescribing the maximum length of State control, detailed provisions calling for judicial or administrative determination of whether the property should be returned to its original owners, provisions calling for the payment of compensation for the use of the property seized, will all serve to postpone a conclusion that the property in question has been expropriated. Moreover, while no one can ordinarily claim exemption from even substantial regulation in the public interest, an alien property owner cannot indefinitely be deprived of virtually all beneficial enjoyment of his property. This conclusion is not altered by the fact that the alien is permitted to remain nominally in possession of his property. The alien cannot indefinitely be reduced merely to a managing and collecting agent for the State. When a seizure which is not originally deemed to be an expropriation ripens into one, the date of 'taking' should not be held to go back to the time when the property was initially seized, but the 'taking' should, rather, date from the time at which it is determined that there was no reasonable prospect that the property would ever be returned.

(3) There are certain types of State interference which, from the outset, will be considered as expropriation even though not labelled as such. Among these are the appointment of a receiver to liquidate the business or other property. This conclusion, as well as the previous one, is founded upon the premiss that the most fundamental right that an owner of property has is the right to participate in its control and management.

(4) The refusal to give permission in advance for the transfer abroad of operating profits, or other funds, does not by itself amount to expropriation. When coupled with other interferences with the use of property, however, the refusal to permit transfer of funds abroad is a relevant factor in determining whether expropriation has occurred from the combined effect of all the interference imposed on an alien's use of his property.

(5) The refusal to permit the alienation of real property, or of personal property not easily removable from the State issuing the prohibition, would seem, under some circumstances, to amount to an expropriation for which, accordingly, compensation is payable. If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no 'taking' of property.

(6) Despite the *Oscar Chinn* case, and the reliance placed by some commentators thereon, it is not at all clear that the prohibition of the sale of certain items (as noted in the fifth conclusion above) or the grant of a monopoly may not amount to the expropriation of the property of alien competitors. In monopoly situations the existence of generally recognized considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no 'taking'. Whether compensation may be obtained solely for the loss of good-will involved in the grant of a monopoly or in the prohibition of a certain line of trade is a more difficult question, and one to which a negative answer would appear to be indicated.

(7) A State's declaration that a particular interference with an alien's enjoyment of his property is justified by the so-called 'police power' does not preclude an international tribunal from making an independent determination of this issue. But, if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive.

(8) Where a State compels an alien to sell his property for less than its true value either to the State or to a third party, a compensatable claim arises. Where an alien sells his property for less than its true value because of a fear of possible expropriation, the serious practical considerations already discussed would seem to require that no claim for additional compensation should be permitted unless the State has clearly indicated that it will not pay any compensation to those whose property it may expropriate or unless the alien property holder is actually placed in physical jeopardy.

(9) It is evident that the question of what kind of interference short of outright expropriation constitutes a 'taking' under international law presents a situation where the common law method of case by case development is pre-eminently the best method, in fact probably the only method, of legal development. This article has attempted primarily to lay out the cases in this area and then to give some general indication of the stage of legal development which has been reached, and the lines along which further development may be expected.

Investments Centre and the Government of Ghana, Award on Jurisdiction and Liability of 27 October 1989, 95 Int'l L. Rep. 183, 209-210 (1994)⁽⁵³⁾ [Stephen M. Schwebel (pres.), Don Wallace, Jr., Monroe Leigh]

[Antoine Biloune, a Syrian national, managed and owned a substantial interest in Marine Drive Complet Ltd. ("MDCL"). MDCL entered into a de facto joint venture agreement with the Ghana Tourist Development Company ("GTDC"), a government entity, to develop a restaurant/resort complex. In August 1987, prior to completion of the project, a stop work order was issued on the grounds that the joint venture had not obtained the necessary building permits. In December 1987, Mr. Biloune was arrested and deported, ostensibly for involvement in illegal financial transactions and failure to submit an assets declaration form on time.]

(Citations selectively omitted)

This Tribunal must determine whether the above facts constitute, as the Claimants charge, a constructive expropriation of MDCL's assets and Mr Biloune's interest in MDCL. The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr Biloune in promoting, financing, and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune's interest in MDCL, unless the Respondents can establish by persuasive evidence sufficient justification for these events.

The Respondents' defenses on this point are that the various events described above are independent and unrelated, and that their conjunction is coincidental. The Respondents maintain that the independent and unrelated reasons for Mr Biloune's detention and deportation essentially were that in 1985 he was found guilty of selling kerosene stoves above the price-regulated price, that he had been accused by a private Ghanaian party of involvement in a bank fraud scheme; and that the sources of his investment in MDCL had not been shown to the satisfaction of the National Investigations Commission to be in accordance with the currency regulations of Ghana.

The evidence submitted in support of these alternative explanations is not convincing for the following reasons.

* * *

The Tribunal therefore holds that the Government of Ghana, by its actions and omissions culminating with Mr Biloune's deportation, constructively expropriated MDCL's assets, and Mr Biloune's interest therein, not later than December 24, 1987. The Claimants are therefore entitled to compensation.

[c]. Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Award of 8 December 2000⁽⁵⁴⁾ [Monroe Leigh (pres.), Ibrahim Fadlallah, Don. Wallace, Jr.]

[For summary of facts, see p. 454.]

(Citations selectively omitted)

15. This dispute arose out of long-term agreements to lease and develop two hotels located in Luxor and Cairo, Egypt...

16. On June 11, 1975, the United Kingdom and the Arab Republic of Egypt entered into an Agreement for the Promotion and Protection of Investments ("IPPA")...

17. On August 8, 1989, Wena and the Egyptian Hotels Company ("EHC"), "a company of the Egyptian Public Sector affiliated to the General Public Sector Authority for Tourism" entered into a 21 year, 6 month "Lease and Development Agreement" for the Luxor Hotel in Luxor, Egypt...

18. On January 28, 1990, Wena and EHC entered into an almost identical, 25-year agreement for the El Nile Hotel in Cairo, Egypt...

[Disputes between the parties began shortly after the agreements

were signed, when Wena withheld a portion of its rent because of the poor condition in which it found the hotels. EHC responded by liquidating Wena's performance security. Wena then commenced arbitration against EHC, but was unhappy with the result and apparently sought to have the decision annulled. On April 1, 1991, EHC seized the Nile and Luxor Hotels by force. The hotels were not returned to Wena until over a year later.]

* * *

82. There is substantial evidence that, even if Egyptian officials other than officials of EHC did not participate in the seizures of the hotels on April 1, 1991, 1) Egypt was aware of EHC's intentions to seize the hotels and did nothing to prevent those seizures, 2) the police, although responding to the seizures, did nothing to protect Wena's investments; 3) for almost one year, Egypt (despite its control over EHC both before and after April 1, 1991) did nothing to restore the hotels to Wena; 4) Egypt failed to prevent damage to the hotels before their return to Wena; 5) Egypt failed to impose any substantial sanctions on EHC (or its senior officials responsible for the seizures), suggesting its approval of EHC's actions; and 6) Egypt refused to compensate Wena for the losses it suffered.

* * *

96. The Tribunal also agrees with Wena that Egypt's actions constitute an expropriation and one without "prompt, adequate and effective compensation," in violation of Article 5 of the IPPA. That article provides in relevant part that:

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of the Party and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation itself or before there was an official Government announcement that expropriation would be effected in the future, whichever is the earlier, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of whether the expropriation is in conformity with domestic law and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

97. Although, as Professor Ian Brownlie has commented, "the terminology of the subject is by no means settled," the fundamental principles of what constitutes an expropriation are well established under international law. For example, as the ICSID tribunal in *Amco Asia v. Indonesia* noted, "it is generally accepted in International Law, that a case of expropriation exists not only when a state takes over private property, but also when the expropriating state transfers ownership to another legal or natural person. The tribunal continued by observing that an expropriation "also exists merely by the state withdrawing the protection of its courts from the owner expropriated, and tacitly allowing a *de facto* possessor to remain in possession of the thing seized ..."

98. It is also well established that an expropriation is not limited to tangible property rights. As the panel in *SPP v. Egypt* explained, "there is considerable authority for the proposition that Contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore." Similarly, Chamber Two of the Iran-U.S. Claims Tribunal observed in the *Tippets* case that "[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected." The chamber continued by noting:

[w]hile assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner has been deprived of fundamental rights of ownership and it

appears that this deprivation is not merely ephemeral.

99. Here, the Tribunal has no difficulty finding that the actions previously described constitute such an expropriation. Whether or not it authorized or participated in the actual seizures of the hotels, Egypt deprived Wena of its “fundamental rights of ownership” by allowing EHC forcibly to seize the hotels, to possess them illegally for nearly a year, and to return the hotels stripped of much of their furniture and fixtures. Egypt has suggested that this deprivation was merely “ephemeral” and therefore did not constitute an expropriation. The Tribunal disagrees. Putting aside various other improper actions, allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the hotels for nearly a year is more than an ephemeral interference “in the use of that property or with the enjoyment of its benefits.”

[d]. *Generation Ukraine, Inc v. Ukraine (ICSID Case No. ARB/00/9), Award of 16 September 2003*⁽⁵⁵⁾ [Jan Paulsson (pres.), Eugen Salpius, Jürgen Voss]

(Citations selectively omitted)

1.. Overview

1.1 The Claimant, a U.S. corporate vehicle wholly-owned by a U.S. national, Eugene J. Laka, seeks damages, at one time quantified in excess of USD 9.4 billion, for the spoliation of its alleged investment in commercial property in Kyiv.

1.2 The Claimant contends that it was strongly encouraged by the Government in late 1992 to invest in Ukraine; that it established a local investment vehicle in February 1993 (called Heneratsiya Ltd.); and that, after it duly identified and achieved approval of a specific project, local authorities obstructed and interfered with the realisation of that project over the course of the ensuing six years in a manner which was tantamount to expropriation and therefore proscribed under the Ukraine–U.S. Bilateral Investment Treaty. It asserts that it is therefore entitled to remedies in ICSID arbitration.

1.3 Ukraine denies that its conduct toward the Claimant was violative of the Bilateral Investment Treaty and argues that, at any rate, the Claimant has proven no damages. Even without considering those issues, however, Ukraine contends that the case must be dismissed for lack of jurisdiction.

* * *

20.19 In order to analyse the Respondent's international obligations under the BIT, the Tribunal will put this controversy to one side and accept the facts as pleaded by the Claimant in order to test the Respondent's conduct against the standard of investment protection encapsulated in Article III of the BIT.

* * *

20.20 The formulation in the first sentence of Article III(1) is somewhat circular by prohibiting an expropriation by measures tantamount to expropriation. Nevertheless, it is perfectly clear that the State Parties to the BIT envisaged that both direct and indirect forms of expropriation are to be covered by Article III.

20.21 The alleged final expropriatory act or measure, as previously mentioned, is said to be the failure by the Kyiv City State Administration to issue amended lease agreements. The disputed measure cannot possibly constitute a direct expropriation of the Claimant's investment because the Kyiv City State Administration never purported to transfer Heneratsiya's proprietary rights in its investment to the State or to a third party. Quite properly, the Claimant has never sought to characterise the disputed measure as a direct expropriation. Instead, the Claimant has, in its written and oral pleadings, contended that this disputed measure was the culmination of a series of other prejudicial acts that ultimately deprived the Claimant of its rights to its investment, due to the level of resulting interference. The various measures of the Respondent thus, according to the Claimant, amounted to a “creeping expropriation”.

20.22 Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State *over a period of time* culminate in the expropriatory taking of such property. The case of *German Interests in Polish Upper Silesia* is one of many examples of an indirect expropriation without a “creeping” element – the seizure of a factory and its machinery by the Polish Government was held by the PCIJ to constitute an indirect taking of

the patents and contracts belonging to the management company of the factory because they were so closely interrelated with the factory itself. But although international precedents on indirect expropriation are plentiful, it is difficult to find many cases that fall squarely into the more specific paradigm of creeping expropriation.

20.23 The *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, et al.* case before the Iran/US Claims Tribunal might be said to demonstrate the possibility of a taking through the combined effect of several acts. The Iranian Government appointed a temporary manager of the joint venture investment company in which the claimant had a fifty percent stakehold with the other fifty percent owned by an Iranian entity. The temporary manager commenced his duties in August 1979 and immediately breached the partnership agreement that regulated the joint venture by signing cheques on the partnership's accounts by himself and making other decisions without consulting the claimant. The claimant managed to rectify these violations of the partnership agreement. Thus, for instance, the practice of two signatures on cheques was restored. The hostage crisis at the U.S. Embassy in Tehran then intervened in November 1979 and the working relationship that had developed between the temporary manager and the claimant came to an end. The claimant's representatives left Iran in December 1979 and thereafter the management of the joint venture ceased all communication with the claimant with respect to its business operations. The Iran/US Claims Tribunal reflected upon the nature of the indirect taking in light of these facts in the following oft-cited passage:

"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.

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of the fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."

20.24 The Tribunal held that the taking of the claimant's property was consummated not when the temporary manager was first appointed in August 1979, but in March 1980 by which time the tentative cooperation between the claimant and the temporary manager had come to an end.

20.25 The *Tippetts* case was cited with approval in a recent ICSID arbitration in *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*. The following statement of principle provides useful guidance in the analysis of the Claimant's plea of creeping expropriation in the circumstances of the present case:

"As is well known, there is a wide spectrum of measures that a state may take in asserting control over property, extending from limited regulation of its use to a complete and formal deprivation of the owner's legal title. Likewise, the period of time involved in the process may vary – from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership. It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title...

There is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property ..."

20.26 The Claimant's submissions on its plea of creeping expropriation have been seriously flawed due to the absence of a coherent analysis of the timing and the nature of its investments in Ukraine and how the acts and omissions of the Kyiv City State Administration have affected the Claimant's investment in the form it

existed at the time of those acts and omissions. A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have eroded the investor's rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation. It is conceptually possible to envisage a case of creeping expropriation where the investor's interests in its investment develop in parallel with the commission of the acts complained of. But such a plea, in order to be successful, would demand a high level of analytical rigorousness and precision that is absent from the submissions before this Tribunal.

* * *

20.38 For these reasons, the Tribunal rejects the Claimant's submission that an "indirect... .. global expropriation of the company's rights and property" occurred on 31 October 1997 "by virtue of the [Kyiv City State Administration]'s failure to produce revised land lease agreements with valid site drawings".

[e]. Comments and Questions

1. Consider the following ruling on indirect expropriation in the case *Benvenuti et Bonfant v. Congo*, 21 I.L.M. 740, 757 (1980). Benevenuti et Bonfant ("B & B") was an Italian company commissioned by the government of Congo to study the possibility of establishing and operating a plastic-bottle manufacturing company. Through a joint venture with the Congolese government, the PLASCO Company, it signed a contract for the construction of both a plastic-bottle manufacturing plant and a mineral-water bottling plant. Through a decree, the Congolese government established certain prices that were lower than those chosen during Board of Directors meetings before and after the decree. According to B & B, these prices were also lower than its cost; the government claimed that the cost estimates were inflated. The Tribunal held that such price fixing by the government inflicted a loss on PLASCO and that the government must assume responsibility for it. It also held that the government's treatment of the company – not inviting B & B to meetings of the Board of Directors or of Shareholders – amounted to de facto expropriation of B & B's share in the company. The Tribunal assessed damages *ex aequo et bono*.
2. For other examples of cases on indirect expropriation, see *Metalclad v. Mexico*, 16 ICSID Rev. – Foreign Investment L. J. 168, 195-97 (2001); *Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, 39 I.L.M. 1317 (2000); *Katte v. Italy*, 19 Eur. H.R. Rep. 368 (1995); *Starrett Housing Corp v. Iran*, Award No. 314-24-1 (August 14, 1987), 6 Iran-U.S. Cl. Trib. Rep. 122; *Foremost Tehran, Inc. v. Iran*, 10 Iran-U.S. Cl. Trib. Rep. 228 (11 April 1986); *TAMS v. Iran*, 6 Iran-U.S. Cl. Trib. Rep. 219. See also the analysis in Thomas Waelde and Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 Int'l & Comp. L.Q. 811 (2001).
3. Two recent studies review current jurisprudence on indirect expropriation: Paulsson & Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, in *Arbitrating Foreign Investment Disputes* (N. Horn, ed.) 145 (2004); and L. Yves Fortier, *Indirect Expropriation in the Law of International Investment: I Know it when I See it or Caveat Investor*, 12th Annual Goff Arbitration Lecture (Hong Kong, 9 December 2004).

[3]. Legitimate Expectations of Investor

[a]. Opel Austria GmbH v. Council of the European Union (Case T-115/94), Judgment of the Court of First Instance (Fourth Chamber) of 22 January 1997, European Court Reports (1997), II-00039 [K. Lenaerts (pres.), P. Lindh, J. D. Cooke]⁵⁶⁾

[After a series of discussions in 1991 with the Austrian government and the European Commission, Opel Austria GmbH ("Opel"), a company incorporated under Austrian law and a wholly-owned subsidiary of General Motors Corp., received financial aid from Austria as an incentive to increase its investment in the country. Although Opel expanded its investment throughout 1992, in December 1992 the European Commission sent a letter to the Austrian Ambassador in Brussels informing him that Opel's investment was not in conformity with provisions of the Free Trade Agreement between Austria and the European Economic Community, and that the Commission would submit the matter to an FTA Joint Committee. On December 20, 1993, seven days after the

Community approved the Agreement on the European Economic Area (EEA), the Council of the European Union adopted a regulation imposing a duty on imports of gearboxes produced in Austria by Opel, which subsequently initiated proceedings at the European Court of Justice. The Court annulled the regulation because it infringed the principle of protection of legitimate expectations of Opel under the EEA Agreement. The Court also found that the regulation had infringed the principle of protection of legal certainty.]

(Citations selectively omitted)

78. ... Article 18 of the First Vienna Convention and Article 18 of the Second Vienna Convention constitute an expression of the general principle of protection of legitimate expectations in public international law, according to which a subject of international law may, under certain conditions, be bound by the expectations created by its acts in other subjects of international law.

79. The applicant rejects the Council's argument that Article 18 of the First Vienna Convention is not capable of conferring on individuals rights which they may invoke before the Court. First, the argument based on lack of direct effect is not relevant in proceedings brought under Article 173 of the EC Treaty. International agreements are an integral part of the Community legal order and it is the task of the Community institutions, including the Court of First Instance and the Court of Justice, to ensure that they are observed. The fact that certain international agreements are not directly applicable does not in any way affect the Community's obligation to ensure that they are observed... Secondly, Article 18 of the First Vienna Convention contains an unambiguous, unconditional prohibition of acts that are incompatible with the aims and objects of international agreements.

* * *

83. In addition, referring to Italian, German, Belgian, Spanish and English law, the Republic of Austria argues that there is also a general principle of law common to the legal systems of the Member States to the effect that a party to a binding agreement must act in good faith to safeguard the interests of other parties to or beneficiaries of the agreement during a period in which the operation of the agreement is suspended. That principle is the corollary of the principle of protection of legitimate expectations. The Court should therefore recognize it as a general principle of Community law. That principle too was infringed by the adoption of the contested regulation. The Republic of Austria considers that the applicant, as a beneficiary of the EEA Agreement, must be entitled to rely on that principle.

84. The Council does not take issue with the applicant's statement that Article 18 of the First Vienna Convention and Article 18 of the Second Vienna Convention codify rules of customary international law which are binding on the Community.

* * *

93. ... [T]he principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the case-law, forms part of the Community legal order... Any economic operator to whom an institution has given justified hopes may rely on the principle of protection of legitimate expectations...

94. In a situation where the Communities have deposited their instruments of approval of an international agreement and the date of entry into force of that agreement is known, traders may rely on the principle of protection of legitimate expectations in order to challenge the adoption by the institutions, during the period preceding the entry into force of that agreement, of any measure contrary to the provisions of that agreement which will have direct effect on them after it has entered into force.

[b]. Comments and Questions

In *International Thunderbird Gaming Corporation v. Mexico* (ad hoc arbitration under the 1976 UNCITRAL Rules), Award, ILC 136 (2006), para. 147, the Tribunal, "[h]aving considered recent investment case law and the good faith principle of international customary law," asserted that "the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages." For a recent discussion on the notion of legitimate expectations for foreign investors, see *Total SA v.*

Argentina, Decision on Liability, ICSID Case No ARB/04/1; IIC 484 (2010), para. 113-34.

[G]. Governmental Acts

[1]. Laws and Decrees Explicitly Expropriating

[a]. Anglo-Iranian Oil Co. Case, 1952 I.C.J. 103, 103-114 (July 22) (Jurisdiction denied)

[b]. Bolivia: Supreme Decree No. 28701, 1 May 2006, 45 ILM 1020, 1021 (2006)⁽⁵⁷⁾

Evo Morales Ayma

Constitutional President of the Republic

In the Council of Ministers, * * *

Decrees:

Article 1. – In exercise of national sovereignty, obeying the mandate of the Bolivian people expressed in the binding Referendum of 18 July 2005 and in strict application of constitutional precepts, the natural hydrocarbons resources of the country are hereby nationalized.

The State recuperates the property, possession and total and absolute control of those resources.

Article 2. – I. As of 1 May 2006, the petroleum enterprises that currently carry out oil and gas production activities in the national territory are bound to deliver title to property to Yacimientos Petrolíferos Fiscales Bolivianos [The Bolivian National Petroleum Company] – YPFB, over the entire production of hydrocarbons.

II. YPFB, on behalf of and in representation of the State, in the full exercise of its property over all the hydrocarbons produced in the country, assumes their commercialization, defining the conditions, volume and price both for the internal market as well as for export and industrialization.

Article 3. – I. Only the companies that immediately comply with the provisions of this Supreme Decree may continue operating in the country, until within a time period of no more than 180 days from its promulgation their activities are regularized by means of contracts that comply with the legal and constitutional conditions and requirements. At the end of this time period, the companies that have not signed contracts may not continue to operate in the country....

[2]. Appointment of Managers

[a]. Anglo-Iranian Oil Co. Case, 1952 I.C.J. 103, 103-114 (July 22) (Jurisdiction denied)

[3]. Seizure of Premises and Impoundment of Property

[See *supra* p. 640.]

[4]. Announcement of Intended Expropriation without Further Acts

[a]. Sola Tiles, Inc. v. The Government of the Islamic Republic of Iran (IUSCT Case No. 317), Award No. 298-317-1 of 22 April 1987⁽⁵⁸⁾ [Karl-Heinz Böckstiegel (pres.), Mohsen Mostafavi, Howard M. Holtzmann]

[In 1979, the managing director of Simat Middle East (Iran) Ltd. ("Simat") conveyed all the company's assets to Claimant Sola Tiles, Inc.]

(Citations selectively omitted)

30. The Claimant alleges that the expropriation of Simat took place over a period between June and November 1979. It claims to have been deprived of the company's assets and goodwill, and of the control and management of the business. Evidence was presented to the Tribunal in the form of affidavits and oral clarifications from Mr. Hachamoff, affidavits from two Simat employees, Ms. Shanz

Eliassi and Mr. Manouchehr Pour-Ebrahimi; and certain contemporaneous documents.

31. According to the Claimant, after Mr. Hachamoff's departure from Iran and the invalidation of the power of attorney executed in favour of Ms. Eliassi, she continued to collect outstanding debts from Simat's customers and deposit them with the bank, and to pay wages to the other employees and miscellaneous operating expenses of the company, until approximately June 1979. In her affidavit Ms. Eliassi relates that on 26 June 1979, she was asked to go to the office of the Revolutionary Committee. There she was informed that the Committee had decided to impound and take over control of Simat's warehouse. Ms. Eliassi further states that some 738,500 Rials, part of the proceeds of a recent sale of tiles, was taken from her on that occasion. She reported these events to Mr. Hachamoff, who was in regular contact by telephone with Simat's office.

32. Two documents support Ms. Eliassi's recollection of events. The first is a notice of impoundment issued by the "Provisional Committee of the Islamic Revolution of the Imam Khomeyni", dated 14 June 1979, which states, in translation, that in compliance with an order of the Committee of 13 June, "the warehouses of the Cement Company (ceramics), containing the Italita tiles, has no right whatsoever to take any tiles out, and it is strictly forbidden unless a written order issued by the Imam Committee of the Third District is obtained, and Mr. Manouchehr and Ms. Shahnaz [Eliassi], the sellers of the tiles, must report themselves as soon as possible to the District." The notice of impoundment then lists the Committee's representatives and their addresses.

33. The second document is a receipt for the sum of 738,500 Rials in cash, stated to have been received from Ms. Eliassi by the Committee on 26 June 1979.

* * *

40. Although there was never any specific expropriatory decree or similar instrument, the Tribunal finds that the impoundment notice issued as an official document by the Committee on 14 June 1979 stands as a clear statement of that body's intentions with regard to the property of Simat – intentions which it proceeded to implement during the course of the next five months. Further, it is well settled that the Revolutionary Committees are among those organs whose acts are attributable to the Government of Iran, which is responsible for them as a matter of law. Basing its conclusion on the available documents and the evidence of two of Simat's former employees, the Tribunal therefore finds that there was a progressive taking of Simat's business operations which was completed, at the latest, by November 1979.

[b]. Comments and Questions

1. As the preceding cases indicate, the modality by which an expropriation has been accomplished is not the critical factor for determination in international law. Rather it is the consequence.
2. In circumstances in which a high official of a government indicates an intention to expropriate, but does not follow through, there will, presumably, not be an expropriation, unless the value of the property held by an alien is reduced and there is a demonstrable causal relation between that depreciation and the statement of the government official.

[c]. *Agrotexim and Others v. Greece (Town planning measures taken by a municipality with a view to expropriating company property), before the European Court of Human Rights, Series A, No. 330, Application No. 14807/89, Judgment of 24 October 1995, 21 Eur. H.R. Rep. 250 (1995)*

[d]. *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica (ICSID Case No. ARB/96/1), Final Award of 17 February 2000*⁽⁵⁹⁾ [L. Yves Fortier (pres.), Elihu Lauterpacht, Prosper Weil]

[See *supra* p. 593.]

[5]. Unilateral Reduction of Concession Area

[a]. *Liberian Eastern Timber Corporation ("LETCO") v. The Government of the Republic of Liberia (ICSID Case No. ARB/83/2), Award of 31 March 1986, 2 ICSID Rep. 346 (1994)*⁽⁶⁰⁾ [Bernardo M. Cremades (pres.), Jorge Gonçalves Pereira, Alan

[In 1983, the Liberian Eastern Timber Corporation ("LETCO") filed a claim against the Government of Liberia seeking recovery of damages derived from an alleged breach of a concession agreement signed between the two parties under the title "Forest Products Utilization Contract." Under the agreement, LETCO had the exclusive right to harvest, process, transport and market forest products within a designated exploitation area. Prior to exploitation, the agreement required LETCO to make a survey of the area, which was duly carried out by the firm. After the agreement was signed in 1970, Liberia withdrew parts of the land concessions in 1970, 1971, and 1977. Although relations between the two parties were briefly normalized, in 1980, the Forest Development Authority of Liberia ("FDA") accused LETCO of breaching its agreement and determined that the firm was incapable of properly exploiting the concession area. Unable to persuade the Government of Liberia to reverse FDA's decision, LETCO initiated the arbitration proceedings.]

(Citations selectively omitted)

1). Nationalization.

As part of its consideration of this case, the Tribunal considered whether the action taken by the Liberian Government in depriving LETCO of its concession might be considered as an act of nationalization, which might be justifiable both under the law of Liberia and under international law, if accompanied by payment of appropriate compensation. It should be emphasized that the Government of Liberia has not sought to justify its action on this basis; rather, it has consistently claimed that its action was taken because of failure on the part of the claimant to properly carry out its obligations under the Concession Agreement – an argument which the Tribunal has rejected on the facts. However, even if the Government had sought to justify its action as an act of nationalization, it would have had to first point to some legislative enactment, embodying the act of nationalization. It would then have had to show that its action was taken for a bona fide public purpose; that it was non-discriminatory; and that it was accompanied by payment (or at least the offer of payment) of appropriate compensation...

None of these conditions is satisfied in the present case. There was no legislative enactment by the Government of Liberia. There was no evidence of any stated policy on the part of the Liberian Government to take concessions of this kind into public ownership for the public good. On the contrary, evidence was given to the Tribunal that areas of the concession taken away from LETCO were granted to other foreign-owned companies; according to Mr. Alain de Marti, who was LETCO's general manager in Liberia for the entire period of the concession, these foreign companies were run by people who were "good friends" of the Liberian authorities (transcript, Paris hearing, 9 December 1985 (especially at p. 3, 48, 49, 50 and 51)). Finally, no offer of compensation has been made to LETCO for the loss of its concession; to the extent that the Liberian Government has attempted any justification of its action, it has been on the basis of alleged breaches of the Concession Agreement by LETCO.

Accordingly, it is the opinion of this Tribunal that even if the argument as to nationalization had been raised, it would have failed. Leaving aside the lack of any legislative enactment, the taking of LETCO's property was not for a bona fide public purpose, was discriminatory and was not accompanied by an offer of appropriate compensation.

2). Breach of Contract and Right to Damages According to Liberian Law.

The Tribunal has obtained statements from experts in Liberian law, relevant articles of the Liberian Code of Laws of 1956 and reported decisions of the Liberian Courts.

* * *

It is clear that under the law of Liberia (as under most, if not all, developed systems of law) the binding force of contracts is recognized, so long as the contracts in question are validly made and do not offend public policy (l'ordre publique). No doubt has been raised as to the validity of the original grant of the concession to LETCO; nor was this grant contrary to Liberian public policy. On the contrary, the State appears to encourage the grant of concessions to foreign persons and corporations (see Berlowitz, "Concessions and Incentives in Liberia").

Although the Tribunal has found no indication that the laws of Liberia have been changed so as to affect the Concession Agreement, it should be pointed out that Article X of the Agreement, under the title "Warranty of Concessionaire's Rights" states:

"Except as otherwise provided in this Agreement, no amendment or repeal of any law or regulation governing this Agreement or any part thereof shall affect the rights and duties of the CONCESSIONAIRE without its consent."

This clause, commonly referred to as a "Stabilization Clause", is commonly found in long-term development contracts and, as is the case with notification procedures of the Concession Agreement, is meant to avoid the arbitrary actions of the contracting government. This clause must be respected, especially in this type of agreement. Otherwise, the contracting state may easily avoid its contractual obligations by legislation. Such legislative action could only be justified by nationalization which meets the criteria described above.

In the opinion of the Tribunal, the particular concession which was granted to LETCO was a contract binding on both parties. Moreover, it contained its own provisions for what was to happen if there were any breaches of the contract by LETCO. As described earlier, Article VII. 4. of the Concession Agreement sets out the Government's power to revoke the Agreement for cause and contains a list of events which might give rise to a revocation of the Concession Agreement.

Again, revocation is not an automatic remedy, even if one or more of the events set out in Article VII comes to pass. LETCO has to be given notice of the particular breach or nonobservance complained of and allowed a period of three months in which to put it right or to compensate the Government. Even then LETCO is given the option of arbitration if it does not agree with the alleged breach or remedy.

This contractual mechanism is confirmed in the Investment Incentive Code of the Republic of Liberia, both in its original edition of 15 April 1966 and in the revised text of 6 March 1973.

On the one hand, Section 10 (subsequently Section 12) grants the Sponsor a period of 90 days in which to remedy the breach which would entitle the Government to cancel the Investment Incentive Contract.

At the same time, Section 11 (subsequently Section 13) confirms the binding nature of the arbitral agreement as well as of the arbitral award handed down pursuant to such agreement.

By its failure to follow the procedure laid down in the Concession Agreement, as well as by its subsequent actions, the Government of Liberia has acted in plain breach of the terms of the Concession Agreement. Its breach of the Agreement entitles LETCO to the recovery of damages.

[6]. Use Restrictions

[See G.C. Christie, *supra* p. 640 and Thomas Waelde *et al.*, *supra* p. 632.]

[7]. Forced Sales

[a]. G.C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 *Brit. Y.B. Int'l L.* 307, 324-326, 328-329 (1962) ⁽⁶⁷⁾

(Citations selectively omitted)

Forced Sales

A type of taking that is not expressly called an expropriation, and which, indeed, is normally accompanied by an explicit disclaimer of any such intention, is illustrated by a group of situations commonly included under the classification of 'forced sales'. In some cases there may be an elaborate legal procedure for accomplishing the 'forced sale'; it is obvious, however, that an apparently voluntary transfer made under the threat of an impending expropriation is, none the less, forced. Here again the commentators recognize the right to compensation of an alien who has been subjected to such treatment. But it would be helpful to have something more than abstract principles. Accordingly, while this is not the place for an elaborate treatment of this complex problem, it may, nevertheless, repay the effort to examine briefly, for whatever general guidance

they may give, some of the attempts to handle the compensation of victims of so-called 'forced sales' during the Nazi regime.

During the military occupation of Germany laws were promulgated recognizing the right of victims of the Nazi tyranny to compensation for injuries to their interests in property. United States Military Government Law No. 59 is typical of the laws adopted by the three Western occupying Powers.' When the occupation was terminated the German Federal Republic agreed to keep these provisions in effect until all claims were dealt with. Military Government Law No. 59 applied generally to aliens as well as German nationals. Among the categories of injuries for which restitution might be claimed were those arising as a result of 'a transaction contra bonos mores, threats or duress... .. or any other tort'. In lieu of restitution, a claimant, upon relinquishing all other claims, could demand from the person first acquiring his property the difference between whatever the claimant had received for the property and the fair purchase price.

The framers of the law showed great practical awareness of the nature of the problems that would be presented in actual cases. A rebuttable presumption was created that any transfer of property during the Nazi regime (30 January 1933 to 8 May 1945) by a person who was directly exposed to persecutory measures, or who belonged to a class of persons who were to be eliminated entirely from the cultural and economic life of Germany, was an act of confiscation. The presumption of confiscation could be avoided by a showing that the transferor was paid a fair purchase price, and furthermore that he was not denied the free disposal of the moneys received, for reasons of race, religion, nationality, ideology or political opposition to National Socialism. Claimants coming from a class of persons who were marked for elimination from the cultural and economic life of Germany were given a right to avoid any transactions involving a transfer or relinquishment of property entered into during the period between the first Nuremberg laws (15 September 1935) and the end of the Nazi regime. This additional right could only be defeated by a showing that the transaction as such would have taken place even in the absence of National Socialism, or that the transferee successfully protected the claimant's property interests. The fairness of the purchase price was not a relevant consideration.' Finally, a rebuttable presumption was established that any gratuitous transfer made by a person subject to persecution, as defined in the act, between 30 January 1933 and 8 May 1945, constituted a bailment or the creation of a fiduciary relationship rather than a donation.

* * *

But even leaving aside, for the moment, the question of proof, there are still other serious problems which must be considered; and the less the situation resembles the extraordinary cases during the Nazi regime, the more difficult these problems become. It might be asked, for example, whether, unless the respondent State has actually declared that it will not pay compensation, an alien ought to be entitled to sell out for what he can get and then come around with a bill for the excess? Perhaps he should be compelled to take his chances one way or the other? Or, perhaps, the question should depend on whether at the time of a sale in anticipation of expropriation reasonably 'adequate' compensation has been expressly promised? Regardless, however, of what is promised, suppose no compensation is in fact paid within a reasonable time? Will this justify the conduct of those who sold out for what they could get, and entitle them now to present a claim for the balance?

The whole question could, of course, be complicated even further if the price the alien received for his property were subjected to some sort of monetary restrictions. In the Nazi situation this, when added to other factors, was considered to make a transfer of property a confiscation. An extreme case of such monetary restrictions taken from a situation of outright expropriation is Dr. Castro's offer to compensate Americans, whose property had been nationalized, with thirty-year bonds, the interest and principal to be paid out of a fund into which would be paid 25 per cent. of the amounts received from the sale to the United States, at a support price of 5-75 cents per pound, of all sugar in excess of 3,000,000 tons annually.' It is evident that some such similar scheme could also be applied to the proceeds foreigners received from so-called 'forced sales'. In this respect, moreover, it has been suggested that currency regulations such as those imposed by Great Britain in 1947 and 1949 might have been subject to attack.³ Something more will be said about currency regulations later.³ The point is, however, that the mere recognition in general terms of a right to compensation on the part of an alien who has been involved in what might be called a 'forced sale' or other form of duress does not get one very far; this is, in fact, only another type of situation, albeit a rather different type, in which the question arises as to what is a sufficient taking so as to

amount to an expropriation. The factual situations in this kind of problem can be very intricate and, unfortunately, there does not seem to be much authority. Future cases will have to decide how far a panicky alien property holder can question the good faith of the State in which he is operating, and how far he will be compelled to rely either on promises of future compensation or even on a presumption that adequate compensation will be paid by the State. The difficulty and inconvenience of claims based on forced sales would seem to require that the alien must in most cases take his chance of ultimately obtaining compensation from the State involved. If he prefers the bird in hand and sells out for what he can get, then he should normally be prepared to sacrifice any future claims based on the inadequacy of his receipts from the sale. If, however, the threats to an alien's property are accompanied by threats to his physical security, the rule should be otherwise; similarly, if the State in question flatly declares that it will not pay any compensation for the alien-owned property whose seizure is threatened. But even in such situations, unless the alien can show that he received an obviously inadequate price for his property, he should be denied the right to assert a claim based on the insufficiency of the price he has received.

[b]. Comments and Questions

1. For an examination of the Canadian National Energy Program compulsory repurchase program, see Errol P. Mendes, *The Canadian National Energy Program: An Example of Assertion of Economic Sovereignty or Creeping Expropriation in International Law*, 14 Vand. J. Trans. L. 475 (1981). The author noted:

Even when achieved with public funds, the voluntary takeover of foreign-controlled enterprises does not constitute expropriation in international law. The marketplace must determine the price of such acquisition, however, without government interference. Since a takeover price predetermined by a government would amount to outright confiscation under international law, and would be unacceptable to the home countries of the foreign investors concerned, the observance by governments of such principles could help develop a utilitarian formula whereby economic sovereignty becomes compatible with foreign investment in the strategic natural resources sector of a nation's economy.

2. A more current example of a forced sale can be found in *Reineccius, First Eagle et al. v. Bank of International Settlements*, supra p. 610, n. 84. The Tribunal noted:

The Bank also referred to cognate national practice. The Bank adduced a rather extensive state practice with respect to the special phenomenon of central banks recalling, in a compulsory program, the shares of private shareholders. The Bank argued that national practice seems particularly apposite to the case at bar, as the central banks, like the Bank for International Settlements, concluded that the earlier practice of permitting private shareholders in banks that were public institutions had become anachronistic and incompatible with the public functions of the national central banks. Hence the central banks adopted recall programs, not unlike that of the BIS in its decision of 8 January 2001. In virtually all of these compulsory recall programs, the valuation of the shares was based upon an averaging of the market value of the shares prior to the announcement of the recall. There is, however, no indication whether the stock market price approximated net asset value. As the Bank described in its Counter-Memorial, the Bank of Canada was nationalized in 1938 by the Bank of Canada Act Amendment Act (Bank's LA-119). The Bank of Canada was organized as a stock corporation with a capitalization of CAD 5,000,000, with each share carrying a nominal value of CAD 50. Pursuant to the Act, new stock, owned by the Canadian Government, was issued in the amount of CAD 5,100,000, giving the government a sufficient majority to buy out the private shareholders. Each former private shareholder received CAD 59.20 per share, the market price pertaining at the time (Bank of Canada Act Amendment Act, 1938, Art. 9 (Bank's LA-119)). Similarly the French Government nationalized the Banque de France in 1945 (Loi 45-14 (Bank's LA-115)). At the time the Banque de France had 46,809 shareholders. The price for each share was set at

28,029 francs, an amount equal to the average trading price of the Banque de France shares over a prior twelve-month reference period (Arrêté du juillet 1946, J.O., 21 juillet 1946, at p. 6538 (Bank's LA-115)). Counter-Memorial, at paras. 153-159. In 1949, the Norwegian Government nationalized the Norges Bank. Norway assumed the shares previously owned by private shareholders against the payment of compensation fixed at 180% of the nominal value of the shares (20 Norges Bank Bulletin, No. 4-5, 21 November 1949, at pp. 57, 59 (Bank's LA-121)). This 180% figure was just higher than the market price of 178% of nominal value pertaining at the time... [The Tribunal proceeds to describe the nationalizations of Banco de España in Spain, the Reserve Bank of New Zealand in New Zealand, the Banco de Portugal and the Banco Nacional Ultramarino in Portugal, and the Banco Central de Venezuela in Venezuela.]

[8]. Cessation of Project Work Due to Governmental Interference

[a]. *Antoine Biloune and Marine Drive complex Ltd v. Ghana Investments Centre and the Government of Ghana, Award on Jurisdiction and Liability of 27 October 1989, 95 Int'l L. Rep. 183, 209-210 (1994)*⁽⁶²⁾ [Stephen M. Schwebel (pres.), Don Wallace, Jr., Monroe Leigh]

[See *supra* p. 644.]

[9]. Setting Product Price at Loss by Governmental Decree

[a]. *S.A.R.L. Benvenuti and Bonfant v. People's Republic of the Congo (ICSID Case No. ARB/77/2), Award of 8 August 1980, 1 ICSID Rep. 330 (1993)* [Jørgen Trolle (pres.), Rudolf Bystricky, Edilbert Razafindralambo]

[See *supra* p. 1181.]

[b]. *Pope & Talbott Inc. v. The Government of Canada (ad hoc arbitration under the 1976 UNCITRAL Rules), Award on the Merits of Phase 2 by Arbitral Tribunal of 10 April 2001*⁽⁶³⁾ [Lord Dervaird (pres.), Benjamin J. Greenberg, Murray J. Belman]

[In Canada, each province has charges, known as stumpage fees, for timber cut on Crown lands. The rates were fixed by the provincial governments and varied considerably. British Columbia changed its fee regime whereby stumpage fees were reduced and a new fee, known as the Super Fee, was introduced on exports in excess of quota, amounting to approximately 1% of total British Columbia exports. Pope & Talbott claimed that this change amounted to a denial of fair and equitable treatment of its investment. The Tribunal held that, although British Columbia could have chosen a different regime that distributed the fee burden more equitably among the producers, the new fee regime did not constitute a denial of fair and equitable treatment.]

[H]. Legality

Under customary international law, an expropriation will be legal if it is accomplished in accordance with the due process of law, for a public purpose, pursued on a non-discriminatory basis, and with just compensation.

[1]. Form of Expropriation (e.g., Due Process)

[a]. *Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens – Measures Affecting Acquired Rights: Fourth Report by F. V. García Amador, [1959] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/119*

[See *supra* p. 589.]

[b]. *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran (IUSCT Case No. 129), Award No. ITL 59-129-3 of 27 March 1986*⁽⁶⁴⁾ [Nils Mangård (pres.), Charles N. Brower, Parviz Ansari Moin]

[For summary of facts, see *supra* p. 498.]

(Citations selectively omitted)

SEPARATE OPINION OF JUDGE BROWER

* * *

Claimant has argued further that the taking in the instant case was unlawful. Although full compensation would appear to be the maximum compensation available in such case, I believe it is important to note that Claimant's remedies, in contrast to its rights, are not limited by Article IV(2) of the Treaty of Amity.

A taking is unlawful under customary international law when it occurs in a discriminatory context, is not for a public purpose, or constitutes a breach of a specific obligation undertaken by the nationalizing State in relation to the property in question, e.g., violates the terms of an agreement between that State and an alien.

* * *

I consider it unlikely that denial of justice in the customary sense constitutes a basis separate from those recognized above. For example, when the alleged denial of justice is lack of notice of the taking or the lack of an opportunity to challenge judicially the propriety of the taking, the taking itself is not a damage resulting from the denial of justice. To the degree that the alien has a customary right to due process, the denial of justice does not render the previous taking unlawful, but rather is a wrong itself for which proximately caused damages may be sought. Although judicial review might have revealed discrimination or the lack of a public purpose, it is those aspects and not the lack of opportunity for municipal judicial review that render the taking unlawful. [In footnote 39]

In some instances, the property protection provision of a bilateral investment treaty expressly requires, for example, prior notice of the proposed taking. In such situations, depending upon the wording of the provision, the lack of notice may render the taking itself unlawful or it may, as a breach of the treaty, constitute a separate unlawful act. [In footnote 39]

Likewise I must express doubt as to whether, under customary international law, a State's mere failure, in the end, actually to have compensated in accordance with the international law standard set forth herein necessarily renders the underlying taking ipso facto wrongful. If, for example, contemporaneously with the taking the expropriating State provides a means for the determination of compensation which on its face appears calculated to result in the required compensation, but which ultimately does not, or if compensation is immediately paid which, though later found by a tribunal to fall short of the standard, was not on its face unreasonable, it would appear appropriate not to find that the taking itself was unlawful but rather only to conclude that the independent obligation to compensate has not been satisfied. If, on the other hand, no provision for compensation is made contemporaneously with the taking, or one is made which clearly cannot produce the required compensation, or unreasonably insufficient compensation is paid at the time of taking, it would seem appropriate to deem the taking itself wrongful. It is in such cases that restitutio in integrum may be appropriate as a remedy and that, in addition to that, or to a monetary award of damages, should that alternative be selected, a tribunal might consider an award of punitive damages... [In footnote 39]

* * *

The practical consequence of unlawfulness is in the remedies available. The remedy for a lawful taking is full compensation; the remedy for an unlawful taking is restitution or, where restitution is not practical, full compensation. Even in cases of unlawful takings, particularly where restitution is not possible, a difference in remedies potentially still could remain insofar as punitive or exemplary damages might be sought.

[2]. Purpose

[a]. Not for a Public Purpose

[i]. *Amoco International Finance Corporation. v. The Government of the Islamic Republic of Iran, et al. (IUSCT Case No. 56), Award No. 310-56-3 of 14 July 1987*^[65] [Michel Virally (pres.), Charles N. Brower, Parviz Ansari Moin]

[See *supra* p. 260.]

[b]. Discrimination

[i]. *Sociedad Minera el Teniente S.A. v. The Aktiengesellschaft Norddeutsche Attinerie (Chilean Copper case)*, Superior Court of Hamburg Docket No. 80 0 4/73, Decision of 22 January 1973, 12 I.L.M. 251, 276-278 (1973)⁽⁶⁶⁾

[In 1971, the Chilean government nationalized all large copper mining companies, including Sociedad Minera el Teniente S.A. ("SMETSA"), a subsidiary of Braden Copper Comp., a U.S. corporation. The nationalization law provided for compensation to be paid to foreign companies for the expropriation of their mine equipment, but not for the expropriation of their mineral rights. Furthermore, compensation would only be paid for mine equipment acquired on or prior to December 31, 1964, and this compensation was subject to deductions for equipment classified as being in "defective condition" and an "excess profit compensation levy." A "Special Copper Court" was established to hear all appeals from the initial determination of the amount of compensation. In regard to the SMETSA claim, it imposed a stamp tax of approximately \$4000 on sheet of paper filed in the appeal.]

(Citations selectively omitted)

As has furthermore not been denied by the defendant or the intervening party, the expropriation was intended primarily for nationalization. A nationalization which is directed specifically against foreigners is to be considered, however, discriminatory and thus an act which is not to be approved in accordance with the principles of public policy.

Even though it may be understandable for a State to wish to free itself of the position of economic power of foreign companies which control particularly important portions of its economy, on the other hand the principle of contractual loyalty which governs every legal system should not be violated.

As the petitioner has credibly shown, the formation of SMETSA with the cooperation and approval of the former President of Chile, Fr. Frei, was effected specifically in view of the special economic conditions of Chile. Under these circumstances, the petitioner had to be able to rely on the fact that a few years later it would not be expropriated at short notice by the Chilean Government, since a majority participation had already been granted to the State of Chile. Here it was to have been expected that Chile would either grant the petitioner an effective indemnification reasonable with respect to the consequences of the sudden loss of property, or else grant the company a reasonable period of transition, as. has recently become customary in the case of investment contracts with developing countries by a promise not to expropriate investment goods before the expiration of a stipulated period of time, and as furthermore would also be in accord with the sense of a Decision of the Chilean Supreme Court handed down in 1964 on the obligation of the Government to comply with a long-term tax promise despite the introduction of a new, more cumbersome tax law.

Since none of this has been taken into account, we are confronted with substantial discrimination, in which connection it is unnecessary to take up the question whether the amount of the stamp tax stipulated by the Special Copper Court is to be considered a further act of discrimination.

The Court in this connection imparts particular weight to the following:

The petitioner has credibly shown that the continuation of the profit adjustment tax which is in an insoluble relationship to the expropriation proceedings is effected by the President of the country at his own free discretion. This act of discretion which is not subject to any restriction is not subject to review by the courts, as the Copper Court itself stated in the grounds of its Decision. This means that legal channels are closed and the party concerned is denied a legal hearing. In this way, however, a fundamental principle of German law is violated, which – even though in this case a German citizen is not involved – is so severe that it must be found to be a violation of German public policy.

In any event, this conglomeration or acts of violation appears so serious as to be entirely unbearable under our view of legality and morality...

**[ii]. *Liberian Eastern Timber Corporation ("LETCO") v. The Government of the Republic of Liberia (ICSID Case No. ARB/83/2)*, Award of 31 March 1986, 2 ICSID Rep. 346 (1994)⁽⁶⁷⁾
[Bernardo M. Cremades (pres.), Jorge Gonçalves Pereira, Alan**

[For summary of facts, see *supra* p. 655.]

[c]. Violation of stabilization clause

[i]. AGIP Spa v. The Government of the Popular Republic of the Congo (ICSID Case No. ARB/77/1), Award of 30 November 1979, 67 Int'l L. Rep. 318 (1984) [Jørgen Trolle (pres.), René-Jean Dupuy, Fuad Rouhani]

[AGIP and the Congolese government entered into a concession agreement, which provided that the government would not apply certain ordinances and decrees as well as all other ordinances and subsequent decrees the object of which is to change the private joint-stock company character of the Company. Some time afterwards, the government decreed that all assets and shares of the company be transferred to a state-owned company. The Tribunal held that this decree violated Congolese law and international law, and that the government was obliged to compensate AGIP for the damage suffered by it as a result of the nationalization.]

[ii]. Government of Kuwait v. American Independent Oil Company (AMINOIL), Award of 24 March 1982, 66 Int'l L. Rep. 518, 585-591 (1982)⁽⁶⁸⁾ [Paul Reuter (pres.), Hamed Sultan, Gerald Fitzmaurice]

[For summary of facts, see *infra* p. 1022.]

(Citations selectively omitted)

88. [T]he Tribunal sees nothing in the conclusions to be drawn from an examination of the above-mentioned circumstances that would *prima facie* prevent recognition of the validity of the nationalization effected by Decree Law No. 124. Nevertheless, Aminoil's concessionary contract contained specific provisions in the light of which it may be queried whether the nationalization was in truth lawful. The provisions concerned are Articles 1 and 17 of the Concession Agreement of 1948, and Article 7(g) of the 1961 Supplemental Agreement which introduced a new version of Article 11 of 1948. The relevant part of *Article 1 of 1948* provided that

The period of this Agreement shall be sixty (60) years from the date of signature. *Article 17 of 1948* provided as follows

The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this Agreement.

Finally, *Article 7(g)* of the Supplemental Agreement of 1961 provided for the deletion of Article 11 of 1948 and the substitution for it of a *new Article 11*. This new version, after indicating in a first paragraph (A) certain events (not here relevant) in which the Ruler of Kuwait would be entitled to terminate the Concession, went on in a second paragraph (B) to state

(B) Save as aforesaid this Agreement shall not be terminated before the expiration of the period specified in Article 1 thereof except by surrender as provided in Article 12 or if the Company shall be in default under the arbitration provisions of Article 18.

These clauses combined, but especially Article 17, constituted what are sometimes called the "stabilization" clauses of the contract. A straightforward and direct reading of them can lead to the conclusion that they prohibit any nationalization. Such is the view maintained by the Company. The Government of Kuwait on the other hand, in a series of arguments the merits of which the Tribunal must now consider, maintained that, on the contrary, these clauses did not prevent a nationalization.

89. The Tribunal will begin by discarding two arguments which it does not consider reliable.

Firstly, the more radical one consists in affirming that these clauses do no more than embody general principles of contract law, and that

in consequence the legal regime of the Concession is the same as that of any contract, and that these clauses add nothing to what would in any event be the legal position. This argument cannot be accepted, for it is a well-known principle of the interpretation of contractual undertakings (and indeed of all juridical instruments) that the interpretation to be adopted must be such as will give each clause a worthwhile meaning or object...

Secondly, according to an initial Government contention, these provisions had a "colonial" character and were imposed upon Kuwait at a time when that State was still under British protectorate, and not in possession of its full sovereign powers. On this basis the stabilization clauses were devoid of value. However, quite apart from any attempt to enquire into the factual circumstances in which these clauses were adopted, this contention cannot be upheld, for they were expressly confirmed on the occasion of the 1961 revision of the Concession after the attainment of complete independence by Kuwait, and again in 1973 when the text of the "1973 Agreement" was put into operation.

90. Other Government arguments were as follows:

(1) It was contended that the stabilization clauses-initially valid and effective-were annulled by the emergence of a subsequent factor in the shape either of the Kuwait Constitution of 1962, or of a public international law rule of *ius cogens* forming part of the law of Kuwait. The relevant provisions of the Kuwait Constitution were those registering the permanent sovereignty of the State over its natural resources, and in particular Articles 21 and 152... ..

However, it does not appear from these provisions that they in any way prevented the State from granting stabilization guarantees by contract. Even if they should be interpreted as doing so, it was the State's duty towards its co-contractant to notify the latter of the putting into force of the resulting constitutional modifications to current contracts. This was not done; nor was it done either at the time of the revision of 1961, or of that of 1973.

(2) Equally on the public international law plane it has been claimed that permanent sovereignty over natural resources has become an imperative rule of *ius cogens* prohibiting States from affording, by contract or by treaty, guarantees of any kind against the exercise of the public authority in regard to all matters relating to natural riches. This contention lacks all foundation. Even if Assembly Resolution 1803 (XVII) adopted in 1962, is to be regarded, by reason of the circumstance of its adoption, as reflecting the then state of international law, such is not the case with subsequent resolutions which have not had the same degree of authority...

(3) Another argument advanced by the Government of Kuwait requires consideration. According to this, Aminoil's Concession belonged to the general category of "administrative contracts" in respect of which-as much by Kuwait law as on the basis of general legal principles-special faculties were reserved to the State, of which account must be taken in the interpretation of the stabilization clauses.

91. The "administrative contract", as it was originally developed in French law, and subsequently in other legal systems such as those of Egypt and Kuwait, is based on the idea that certain contracts concluded by the State, or by public entities, are governed by special rules, the two principal ones being as follows

- (i) The public Authority can require a variation in the extent of the other party's liabilities (services, payments) under the contract. This must not however go so far as to distort (unbalance) the contract; and the State can never modify the financial clauses of the contract, nor, in particular, disturb the general equilibrium of the rights and obligations of the parties that constitute what is sometimes known as the contract's "financial equation... .."
- (ii) The public authority may proceed to a more radical step in regard to the contract namely to put an end to it when essential necessities concerning the functioning of the State (operation of public services) are involved. It is with this second aspect of the notion of an administrative contract that the present case could in theory be concerned. Yet even if Aminoil's Concession belonged to this category of contract, it would still be necessary that exigencies connected with essential State functioning should be such as to justify Decree Law No. 124.

92. In order to find an answer to this question, in connection with that of the effect of the stabilization clauses of the Concession, the matter has to be seen in its historical perspective.

93. It seems fair to say that what the Parties had in mind in drafting the stabilization clauses in 1948 and 1961, was anything which, by

reason of its confiscatory character, might cause serious financial prejudice to the interests of the Company. Thus, as mentioned earlier, Article 7(g) of 1961, instituting a new revised Article 11 of 1948, enumerated and strictly limited all the *instances* in which the Concession can terminate through a forfeiture of the concessionaire's rights (for failure in its obligations), but is silent as to all acts that would lead to the ending of the Concession without having a confiscatory character. It can be held that the case of nationalization is precisely one of those acts, since as a matter of international law it is subject *inter alia* to the payment of appropriate compensation.

94. The case of nationalization is certainly not expressly provided against by the stabilization clauses of the Concession. But it is contended by Aminoil that notwithstanding this lacuna, the stabilization clauses of the Concession (Articles 17 and revised 11) are cast in such absolute and all-embracing terms as to suffice in themselves – unconditionally and in all circumstances – for prohibiting nationalization. That is a possible interpretation on the purely formal plane; but, for the following reasons, it is not the one adopted by the Tribunal.

95. No doubt contractual limitations on the State's right to nationalize are juridically possible, but what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for, and be within the regulations governing the conclusion of State contracts; and it is to be expected that it should cover only a relatively limited period. In the present case however, the existence of such a stipulation would have to be presumed as being covered by the general language of the stabilization clauses, and over the whole period of an especially long concession since it extended to 60 years. A limitation on the sovereign rights of the State is all the less to be presumed where the concessionaire is in any event in possession of important guarantees regarding its essential interests in the shape of a legal right to eventual compensation.

96. Such is the case here, for if the Tribunal thus holds that it cannot interpret Articles 17 and 7(g) – revised 11 – as absolutely forbidding nationalization, it is nevertheless the fact that these provisions are far from having lost all their value and efficacy on that account since, by impliedly requiring that nationalization shall not have any confiscatory character, they re-inforce the necessity for a proper indemnification as a condition of it.

97. There is another aspect of the matter which has weighed with the Tribunal. While attributing its full value to the fundamental principle of *pacta sunt servanda*, the Tribunal has felt obliged to recognize that the contract of Concession has undergone great changes since 1948: changes conceded-often unwillingly, but conceded nevertheless-by the Company. These changes have not been the consequence of accidental or special factors, but rather of a profound and general transformation in the terms of oil concessions that occurred in the Middle-East, and later throughout the world... These changes must not simply be viewed piece-meal, but on the basis of their total effect, and they brought about a metamorphosis in the whole character of the Concession.

98. This Concession – in its origin a mining concession granted by a State whose institutions were still incomplete and directed to narrow patrimonial ends – became one of the essential instruments in the economic and social progress of a national community in full process of development. This transformation, progressively achieved, took place at first by means of successive increases in the financial levies going to the State, and then through the growing influence of the State in the economic and technical management of the undertaking, particularly as to the control of pricing policy, taken over in 1973, and the regulation of works and investment programmes. The contract of Concession thus changed its character and became one of those contracts in regard to which, in most legal systems, the State, while remaining bound to respect the contractual equilibrium, enjoys special advantages.

99. In relation to Aminoil's undertaking therefore, the State thus became, in fact if not in law, an associate whose interests had become predominant. Moreover, in spite of its unfinished, and in certain ways improvised character, the text of the projected Agreement of July 1973, made applicable by the 22 December 1973 Letter, bears witness to this evolution.

100. The faculty of nationalizing the Concession could not thenceforward be excluded in relation to the regime of the undertaking as it resulted from the sum total of the considerations relevant to its functioning. This conclusion concerning the interpretation of the stabilization clauses, as being no longer possessed of their former absolute character, which the Tribunal has

thus reached, is in harmony with that regime as it stood in 1977 – and a contrary interpretation would, in addition, disregard its other contractual components.

101. The Tribunal wishes however to stress here that the case is not one of a fundamental change of circumstances (*rebus sic stantibus*) within the meaning of Article 62 of the Vienna Convention on the Law of Treaties. It is not a case of a change involving a departure from a contract, but of a change in the nature of the contract itself, brought about by time, and the acquiescence or conduct of the Parties.

102. The Tribunal thus arrives at the conclusion that the “takeover” of Aminoil’s enterprise was not, in 1977, inconsistent with the contract of concession, provided always that the nationalization did not possess any confiscatory character.

[iii]. Mobil Oil Iran Inc., et al. v. Government of the Islamic Republic of Iran and National Iranian Oil Company (IUSCT Case Nos. 74, 76, 81, 150), Award No. 31174/76/81/150-3 of 14 July 1981⁽⁶⁹⁾ [Michel Virally (pres.), Charles N. Brower, Parviz Ansari Moin]

[For summary of facts, see *supra* p. 624.]

[d]. Comments and Questions

For an analysis of the case law on violations of stabilization clauses, see Taida Begic, *Applicable Law in International Investment Disputes* 84-98 (2005). Begic concludes:

The position of the arbitral tribunals... is clear: under international law the foreign investor must be compensated for the losses suffered by such actions. But the positions appear divergent as to whether the incompatibility of the nationalization with the stabilization clause will be sufficient reason to demonstrate the unlawful character of the nationalization. In *TOPCO* and *AGIP*, the tribunals were clear in holding that the nationalization as an act that terminated the parties’ agreement was in violation of a stabilization clause contained therein and this violation was sufficient to demonstrate the unlawful character of nationalization. In *AMINOIL* and *Amoco*, the tribunals refused to accept the position that the nationalization was unlawful in light of these clauses. In their opinion, only an express prohibition of nationalization provided by the contract may have the effect of making such an act inconsistent with the stabilization clauses and, consequently, unlawful under international law. 97.

[I]. Date of Expropriation

The date of expropriation may affect the amount of compensation awarded. For direct expropriation, the date of expropriation is often easily determinable, as a discrete act or series of acts have been taken over a relatively short period of time. Difficulties arise with respect to indirect “creeping” expropriation where a series of acts over a long period of time have given rise to expropriation.

[1]. Vance R. Koven, *Expropriation and the “Jurisprudence” of OPIC*, 22 Harv. J. Int’l L. 269, 277, 311-314 (1981)⁽⁷⁰⁾

(Citations selectively omitted)

Section 1.10 defines the “date of expropriation” as the first day of the period in which an action, through duration of time, became expropriatory action. Along with the definition of “expropriatory action” itself, this unfortunately simple definition is one of the greatest problems under the Contract. In the event of an expropriation in the form of a simple decree of eminent domain, the definition would apply clearly; but in all other cases, thus far, interpretive problems have abounded. For “creeping” expropriation, where a slow accretion of interferences with the investors management or control of the foreign enterprise results in the inability of the project to continue, determining the date on which “an action” created that result is an absurd exercise, but one of extreme importance because of the principles of compensation at work in the Contract. Since it is the value of the foreign enterprise at the date of expropriation that is compensable, the more stoically the foreign enterprise hangs on in the face of host government interference, the more it hurts its chances of recovering the full value of its business. This is particularly true when those interferences have resulted in

lower profits which would be added to retained earnings, or indeed in losses which under the accounting procedures of the Contract must be subtracted from retained earnings.

* * *

Next to the question of expropriation *vel non*, the determination of the date of expropriation is the most keenly contested issue arising from a claim under the Contract. Businesses are dynamic. Although a balance sheet for a business may be constructed at any given date, the value, it reflects will vary from day to day. Moreover, with a "creeping" expropriation it is difficult to determine both what business activities have been precluded by the government action and what actions of governments, suppliers, customers, employees, creditors and debtors have been affected by the plan of expropriation.

Date of expropriation issues in the decided claims may be classified by how explicit and complex the government action is which constitutes the expropriatory action. At one end of the spectrum are the cases where a specific law or decree effected an expropriatory alteration in the management or control of the foreign enterprise. At the other end are cases where, without a formal decree or official communication, government conduct caused the foreign enterprise to cease operations on its own initiative.

Within the first category of cases fall the claims stemming from the cancellation of concession agreements. In such situations, the effective date of cancellation usually determines the date of expropriation. In *Agricola*, for example, the host government notified the foreign enterprise of the cancellation of a concession agreement, and the parties then undertook negotiations concerning recapitalizing the foreign enterprise, revising the market territory and other matters.

When these negotiations failed, however, OPIC found the date of the event triggering them, rather than the date of breakdown of the talks, to be the date of the expropriatory action. The arbitrators in *Valentine* made a similar determination, although they held the date of expropriation to be the issue date of the decree which revoked the concession, rather than the date on which Valentine became aware of the decree. Likewise, in *Chile Copper Company*, a companion claim to *Anaconda*, OPIC found that the appropriate date was the effective date of the expropriating law.

Even where a government decree has been issued, OPIC's determinations of date of expropriation have not been entirely consistent. In the Chilean copper cases, the enactment and effectiveness of the decree itself was the crucial date. In other Chilean cases, where intervenors were also appointed, the official date of expropriation was the date of appointment (despite previous interference by the Chilean government). As it happened, this date coincided with that on which the intervenor appeared at company headquarters to take control. In *First National City Bank*, a claim involving various formal decrees as well as harassment, OPIC passed over such actions and chose the closing date of the sale of its assets to the Chilean government.

A similar category of claims, arising from investments in Vietnam, concerned the host government's actual or constructive interference with the investor's operation. In *Chase Manhattan Bank*, OPIC determined that the date of the fall of Saigon, rather than the date of the military decree nationalizing all foreign (except French) property, should serve as the date of expropriation. OPIC was apparently following the reasonable principle that actual interference in operations is more important in determining the date of expropriation than the technicalities of official pronouncements. Similarly, in *International Dairy Engineering Company of Asia, Inc.*, OPIC used the date when fighting cut off communication between the plant outside Saigon and its management, which had set up headquarters in Thailand. In *Caltex (Asia) Ltd.*, on the other hand, for no apparent reason OPIC chose the date of the military decree, thereby honoring its principle in the breach.

Another Vietnam case to fall outside the pattern was *Singer Sewing Machine Company*, where the investment had been reduced to a ten per cent equity holding, the rest having been sold to a French company. The enterprise was thus exempt from nationalization from 1975 until a 1977 decree, which granted compensation only to French companies. OPIC had no difficulty in finding the date of this decree to be the date of expropriation.

At the other end of the spectrum are instances where no decree or executive action has emanated from the governing authority. In these cases OPIC's method of analysis appears to be to find a date "by which" a chain of events became expropriatory in effect. This has

led to what might be viewed as an arbitrary assignment of a date of expropriation. In *Revere*, for example, the arbitrators looked at the long chain of government actions giving rise to the claim – the announced polity of nationalization, the passage of the Bauxite Levy in June 1974, the negotiations with the investor, and finally the shutting down of the RJA plant – and concluded that the passage of the Bauxite Levy was the act which implemented the stated position of Prime Minister Manley that the bauxite contracts had been “abrogated by history” and that “the Government of Jamaica cannot be bound by them any longer.” *Revere* had contended that the policy statement itself showed Jamaica had repudiated the agreement with the aluminum companies; the panel, although critical of OPIC’s attempt to find some physical action which would have been more like a traditional taking, looked for some action in furtherance of the stated policy. Thus, the arbitrators’ conclusion that the repudiation of the development agreement occurred “in June” is somewhat misleading by its imprecision. Rather, to be consistent with their method of determination, the arbitrators should have established the date of expropriation as the exact date the measure was enacted, a date of which they were clearly aware.

OPIC’s preference for physical acts which identify expropriatory action was apparent in and *Indian Head*. In the former case, the expropriatory date was the date the foreign enterprise’s plant was shut down; in the latter it was the date that plant was reopened against the investors’ will. The resolution of *Feam*, though apparently consented to by the investor, seems at odds with the resolution of *First National City Bank* and with the reality of the situation, in which many acts of harassment made the shutting down of the foreign enterprise a long overdue acknowledgment of an untenable position.

In *Cabot*, on the other hand, OPIC’s solution appears consistent with *Feam*’s methodology of picking a date “by which” the cumulative effects of interference with (in this case) the fundamental shareholder rights of the investor had unquestionably been denied. The same may be said of *Walsh*, where the denial of Walsh’s claim before the Ministry of justice was held to be the single event indicating that the construction agreement had been repudiated.

[2]. W. Michael Reisman and Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 *Brit. Y.B. Int’l L.* 115, 148, 150 (2004)⁽⁷¹⁾

(Citations selectively omitted)

... BITs and comparable multilateral investment treaties should, as a matter of both the intent of their drafters and the policies that animate them, be construed to deter, not reward, unlawful expropriations of all kinds. If application of the Iran-U.S. Claims Tribunal’s standard in practice reduces the amount of compensation due to victims of creeping expropriations or consequential expropriations, then, we suggest, the “moment of expropriation” should be distinguished from “moment of valuation” for these purposes. And again, it is in this regard that the determination in the first instance of the investor may merit some deference. In any event, and whatever the method adopted by a tribunal to determine the proper “moment of expropriation” in circumstances of creeping and consequential expropriations, that determination must enable the tribunal to give full effect to *Chorzow Factory*’s imperative “that reputation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”

* * *

To calculate compensation for consequential and creeping expropriations carried out within the legal universe of a BIT, tribunals can no longer be content to evaluate the fair market value of an expropriated investment as of the date when an accretion of governmental acts and omissions has so dramatically devalued that investment as to render it “practically useless” or its value “irretrievably lost.” Because these principles may, in practice, threaten the stable and mutually beneficial normative framework for reciprocal foreign investment that states design BITs to create and maintain, international tribunals seeking to award compensation for investment expropriated consequentially or by a creeping series of measures “tantamount to” expropriation may benefit from an alternative principle. Above all, any standard adopted to determine the appropriate date from which to calculate compensation should effectively deter, not reward, consequential and creeping expropriations.

In this regard tribunals seized with cases raising these issues may find it both useful and appropriate to disaggregate the moment of expropriation and the moment of valuation – to distinguish the

"moment of expropriation," which goes to the question of *liability* (i.e., whether an accretion of measures *has* ripened into a compensable expropriation), from the "moment of valuation," which goes to the question of *damages*. Because creeping and consequential expropriations frequently demand highly fact-sensitive inquiries, it is neither possible nor prudent to suggest monolithic or bright-line rule for calculating compensation in these circumstances. But as a general principle, the moment of valuation should be the date on which assessing the fair market value of a foreign investment for purposes of calculating compensation will enable tribunal to give full effect to *Chorzów Factory's* imperative. Adoption of this principle, in our view, would contribute in the long term to fortifying the stable and predictable legal regime for reciprocal foreign investment upon which both foreign investors and developing states depend in the BIT generation.

[3]. Cases

[a]. *Amoco International Finance Corporation. v. The Government of the Islamic Republic of Iran, et al.* (IUSCT Case No. 56), Award No. 310-56-3 of 14 July 1987⁽⁷²⁾ [Michel Virally (pres.), Charles N. Brower, Parviz Ansari Moin]

[For summary of facts, see *supra* p. 260.]

(Citations selectively omitted)

125. The Tribunal agrees that the expropriation which took place in this Case was the outcome of a lengthy process, but it finds that the precise character of this process was, at the beginning and for a rather long period of time, ambiguous. The starting point of this process, according to the Claimant, is a declaration by the managing director of NPC that Iran sought to purchase all foreign interests in its petrochemical industry. The documents produced by the Claimant evidence that this intention of purchasing Amoco's interests in Khemco was announced at an early stage to Amoco and that both parties agreed to start negotiations to this end. Express reference to these negotiations is made in the minutes of the meeting of 11 July 1979, at which it was decided that the sales of Khemco products would be handled by NIOC and NPC. In a telex dated 6 August 1979, that is, after the date on which the Claimant believes the expropriation to be complete, Amoco expressly mentions the discussions pending between the parties on the purchase of Amoco's interests in Khemco and invokes them in support of its protest against the measures taken for the marketing of Khemco products, which, Amoco said, "amounts to nationalization."

126. In view of these facts, the Tribunal finds it difficult to accept the theory that an expropriation had taken place on 1 August 1979. It is well established that at this time, and already from April 1979 onwards at least, Iran had decided to acquire Amoco's share in the capital stock of Khemco. It seems equally clear that Amoco arrived at the conclusion that, in the circumstances then prevailing in the country, it had no future in the petrochemical industry in Iran. Both parties were substantially in agreement to terminate the participation of Amoco in Khemco. The way contemplated by the parties at the time, in order to arrive at such a result, was a purchase of Amoco's rights by NIOC, but according to their declarations before the Tribunal, serious differences concerning the price to be paid necessitated negotiations in order to try to solve this problem.

127. It was apparent that the negotiations to be conducted would be difficult and lengthy, but the final transfer of Amoco's rights could not be doubted by either party. Pending their outcome, NIOC and NPC decided to take a certain number of decisions relating to the management of Khemco...

128. The Tribunal is not aware of the way in which the purported negotiations were pursued during the following months or even whether such negotiations actually took place. The Claimant contends that, after the measures taken in the matter of marketing, it could no longer pursue negotiations. The events of November 1979, in any case, dramatically changed the whole situation and made it impossible for both parties to conduct any discussions. Eventually a new stance was taken by the Iranian authorities, which decided to include the Khemco Agreement on the list of contracts nullified pursuant to the Single Article Act. The decision by the Special Commission, notified on 24 December 1980, declaring the Khemco Agreement "null and void," was the final act of the process started in April 1979. It was also the first decision taken directly by a governmental authority.

129. The Claimant contends that "the Act did not nationalize

Claimant's property or even purport to ratify the prior taking; it merely authorized the Special Commission to declare contracts 'null and void.'" It adds that the nullification was unlawful, since it "violated due process and because no adequate legal basis for a declaration of nullity was offered or could be offered." This last objection cannot be sustained since the decision of the Special Commission was taken pursuant to the Single Article Act, which is of a legislative nature. This fact suffices to give it a legal basis.

130. Formally, it is true that the Khemco Agreement was declared "null and void" by the Special Commission, pursuant to the terms of the Single Article Act. The real issue, however, is to determine how such a decision must be characterized in international law, which is the applicable law. In view of the tremendous political importance of the Single Article Act in the attainment of the objectives of the Islamic Revolution in Iran, the international legal meaning of this Single Article Act can certainly not be ascertained without placing it in the context of the events which took place at this time in Iran, and without taking into account the political and legal position of the Islamic Government towards the previous regime.

131. The Single Article Act relates to the oil industry, which is not only Iran's major industry and source of revenue, but which has played a major role in the politics of Iran since the time of Mossadegh's national government. It is generally recognized that the strikes in the oil industry were decisive in the upheaval which led to the overthrow of the Shah and the establishment of a revolutionary government and that the exclusion of all foreign interests in the oil industry was one of the main objectives of the revolutionary movements. Since such interests were based on contracts executed after the Shah's return in 1953, numerous declarations of the new authorities tended to affirm that all such contracts were in violation of the 1951 Nationalization of the Iranian Oil Industry Act, and, therefore, null and void. The Single Article Act was framed in order to comply with this political, rather than legal, aim. It does not carry all the consequences of the theory of the nullity of the contracts, however, since it provides that compensation might be paid in case of nullification. As a matter of fact, its effect was a complete re-nationalization of the oil industry and, for all practical purposes, it amounted to a nationalization of the rights of the foreign parties to the nullified contracts. Such a construction of the Single Article Act as a measure of expropriation is, furthermore, expressly conceded by the Respondents. The Tribunal finds that it correctly defines the real meaning in international law of the Single Article Act and of the decision of the Special Commission.

132. The analysis of all the relevant facts known to the Tribunal thus reveals that the process which led to the expropriation of Amoco's rights and interests in Khemco was complete only on 24 December 1980, with the notification of the decision of the Special Commission. This process, which started more than twenty months before, was exceptionally lengthy, due to the extraordinary events which took place during this period. It also changed orientation over time, since, even if its original purpose was the transfer of Amoco's rights and duties to NPC, such a transfer was initially not contemplated to be accomplished by way of expropriation. Such a purpose was eventually realized by a decision taken under a procedure decided by a legislative act, the legality of which, under Iranian law, cannot be doubted by this Tribunal. The Claimant's argument that the expropriation was made in violation of Iranian law, therefore, is rejected.

[b]. *Phillips Petroleum Company Iran v. The Islamic Republic of Iran and The National Iranian Oil Company (IUSCT Case No. 39), Award No. 425-39-2 of 29 June 1989*⁷³⁾ [Robert Briner (pres.), Seyed K. Khalilian, George H. Aldrich]

[See *supra* p. 621.]

[c]. *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica (ICSID Case No. ARB/96/1), Final Award of 17 February 2000*⁷⁴⁾ [L. Yves Fortier (pres.), Elihu Lauterpacht, Prosper Weil]

[For summary of facts, see *supra* p. 593.]

(Citations selectively omitted)

78. Stated differently, international law does not lay down any precise or automatic criterion, such as the date of the transfer of ownership or the date on which the expropriation has been "consummated" by agreed or judicial determination of the amount of compensation or by payment of compensation. The expropriated property is to be evaluated as of the date on which the governmental

“interference” has deprived the owner of his rights or has made those rights practically useless. This is a matter of fact for the Tribunal to assess in the light of the circumstances of the case.

79. Claimant does not really contest this approach. The determination of the relevant date, so Claimant writes, “... may vary under different circumstances, thereby affecting the determination of the actual date of expropriation.”

80. Although the expropriation by the decree of 5 May 1978 was only the first step in a process of transferring the Property to the Government, it cannot reasonably be maintained, as Claimant seeks to do, that this Decree expressed no more than an “intention” to expropriate or that, in 1978, the Government merely “sought to expropriate”. In the circumstances of this case, the taking of the Property occurred as of 5 May 1978, the date of the 1978 Decree.

81. As of that date, the practical and economic use of the Property by the Claimant was irretrievably lost, notwithstanding that CDSE remained in possession of the Property. As of 5 May 1978, Claimant’s ownership of Santa Elena was effectively blighted or sterilised because the Property could not, thereafter, be used for the development purposes for which it was originally acquired (and which, at that time, were not excluded) nor did it possess any significant resale value.

82. As noted in the U.S. Senate Staff Report entitled “Confiscated Property of American Citizens Overseas: Cases in Honduras, Costa Rica and Nicaragua”:

“This odd situation has caused the owners of the land to lose a great deal of money because they are not allowed to develop the property as a profit-making, eco-tourism project, yet they are required to pay for the maintenance of the property...”

83. Since the Tribunal is of the view that the taking of the Property occurred on 5 May 1978, it is as of that date that the Property must be valued. There is no evidence that its value at that date was adversely affected by any prior belief or knowledge that it was about to be expropriated. Consequently, for the purpose of retrospectively attributing a value to the Property in 1978, the Tribunal has not had to consider later appraisals, such as the Government’s 1993 Appraisal or those submitted by the parties in these proceedings.

84. The significance of identifying the date of taking lies in its bearing on the factors that may properly be taken into account in assessing the “fair market value” of the Property – a value which, as noted, both sides are agreed must be the basis of the present Award. If the relevant date were the date of this Award, then the Tribunal would have to pay regard to the factors that would today be present to the mind of a potential purchaser. Of these, the most important would no doubt be the knowledge that the Government has adopted an environmental policy which would very likely exclude the kind of tourist, hotel and commercial development that the Claimant contemplated when it first acquired the Property. If, on the other hand, the relevant date is 5 May 1978, factors that arose thereafter – though not necessarily subsequent statements regarding facts that existed as of that date – must be disregarded.

[d]. Comments and Questions

1. In *Indirect Expropriation and Its Valuation in the BIT Generation*, Reisman & Sloane propose separating the question of whether there was a taking and when it occurred from the question of valuation. Does this proposal give too much discretion to the tribunal seised with the matter?
2. Even assuming that Reisman & Sloane’s proposal is sound, does the moment of taking continue to be of sufficient importance to warrant determination? Why?
3. For an analysis of the date of valuation for an unlawful expropriation, see *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan* (ICSID Case No. ARB/05/16), Award of 29 July 2008, ¶¶ 737-44, 785-96.

[J]. Defenses Argued by Governments

[1]. U.N. Resolutions

[a]. Permanent Sovereignty over Natural Resources, General Assembly Resolution 1803 (XVII) of 14 December 1962

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

[b]. Declaration on the Establishment of a New International Economic Order (1 May 1974), A/RES/3201 (S-VI)

4. The new international economic order should be founded on full respect for the following principles:

* * *

- (e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right;

** *

- (g) Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries;
- (h) The right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities [...].

[c]. Charter of Economic Rights and Duties of States (12 December 1974), A/ RES/3281 (XXIX)

Article 2

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
2. Each State has the right:
 - (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with national objectives and priorities. No State shall be obliged to grant preferential treatment to foreign investment;
 - (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host state. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph;
 - (c) To nationalize, expropriate, or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

[2]. Cases

[For summary of facts, see *supra* p. 461.]

(Citations selectively omitted)

80. This Tribunal has stated that it intends to rule on the basis of positive law, but now it is necessary to determine precisely the content of positive law and to ascertain the place which resolutions by the General Assembly of the United Nations could occupy therein.

In its Preliminary Award of 27 November 1975, this Tribunal postponed the examination of the objection raised by the Libyan Government in its Memorandum of 26 July 1974 according to which:

Nationalization is not related to the sovereignty of the State. This fact has been recognized by the consecutive Resolutions of the United Nations on the sovereignty of States over their natural resources, the last being Resolution No. 3171 of the United Nations General Assembly adopted on December 13, 1973, as well as paragraph (4/E) of Resolution No. 3201 (S. VI) adopted on 1 May, 1974. The said Resolutions confirm that every State maintains complete right to exercise full sovereignty over its natural resources and recognize Nationalization as being a legitimate and internationally recognized method to ensure the sovereignty of the State upon such resources. Nationalization, being related to the sovereignty of the State, is not subject to foreign jurisdiction. Provisions of the International Law do not permit a dispute with a State to be referred to any Jurisdiction other than its national Jurisdiction. In affirmance of this principle, Resolutions of the General Assembly provide that any dispute related to-Nationalization or its consequences should be settled in accordance with provisions of domestic law of the State.

81. At the stage of the Preliminary Award, it was premature to go into these arguments, since they were related to the merits of the case. Now, this Tribunal must examine the relevancy and the scope of these arguments to the instant case.

The practice of the United Nations, referred to in the Libyan Government's Memorandum, does not contradict in any way the status of international law as indicated above. This Tribunal wishes first to recall the relevant passages for this ease of Resolution 1803 (XVII) entitled "Permanent Sovereignty over Natural Resources", as adopted by the General Assembly on 14 December 1962:

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law...

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law...

82. The Memorandum of the Libyan Government which has just been quoted relies, however, on more recent Resolutions of the General Assembly (3171 and 3201 (S-VI), in particular) which, according to this Government would as a practical matter rule out any recourse to international law and would confer an exclusive and unlimited competence upon the legislation and courts of the host country.

Although not quoted in the Libyan Memorandum, since subsequent to the date of 26 July 1974, Resolution 3281 (XXIX), proclaimed under the title "Charter of Economic Rights and Duties of the States" and adopted by the General Assembly on 12 December 1974, should also be mentioned with the two Resolutions in support of the contention made by the Libyan Government. Two portions of such Resolutions are of particular interest in the present case:

- Resolution 3201 (S-VI) adopted by the General Assembly on 1 May 1974 under the title “Declaration on the Establishment of a New International Economic Order”, Article 4, paragraph (e):

Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.

- Article 2 of Resolution 3281 (XXIX)

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
2. Each State has the right...
- c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

Substantial differences thus exist between Resolution 1803 (XVII) and the subsequent Resolutions its regards the role of international law in the exercise of permanent sovereignty over natural resources. This aspect of the matter is directly related to the instant case under consideration; this Tribunal is obligated to consider the legal validity of the above-mentioned Resolutions and the possible existence of a custom resulting therefrom.

83. The general question of the legal validity of the Resolutions of the United Nations has been widely discussed by the writers. This Tribunal will recall first that, under Article 10 of the U.N. Charter, the General Assembly only issues “recommendations”, which have long appeared to be texts having no binding force and carrying no obligations for the Member States...

Refusal to recognize any legal validity of United Nations Resolutions must, however, be qualified according to the various texts enacted by the United Nations. These are very different and have varying legal value, but it is impossible to deny that the United Nations activities have had a significant influence on the content of contemporary international law. In appraising the legal validity of the above-mentioned Resolutions, this Tribunal will take account of the criteria usually taken into consideration, i.e., the examination of voting conditions and the analysis of the provisions concerned.

84. (1) With respect to the first point, Resolution 1803 (XVII) of 14 December 1962 was passed by the General Assembly by 87 votes to 2, with 12 abstentions. It is particularly important to note that the majority voted for this text, including many States of the Third World, but also several Western developed countries with market economies, including the most important one, the United States. The principles stated in this Resolution were therefore assented to by a great many States representing not only all geographical areas but also all economic systems.

From this point of view, this Tribunal notes that the affirmative vote of several developed countries with a market economy was made possible in particular by the inclusion in the Resolution of two references to international law, and one passage relating to the importance of international cooperation for economic development. According to the representative of Tunisia:

“... the result of the debate on this question was that the balance of the original draft resolution was improved – a balance between, on the one hand, the unequivocal affirmation of the inalienable right of States to exercise sovereignty over their natural resources and, on the other hand, the reconciliation or adaptation of this sovereignty to international law, equity and the principles of international cooperation.”

The reference to international law, in particular in the field of nationalization, was therefore an essential factor in the support given by several Western countries to Resolution 1803 (XV/II).

85. On the contrary, it appears to this Tribunal that the conditions under which Resolutions 3171 (XXV/II), 3201 (S-VI) and 3281 (XXIX) (Charter of the Economic Rights and Duties of States) were notably different:

- Resolution 3171 (XXV/II) was adopted by a recorded vote of 108 votes to 1, with 16 abstentions, but this Tribunal notes that a separate vote was requested with respect to the paragraph in the operative part mentioned in the Libyan Government's Memorandum whereby the General Assembly stated that the application of the principle according to which nationalizations effected by States as the expression of their sovereignty implied that it is within the right of each State to determine the amount of possible compensation and the means of their payment, and that any dispute which might arise should be settled in conformity with the national law of each State instituting measures of this kind. As a consequence of a roll-call, this paragraph was adopted by 86 votes to 11...

This specific paragraph concerning nationalizations, disregarding the role of international law, not only was not consented to by the most important Western countries, but caused a number of the developing countries to abstain.

- Resolution 3201 (S-VI) was adopted without a vote by the General Assembly, but the statements made by 38 delegates showed clearly and explicitly what was the position of each main group of countries. The Tribunal should therefore note that the most important Western countries were opposed to abandoning the compromise solution contained in Resolution 1803 (XV/II).
- The conditions under which Resolution 3281 (XXIX), proclaiming the Charter of Economic Rights and Duties of States, was adopted also show unambiguously that there was no general consensus of the States with respect to the most important provisions and in particular those concerning nationalization. Having been the subject matter of a roll-call vote, the Charter was adopted by 118 votes to 6, with 10 abstentions.

The analysis of votes on specific sections of the Charter is most significant insofar as the present case is concerned. From this point of view, paragraph 2 (c) of Article 2 of the Charter, which limits consideration of the characteristics of compensation to the State and does not refer to international law, was voted by 104 to 16, with 6 abstentions, all of the industrialized countries with market economies having abstained or having voted against it.

86. Taking into account the various circumstances of the votes with respect to these Resolutions, this Tribunal must specify the legal scope of the provisions of each of these Resolutions for the instant case.

A first general indication of the intent of the drafters of the Charter of Economic Rights and Duties of States is afforded by the discussions which took place within the Working Group concerning the mandatory force of the future text. As early as the first session of the Working Group, differences of opinion as to the nature of the Charter envisaged gave rise to a very clear division between developed and developing countries. Thus, representatives of Iraq, Sri Lanka, Egypt, Kenya, Morocco, Nigeria, Zaire, Brazil, Chile, Guatemala, Jamaica, Mexico, Peru and Rumania held the view that the draft Charter should be a legal instrument of a binding nature and not merely a declaration of intention.

On the contrary, representatives of developed countries, such as Australia, France, Federal Republic of Germany, Italy, Japan, United Kingdom and United States expressed doubt that it was advisable, possible or even realistic to make the rights and duties set forth in a draft Charter binding upon States (Report of the Working Party on its 1st Session, U.N. Doc. TD/B/AC.12/1 (1973), at 6).

The form of resolution adopted did not provide for the binding application of the text to those to which it applied, but the problem of the legal validity to be attached to the Charter is not thereby solved. In fact, while it is now possible to recognize that resolutions of the United Nations have a certain legal value, this legal value differs considerably, depending on the type of resolution and the conditions attached to its adoption and its provisions. Even under the assumption that they are resolutions of a declaratory nature, which is the case of the Charter of Economic Rights and Duties of States, the legal value is variable...

As this Tribunal has already indicated, the legal value of the resolutions which are relevant to the present case can be determined on the basis of circumstances under which they were adopted and by analysis of the principles which they state:

- With respect to the first point, the absence of any binding force of the resolutions of the General Assembly of the United Nations implies that such resolutions must be accepted by the members of the United Nations in order to be legally binding. In this respect, the Tribunal notes that only Resolution 1803 (XVII) of 14 December 1962 was supported by a majority of Member States representing all of the various groups. By contrast, the other Resolutions mentioned above, and in particular those referred to in the Libyan Memorandum, were supported by a majority of States but not by any of the developed countries with market economies which carry on the largest part of international trade.

87. (2) With respect to the second point, to wit the appraisal of the legal value on the basis of the principles stated, it appears essential to this Tribunal to distinguish between those provisions stating the existence of a right on which the generality of the States has expressed agreement and those provisions introducing new principles which were rejected by certain representative groups of States and having nothing more than a *de lege ferenda* value only in the eyes of the States which have adopted them; as far as the others are concerned, the rejection of these same principles implies that they consider them as being *contra legem*. With respect to the former, which proclaim rules recognized by the community of nations, they do not create a custom but confirm one by formulating it and specifying its scope, thereby making it possible to determine whether or not one is confronted with a legal rule. As has been noted by Ambassador Castaneda, "[such resolutions] do not create the law; they have a declaratory nature of noting what does exist" (129 R.C.A.D.I. 204 (1970), at 315).

On the basis of the circumstances of adoption mentioned above and by expressing an *opinio juris communis*, Resolution 1803 (XVII) seems to this Tribunal to reflect the state of customary law existing in this field. Indeed, on the occasion of the vote on a resolution finding the existence of a customary rule, the States concerned clearly express their views. The consensus by a majority of States belonging to the various representative groups indicates without the slightest doubt universal recognition of the rules therein incorporated, *i.e.*, with respect to nationalization and compensation the use of the rules in force in the nationalizing State, but all this in conformity with international law.

88. While Resolution 1803 (XVII) appears to a large extent as the expression of a real general will, this is not at all the case with respect to the other Resolutions mentioned above, which has been demonstrated previously by analysis of the circumstances of adoption. In particular, as regards the Charter of Economic Rights and Duties of States, several factors contribute to denying legal value to those provisions of the document which are of interest in the instant case.

- In the first place, Article 2 of this Charter must be analyzed as a political rather than as a legal declaration concerned with the ideological strategy of development and, as such, supported only by non-industrialized States.
- In the second place, this Tribunal notes that in the draft submitted by the Group of 77 to the Second Commission (U.N. Doc A/C.2/L. 1386 (1974), at 2), the General Assembly was invited to adopt the Charter "as a first measure of codification and progressive development" within the field of the international law of development. However, because of the opposition of several States, this description was deleted from the text submitted to the vote of the Assembly. This important modification led Professor Virally to declare:

"It is therefore clear that the Charter is not a first step to codification and progressive development of international law, within the meaning of Article 13, para. 1 (a) of the Charter of the United Nations, that is to say an instrument purporting to formulate in writing the rules of customary law and intended to better adjust its content to the requirements of international relations. The persisting difference of opinions in respect to some of its articles prevented reaching this goal and it is healthy that people have become aware of this. " (La Charte des Droits et Devoirs Economiques des Etats. Notes de Lecture ", 20 A.F.D.I. 57 (1974), at 59.)

The absence of any connection between the procedure of compensation and international law and the subjection of this procedure solely to municipal law cannot be regarded by this Tribunal except as a *de lege ferenda* formulation, which even appears *contra legem* in the eyes of many developed countries. Similarly, several developing countries, although having voted favorably on the Charter of Economic Rights and Duties of States as a whole, in explaining their votes regretted the absence of any reference to international law.

89. Such an attitude is further reinforced by an examination of the general practice of relations between States with respect to investments. This practice is in conformity, not with the provisions of Article 2(c) of the above-mentioned Charter conferring exclusive jurisdiction on domestic legislation and courts, but with the exception stated at the end of this paragraph: Thus a great many investment agreements entered into between industrial States or their nationals, on the one hand, and developing countries, on the other, state, in an objective way, the standards of compensation and further provide, in case of dispute regarding the level of such compensation, the possibility of resorting to an international tribunal. In this respect, it is particularly significant in the eyes of this Tribunal that no fewer than 65 States, as of 31 October 1974, had ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States, dated March 18, 1965.

90. The argument of the Libyan Government, based on the relevant resolutions enacted by the General Assembly of the United Nations, that any dispute relating to nationalization or its consequences should be decided in conformity with the provisions of the municipal law of the nationalizing State and only in its courts, is also negated by a complete analysis of the whole text of the Charter of Economic Rights and Duties of States.

From this point of view, even though Article 2 of the Charter does not explicitly refer to international law, this Tribunal concludes that the provisions referred to in this Article do not escape all norms of international law. Article 33, paragraph 2, of this Resolution states as follows: "2. In their interpretation and application, the provisions of the present Charter are interrelated and each provision should be construed in the context of the other provisions". Now, among the fundamental elements of international economic relations quoted in the Charter, principle (j) is headed its follows: "Fulfillment in good faith of international obligations".

Analyzing the scope of these various provisions, Ambassador Castaneda, who chaired the Working Group charged with drawing up the Charter of Economic Rights and Duties of States, formally stated that the principle of performance in good faith of international obligations laid down in Chapter I(j) of the Charter applies to all matters governed by it, including, in particular, matters referred to in Article 2. Following his analysis, this particularly competent and eminent scholar concluded as follows:

"The Charter accepts that international law may operate as a factor limiting the freedom of the State should foreign interests be affected, even though Article 2 does not state this explicitly. This stems legally from the provisions included in other Articles of the Charter which should be interpreted and applied jointly with those of Article 2." ("La Charte des Droits et Devoirs Economiques des Etats. Note sur son Processus d'Elaboration", 20 A.F.D.I. 31 (1974), at 54.)

91. Therefore, one should note that the principle of good faith, which had already been mentioned in Resolution 1803 (XVII), has an important place even in Resolution 3281 (XXIX) called "The Charter of Economic Rights and Duties of States". One should conclude that a sovereign State which nationalizes cannot disregard the commitments undertaken by the contracting State: to decide otherwise would in fact recognize that all contractual commitments undertaken by a State have been undertaken under a purely permissive condition on its part and are therefore lacking of any legal force and any binding effect. From the point of view of its advisability, such a solution would gravely harm the credibility of States since it would mean that contracts signed by them did not bind them; it would introduce in such contracts a fundamental imbalance because in these contracts only one party – the party contracting with the State – would be bound. In law, such an outcome would go directly against the most elementary principle of good faith and for this reason it cannot be accepted.

[b]. Comments and Questions

1. An entirely different perspective is provided by M. Somarajah *The International Law of Foreign Investment* (2nd ed., Cambridge University Press 2004). Somarajah argues that the law of foreign investment was premised on Western neo-classical economic models, which are no longer valid. He further claims that this position has been replaced by a view that foreign investments are affected by numerous economic and non-economic factors. Finally, he proposes that investment contracts between a foreign investor and a host state do not necessarily define the terms of the investment. Rather, because of the long time frame of investments, contracts merely provide the preliminary framework within which the relationship between the investor and state is to operate.
2. Another "new international economic order" point of view is set forth by Judge Moham-med Bedjaoui in *International Law: Achievements and Prospects* (1991). Judge Bedjaoui asserts a right to development on the part of "proletarian nations" and a corresponding obligation on the advanced countries to aid in the development within a framework of a "new international social law."
3. In this regard, see also Rahmatullah Khan, *Law of International Trade Transactions* (1973).

[c]. Government of Kuwait v. American Independent Oil Company (AMINOIL), Award of 24 March 1982, 66 Int'l L. Rep. 518 (1982)⁽⁷⁶⁾ [Paul Reuter (pres.), Hamed Sultan, Gerald Fitzmaurice]

[For summary of facts, see *infra* p. 1022.]

(Citations selectively omitted)

(2) Equally on the public international law plane it has been claimed that permanent sovereignty over natural resources has become an imperative rule of *jus cogens* prohibiting States from affording, by contract or by treaty, guarantees of any kind against the exercise of the public authority in regard to all matters relating to natural riches. This contention lacks all foundation. Even if Assembly Resolution 1803 (XV/II) adopted in 1962, is to be [95] regarded, by reason of the circumstance of its adoption, as reflecting the then state of international law, such is not the case with subsequent resolutions which have not had the same degree of authority. Even if some of their provisions can be regarded as codifying rules that reflect international practice, it would not be possible from this to deduce the existence of a rule of international law prohibiting a State from undertaking not to proceed to a nationalization during a limited period of time. It may indeed well be eminently useful that "host" States should, if they so desire, be able to pledge themselves not to nationalize given foreign undertakings within a limited period; and no rule of public international law prevents them from doing so.

[3]. Administrative Contracts

[a]. The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL), Award of 24 March 1982, 66 Int'l L. Rep. 518, 588-589 (para. 90(3), 91(i)(ii)) (1982)⁽⁷⁷⁾ [Paul Reuter (pres.), Hamed Sultan, Gerald Fitzmaurice]

[For summary of facts, see *infra* p. 1022.]

(Citations selectively omitted)

(3) Another argument advanced by the Government of Kuwait requires consideration. According to this, Aminoil's Concession belonged to the general category of "administrative contracts" in respect of which – as much by Kuwait law as on the basis of general legal principles – special faculties were reserved to the State, of which account must be taken in the interpretation of the stabilization clauses.

91. The "administrative contract", as it was originally developed in French law, and subsequently in other legal systems such as those of Egypt and Kuwait, is based on the idea that certain contracts concluded by the State, or by public entities, are governed by special rules, the two principal ones being as follows

- (i) The public Authority can require a variation in the extent of the other party's liabilities (services, payments) under the contract. This must not however go so far as to distort (unbalance) the contract; and the State can never modify the financial clauses of the contract, – nor, in particular, disturb the general equilibrium of the rights and obligations of the parties that constitute what is sometimes known as the contract's "financial equation". This characteristic is also to be found in certain ordinary private law contracts, and respect for the equilibrium of reciprocal undertakings is a fundamental principle of the law of contracts. But in the present case it has to be realized that the main difficulties that arise are not about respect for the financial equation that reflects the contractual equilibrium, but about the method of applying Article 9, that is to say not over respect for the original equilibrium, but over the search for a new, equitable, equilibrium.
- (ii) The public authority may proceed to a more radical step in regard to the contract namely to put an end to it when essential necessities concerning the functioning of the State (operation of public services) are involved. It is with this second aspect of the notion of an administrative contract that the present case could in theory be concerned. Yet even if Aminoil's Concession belonged to this category of contract, it would still be necessary that exigencies connected with essential State functioning should be such as to justify Decree Law No. 124.

[4]. Force Majeure/Impossibility/Frustration

[a]. Mobil Oil Iran Inc., et al. v. Government of the Islamic Republic of Iran, et al. (USCT Case Nos. 74, 76, 81, 150), Award No. 311-74/76/81/150-3 of 14 July 1987⁽⁷⁸⁾ [Michel Virally (pres.), Charles N. Brower, Parviz Ansari Moin]

[For summary of facts, see *supra* p. 624.]

(Citations selectively omitted)

112. It is not disputed that the Claimants withdrew OSCO's expatriate personnel in late December 1978 and early January 1979 because of the civil disturbances associated with the revolutionary movements. It is also common ground that oil production as well as oil exports were severely disturbed during this time and for some time were completely terminated.

113. Although the Claimants contend that "neither of the events identified by the Respondents created a situation of *force majeure*," they recognize that "events in Iran may have interfered temporarily with the producing and export of oil from Iran," and that "export of oil was suspended for a period." Furthermore, in letters dated 6 and 13 January 1979, explaining the withdrawal of the OSCO expatriate staff, they stated "that events in Iran had made impossible for them at present to continue to carry out their duties, and that their personnel safety was substantially at risk." This is an implicit, but clear, admission of a situation of *force majeure*.

114. The Tribunal has already held that the revolutionary events which occurred at the end of 1978 and the beginning of 1979 created conditions of *force majeure*. See, e.g., Sylvania Technical Systems, Inc. and Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985); Starrett Housing Corp. and Islamic Republic of Iran, Award No. ITL 32-24-1 (19 Dec. 1983). The dispute between the Parties, however, is concerned less with the occurrence of such conditions, which is affirmed by the Respondents and not really denied by the Claimants, than with the duration of such conditions and their effects on the SPA.

115. The Claimants contend that conditions of *force majeure* ended in March 1979 because exports of Iranian oil resumed at that time. "Thus, performance of the Agreement, which was for sale of oil to the Claimants could have resumed"... All this is strongly denied by the Respondents, who assert that the conditions of *force majeure* persisted much later and that they completely frustrated the Agreement. They emphasize that the oil exports resumed only on a limited scale and that for months production remained well below the level attained in the preceding years.

116. Article 27 of the SPA envisioned *force majeure* only as an excuse for failure by a party to comply with the terms of the Agreement. In other words, in this Article..., *force majeure* conditions were regarded only as causing a suspension of certain provisions of the Agreement. This is in line with the most common practice in contract law. Usually, *force majeure* conditions will have the effect of terminating a contract only if they make performance definitively impossible or impossible for a long period of time.

117. It also is admitted generally that *force majeure*, as a cause of full or partial suspension or termination of a contract, is a general principle of law which applies even when the contract is silent. Therefore, although Article 27 does not so provide, that absence is no obstacle to a finding that the Agreement was terminated by *force majeure* if the circumstances warrant such a finding. In the circumstances of these Cases, however, the Tribunal does not find that on 10 March 1979 the situation was such that the Agreement could be considered as frustrated or terminated for cause of *force majeure*. A new revolutionary Islamic Government had already been established. The conditions therefore could be expected to progressively return to normal and, in fact, oil exports were resumed. In addition, it is noteworthy that NIOC's letter of 10 March 1979 made no mention at all of *force majeure* and spelled out the conditions of resumption of oil sales to the Consortium. At the same time, it would be erroneous to pretend that the conditions in Iran already had returned to normal by this date. It is not disputed that the quantities of oil available for export were considerably less than during the preceding years and did not reach a comparable level for months. The conditions for a return of OSCO's expatriate staff, furthermore, were not yet met.

118. The same finding applies to the Respondents' argument that the Agreement was frustrated by changed circumstances. In support of this argument the Respondents heavily rely on the use of this phrase in Article V of the CSD. The Tribunal, however, observes that, in this Article, "changed circumstances" only denotes one of the elements that the Tribunal is invited to take into account when determining the choice of law to be applied in any given case. This has no direct bearing on the merits of a claim.

**[b]. CMS Gas Transmission Company v. The Argentine Republic (ICSID Case No. ARB/01/8), Award of 12 May 2005⁽⁷⁹⁾
[Francisco Orrego Vicuña (pres.), Marc Lalonde, Francisco Rezek]**

[For summary of facts, see *infra* p. 1056.]

(Citations selectively omitted)

53. [T]he Argentine Republic embarked in 1989 on economic reforms, which included the privatization of important industries and public utilities as well as the participation of foreign investment. Gas transportation was one of the significant sectors to be included under this reform program. The basic instruments governing these economic reforms were Law No. 23.696 on the Reform of the State of 1989, Law No. 23.928 on Currency Convertibility of 1991 and Decree No. 2128/91 fixing the Argentine peso at par with the United States dollar.

54. Within this broad framework specific instruments were enacted to govern the privatization of the main industries. As far as the Gas sector was concerned, Law No. 24.076 of 1992, or Gas Law, established the basic rules for the transportation and distribution of natural gas. This instrument was implemented the same year by Decree No. 1738/92 or Gas Decree.

55. As a consequence of the new legislation, Gas del Estado, a State-owned entity, was divided into two transportation companies and eight distribution companies. Transportadora de Gas del Norte (TGN) was one of the companies created for gas transportation. The privatization of the new company was opened to investors by means of a public tender offer and a related Information Memorandum was prepared by consultant and investment firms in 1992 at the request of the Government.

56. A Model License approved by Decree No. 2255/92 established the basic terms and conditions for the licenses that each new company would be granted by the Argentine Government. TGN's license was granted by Decree No. 2457/92 for a period of thirty-five years, subject to extension for another ten years on the fulfillment of certain conditions.

57. In the Claimant's view, the legislation and regulations enacted, as well as the license, resulted in a legal regime under which tariffs were to be calculated in dollars, conversion to pesos was to be effected at the time of billing and tariffs would be adjusted every six months in accordance with the United States Producer Price Index (US PPI). As will be examined further below, the Respondent has a different understanding of the nature and legal effects of these various instruments.

58. CMS's participation in TGN began in 1995 under a 1995 Offering Memorandum leading to the purchase of the shares still held by the government. CMS's acquisition represented 25% of the company,

later supplemented by the purchase of an additional 4.42%, thus totaling 29.42% of TGN's shares. This new Offering Memorandum was modeled on the 1992 Information Memorandum and the license.

4.. Argentina's Measures in the Period 1999–2002 and the Emergence of the Dispute

59. Towards the end of the 1990's a serious economic crisis began to unfold in Argentina, which eventually had profound political and social ramifications. The nature and extent of this crisis will be discussed below.

60. Against this background, the Argentine Government called in late 1999 for a meeting with representatives of the gas companies in order to discuss a temporary suspension of the US PPI adjustment of the gas tariffs. The companies agreed to a temporary suspension deferring the adjustment due for a period of six months (January 1–June 30, 2000)... This agreement was approved by ENARGAS, the public regulatory agency of the gas industry, by Resolution No. 1471 on January 10, 2000.

61. Soon thereafter it became apparent that the agreement would not be implemented and requests by TGN for an adjustment of tariffs in accordance with the License were not acted upon; in fact ENARGAS directed the company to refrain from introducing any such adjustment. On July 17, 2000, a further meeting was held with representatives of the gas companies, at which the companies were asked to agree on a new deferral of the tariff adjustment. Another agreement to this effect was entered into on that date, freezing US PPI adjustments of tariffs for a two year period while allowing for some increases relating to the earlier deferral and lost income. Income lost as a result of the new deferral was to be gradually recovered and US PPI adjustments were to be reintroduced as from June 30, 2002. Decree No. 669/2000 embodied the new arrangements while recognizing that the US PPI adjustment constituted "a legitimately acquired right" and was a basic premise and condition of the tender and the offers.

62. In a proceeding commenced by the Argentine "Defensor del Pueblo de la Nación," a federal judge issued on August 18, 2000 an injunction for the suspension of both the agreement and Decree No. 669/2000 pending a decision on the challenged legality of the US PPI adjustment... In due course, the companies, the Government and ENARGAS appealed the above decision of the federal judge, however, the appeal was rejected. A final appeal of the companies to the Argentine Supreme Court is still pending.

63. Based on these developments, ENARGAS repeatedly confirmed the continuing freeze of the US PPI adjustment of tariffs, resulting in no adjustments being made in accordance with this mechanism as from January 1, 2000, that is since the first deferral. The parties disagree on the nature and extent of the decisions adopted by ENARGAS, as will be discussed below. Against these developments, CMS notified its consent to arbitration under ICSID on July 12, 2001, following the required notification of the dispute to the Argentine Government. The dispute at this stage concerned only the issue of the application of the US PPI adjustment.

64. In late 2001 the crisis deepened as the corrective measures that Minister Domingo Cavallo had set in train did not succeed. Significant capital flight from Argentina followed. In the wake of these further developments, the Government introduced the "corralito" by Decree No. 1570/2001, drastically limiting the right to withdraw deposits from bank accounts. Default was declared and several Presidents succeeded one another in office within a matter of days. Emergency Law No. 25.561 was enacted on January 6, 2002, declaring a public emergency until December 10, 2003 and introducing a reform of the foreign exchange system. Extensions of this period were later introduced, as will be discussed below.

65. The Emergency Law introduced the second type of measures that underlie the dispute in the present case. Thus, the currency board which had pegged the peso to the dollar under the 1991 Convertibility Law was abolished, the peso was devalued and different exchange rates were introduced for different transactions. The right of licensees of public utilities to adjust tariffs according to the US PPI was terminated, as was the calculation of tariffs in dollars...

66. The Emergency Law envisaged a process of renegotiation of licenses to be conducted by a Renegotiation Commission... Renegotiations were to be completed by December 31, 2004. Renegotiation was completed by this date in respect of some public utilities and related companies, but this was not the case in the gas transportation and distribution sector. A witness introduced by the

Respondent explained that this was attributable to the inherent difficulty in renegotiating 64 public utility contracts and numerous subcontracts.

67. On February 13, 2002 CMS notified an ancillary dispute concerning the measures enacted under the Emergency Law and related decisions. In its Decision on Jurisdiction, the Tribunal considered that the disputes arising from the one as well as the other types of measures were sufficiently closely related and thus proceeded to the merits phase in respect of both.

* * *

316. Article 25 reads as follows:

“1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole;

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) the international obligation in question excludes the possibility of invoking necessity; or
- (b) the State has contributed to the situation of necessity.”

317. While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse. The very opening of the Article to the effect that necessity “may not be invoked” unless strict conditions are met, is indicative of this restrictive approach of international law. Case law, state practice and scholarly writings amply support this restrictive approach to the operation of necessity. The reason is not difficult to understand. If strict and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law.

318. The Tribunal must now undertake the very difficult task of finding whether the Argentine crisis meets the requirements of Article 25, a task not rendered easier by the wide variety of views expressed on the matter and their heavy politicization. Again here the Tribunal is not called upon to pass judgment on the measures adopted in that connection but simply to establish whether the breach of the Treaty provisions discussed is devoid of legal consequences by the preclusion of wrongfulness.

319. A first question the Tribunal must address is whether an essential interest of the State was involved in the matter. Again here the issue is to determine the gravity of the crisis. The need to prevent a major breakdown, with all its social and political implications, might have entailed an essential interest of the State in which case the operation of the state of necessity might have been triggered. In addition, the plea must under the specific circumstances of each case meet the legal requirements set out by customary international law.

320. In the instant case, the Respondent and leading economists are of the view that the crisis was of catastrophic proportions; other equally distinguished views, however, tend to qualify this statement. The Tribunal is convinced that the crisis was indeed severe and the argument that nothing important happened is not tenable. However, neither could it be held that wrongfulness should be precluded as a matter of course under the circumstances. As is many times the case in international affairs and international law, situations of this kind are not given in black and white but in many shades of grey.

321. It follows that the relative effect that can be reasonably attributed to the crisis does not allow for a finding on preclusion of wrongfulness. The Respondent's perception of extreme adverse effects, however, is understandable, and in that light the plea of necessity or emergency cannot be considered as an abuse of rights as the Claimant has argued.

322. The Tribunal turns next to the question whether there was in this case a grave and imminent peril. Here again the Tribunal is persuaded that the situation was difficult enough to justify the government taking action to prevent a worsening of the situation and the danger of total economic collapse. But neither does the relative effect of the crisis allow here for a finding in terms of preclusion of wrongfulness.

323. A different issue, however, is whether the measures adopted were the "only way" for the State to safeguard its interests. This is indeed debatable. The views of the parties and distinguished economists are wide apart on this matter, ranging from the support of those measures to the discussion of a variety of alternatives, including dollarization of the economy, granting of direct subsidies to the affected population or industries and many others. Which of these policy alternatives would have been better is a decision beyond the scope of the Tribunal's task, which is to establish whether there was only one way or various ways and thus whether the requirements for the preclusion of wrongfulness have or have not been met.

324. The International Law Commission's comment to the effect that the plea of necessity is "excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient," is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.

325. A different condition for the admission of necessity relates to the requirement that the measures adopted do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. As the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation governed by Article 26 of the Articles.

326. In addition to the basic conditions set out under paragraph 1 of Article 25, there are two other limits to the operation of necessity arising from paragraph 2. As noted in the Commentary, the use of the expression "in any case" in the opening of the text means that each of these limits must be considered over and above the conditions of paragraph 1.

327. The first such limit arises when the international obligation excludes necessity, a matter which again will be considered in the context of the Treaty.

328. The second limit is the requirement for the State not to have contributed to the situation of necessity. The Commentary clarifies that this contribution must be "sufficiently substantial and not merely incidental or peripheral". In spite of the view of the parties claiming that all factors contributing to the crisis were either endogenous or exogenous, the Tribunal is again persuaded that similar to what is the case in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions. This is the unavoidable consequence of the operation of a global economy where domestic and international factors interact.

329. The issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of the present dispute, must conclude that this was the case. The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.

330. There is yet another important element which the Tribunal must take into account. The International Court of Justice has in the *Gabcikovo-Nagymaros* case convincingly referred to the International Law Commission's view that all the conditions governing necessity must be "cumulatively" satisfied.

331. In the present case there are, as concluded, elements of necessity partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test. This in itself leads to the inevitable conclusion that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts.

[Sempra Energy International ("Sempra") invested in two natural gas companies in Argentina. Argentina subsequently suspended the companies' tariff adjustments based on the United States producer price index and introduced other regulatory measures. These changes led Sempra to claim that Argentina had modified its regulatory framework in violation of the specific commitments Argentina had made to investors, both by contractual obligations given to Sempra in form of the distribution licenses and by the BIT. Sempra claimed that Argentina had wrongfully expropriated Sempra's investment both directly and indirectly (so-called creeping) expropriation. Sempra also claimed that Argentina had breached Article IV of the BIT referring to violations of the fair and equitable treatment standard and the protection of legitimate expectations; that the measures adopted by Argentina were arbitrary and discriminatory; that full protection and security were not provided to Sempra; and that the BIT's 'umbrella clause' was breached. Sempra claimed damages in the amount of US\$209.3 million. Argentina defended its actions, *inter alia*, on the grounds of necessity under Articles IV(3) and XI of the BIT.]

(Citations selectively omitted)

344. The Tribunal shares the parties' understanding of Article 25 of the Articles on State Responsibility as reflecting the state of customary international law on the matter. This is not to say that the Articles are a treaty or even themselves a part of customary law. They are simply the learned and systematic expression of the law on state of necessity developed by courts, tribunals and other sources over a long period of time. Article 25 states...

[See *supra* p. 691 for text of Article 25.]

345. There is no disagreement either about the fact that a state of necessity is a most exceptional remedy that is subject to very strict conditions because otherwise it would open the door to States to elude compliance with any international obligation. Article 25 accordingly begins by cautioning that the state of necessity "may not be invoked" unless such conditions are met. Whether in fact the Respondent's invocation of a state of necessity meets those conditions is the difficult task that the Tribunal must now undertake.

346. The Tribunal has examined with particular attention the recent decision on liability and subsequent award on damages in the *LG&E* case as they have dealt with mostly identical questions concerning emergency and state of necessity. The decision on liability has been contrasted with the finding of the Tribunal in *CMS*. While two arbitrators sitting in the present case were also members of the tribunal in the *CMS* case the matter has been examined anew. This Tribunal must note, first, that in addition to differences in the legal interpretation of the Treaty in this context, an important question that distinguishes the *LG&E* decision on liability from *CMS*, and for that matter also from the recent award in *Enron*, lies in the assessment of the facts. While the *CMS* and *Enron* tribunals have not been persuaded by the severity of the Argentine crisis as a factor capable of triggering the state of necessity, *LG&E* has considered the situation in a different light and justified the invocation of emergency and necessity, albeit for a limited period of time. This Tribunal, however, is not any more persuaded than the *CMS* and *Enron* tribunals about the crisis justifying the operation of emergency and necessity, although it also readily accepts that the changed economic conditions have an influence on the questions of valuation and compensation, as will be examined further below.

347. The first condition which Article 25 sets out is that the act in question must be the only way for the State to safeguard an essential interest against a grave and imminent peril. The Tribunal must accordingly establish whether the Argentine crisis qualified as one affecting an essential interest of the State. The opinions of experts are sharply divided on this issue. They range from those that consider the crisis as having had gargantuan and catastrophic proportions, to those that believe that it was no different from many other contemporary crisis situations around the world.

348. The Tribunal has no doubt that there was a severe crisis, and that in such a context it was unlikely that business could have continued as usual. Yet, the argument that such a situation compromised the very existence of the State and its independence, and thereby qualified as one involving an essential State interest, is not convincing. Questions of public order and social unrest could have been handled, as in fact they were, just as questions of

political stabilization were handled under the constitutional arrangements in force.

349. This issue is in turn connected with the alleged existence of a grave and imminent peril that could threaten the essential interest. While the Government had a duty to prevent a worsening of the situation, and could not simply leave events to follow their own course, there is no convincing evidence that events were actually out of control or had become unmanageable.

350. It is thus quite evident that measures had to be adopted to offset the unfolding crisis, but whether the measures taken under the Emergency Law were the "only way" to achieve this result, and whether no other alternative was available, are questions on which the parties and their experts are profoundly divided, as noted above. A rather sad global comparison of experiences in the handling of economic crises shows that there are always many approaches to addressing and resolving such critical events. It is therefore difficult to justify the position that only one of them was available in the Argentine case.

351. While one or the other party would like the Tribunal to point out which alternative was recommendable, it is not the task of the Tribunal to substitute its view for the Government's choice between economic options. It is instead the Tribunal's duty only to determine whether the choice made was the only one available, and this does not appear to have been the case.

352. Article 25 next requires that the measures in question do not seriously impair the interests of a State or States toward which the obligations exist, or of the international community as a whole. The interest of the international community does not appear to be in any way impaired in this context, as it is an interest of a general kind. That of other States will be discussed below in connection with the Treaty obligations. At that point, it will also be discussed whether the Treaty excludes necessity, this being another condition peremptorily laid down by the Article.

353. A further condition that Article 25 imposes is that the State cannot invoke necessity if it has contributed to the situation giving rise to a state of necessity. This is of course the expression of a general principle of law devised to prevent a party from taking legal advantage of its own fault. In spite of the parties' respective claims that the factors precipitating the crisis were either endogenous or exogenous, the truth seems to be somewhere in the middle, with both kinds of factors having intervened. This mix has in fact come to be generally recognized by experts, officials and international agencies.

354. This means that there has to some extent been a substantial contribution of the State to the situation giving rise to the state of necessity, and that it therefore cannot be claimed that the burden falls entirely on exogenous factors. This state of affairs has not been the making of a particular administration, given that it was a problem which had been compounding its effects for a decade. Still, the State must answer for it as a whole.

355. The Tribunal must note in addition that, as held in the *Gabcikovo-Nagymaros* decision with reference to the work of the International Law Commission, the various conditions discussed above must be cumulatively met. This brings the standard governing the invocation of necessity to a still higher echelon. In the light of the various elements examined above, the Tribunal concludes that the requirements for a state of necessity under customary international law have not been fully met in this case.

[d]. *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of 3 October 2006,⁽⁸¹⁾ 61-62, 64, 67-68, 70-80 [Tatiana B. de Maekelt (pres.), Francisco Rezek, Albert Jan van den Berg]

[The three claimants, United States corporations LG&E Energy Corp, LG&E Capital Corp, and LG&E International Inc (cumulatively 'LG&E'), held shares in three Argentine gas distribution companies, which had been granted licenses for the transport and distribution of natural gas in Argentina during the privatization of the Argentine gas monopoly.

The legal and regulatory framework applicable to LG&E's investment established fixed maximum tariffs for gas transport and distribution that were to be reviewed every five years. The regulations also provided for semi-annual tariff adjustments in accordance with the United States Producer Price Index ('US PPI'), as well as the calculation of tariffs in US dollars and conversion to pesos at the

time of billing. According to the regulations, the licenses could not be rescinded or modified without the consent of the licensees. Furthermore, the Argentine peso was pegged to the US dollar by the Convertibility Law of 1991.

Within the context of the Argentine financial and economic crisis, the Argentine government and the licensees agreed in 2000 to postpone the semi-annual tariff adjustments for a limited period. On January 6, 2002, Argentina adopted the Public Emergency and Currency Exchange Law, 6 January 2002, which abrogated the Convertibility Law, switched most of the existing debts into Argentine pesos, and provided for the renegotiation of private and public agreements to adapt them to the new exchange system. All tariff adjustment clauses were abolished and the Argentine government proceeded with the mandatory renegotiation of all gas transport and distribution licenses under threat of rescission of contract.

LG&E filed a request for ICSID arbitration on December 21, 2001, contending that Argentina failed to abide by its obligations under the Argentina-U.S. BIT. Specifically, LG&E alleged that Argentina did not accord foreign investors fair and equitable treatment, and that its investment had been subject to discriminatory and arbitrary treatment because the measures adopted by Argentina particularly affected the gas distribution sector as compared to other public utilities suppliers. In the view of LG&E, Argentina also violated the umbrella clause contained in the Argentina/US BIT by not abiding by the obligations that resulted from the legal and regulatory framework applicable to investments in the gas distribution sector. Finally, LG&E argued that Argentina had indirectly expropriated its investment without compensation by substantially impairing the value of LG&E's holdings in the licensees. Accordingly, LG&E sought full compensation in addition to pre- and post-award compound interest.

Argentina objected to all of these claims. As will be discussed in the excerpt below, Argentina also argued that the circumstances of the case warranted application of the 'state of necessity' defence, thus exempting it from liability for any possible treaty violation.]

(Citations selectively omitted)

E.. STATE OF NECESSITY

1.. Parties' Positions

201. Respondent contends... that, if Argentina would have breached its Treaty obligations, the state of political, economic and social crisis that befell Argentina allowed it to take action contrary to the obligations it had assumed with respect to the gas-distribution licensees. Thus, even if the measures adopted by the State in order to overcome the economic crisis suffered during the years 1998 through 2003, resulted in a violation of the rights guaranteed under the Treaty to foreign investments, such measures were implemented under a state of necessity and therefore, Argentina is excused from liability during this period.

202. Respondent pleads its defense as a "state of necessity" defense, available under Argentine law, Treaty in Articles XI and IV(3), as well as customary international law.

203. Claimants reject Respondent's contentions regarding the alleged state of necessity defense. Claimants contend that Article XI is not applicable in the case of an economic crisis because the public order and essential security interests elements are intentionally narrow in scope, limited to security threats of a physical nature.

2.. General Comments on Article XI

(i). Preliminary Considerations

204. Article XI of the Bilateral Treaty provides:

"This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

205. The Tribunal's analysis to determine the applicability of Article XI of the Bilateral Treaty is twofold. First, the Tribunal must decide

whether the conditions that existed in Argentina during the relevant period were such that the State was entitled to invoke the protections included in Article XI of the Treaty. Second, the Tribunal must determine whether the measures implemented by Argentina were necessary to maintain public order or to protect its essential security interests, albeit in violation of the Treaty.

206. The Tribunal reiterates that to carry out the two-fold analysis already mentioned, it shall apply first, the Treaty, second, the general international law to the extent that is necessary and third, the Argentine domestic law. The Tribunal underscores that the claims and defenses mentioned derive from the Treaty and that, to the extent required for the interpretation and application of its provisions, the general international law shall be applied (See section V. B *supra*).

* * *

(iii). Necessary Nature of the Measures Adopted

* * *

b.. Tribunal's Analysis

226. In the judgment of the Tribunal, from 1 December 2001 until 26 April 2003, Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests.

227. The Tribunal does not consider that the initial date for the state of necessity is the effective date of the Emergency Law, 6 January 2002, because, in the first place, the emergency had already started when the law was enacted. Second, should the Tribunal take as the initial date the day when the Emergency Law became effective, it might be reasonable to take as its closing date the day when the state of emergency is lifted by the Argentine State, a fact that has not yet taken place since the law has been extended several times.

228. It is to be pointed out that there is a factual emergency that began on 1 December 2001 and ended on 26 April 2003, on account of the reasons detailed below, as well as a legislative emergency, that begins and ends with the enactment and abrogation of the Emergency Law, respectively. It should be borne in mind that Argentina declared its state of necessity and has extended such state until the present. Indeed, the country has issued a record number of decrees since 1901, accounting for the fact that the emergency periods in Argentina have been longer than the non-emergency periods. Emergency periods should be only strictly exceptional and should be applied exclusively when faced with extraordinary circumstances. Hence, in order to allege state of necessity as a State defense, it will be necessary to prove the existence of serious public disorders. Based on the evidence available, the Tribunal has determined that the situation ended at the time President Kirchner was elected.

229. Thus, Argentina is excused under Article XI from liability for any breaches of the Treaty between 1 December 2001 and 26 April 2003. The reasons are the following:

230. These dates coincide, on the one hand, with the Government's announcement of the measure freezing funds, which prohibited bank account owners from withdrawing more than one thousand pesos monthly and, on the other hand, with the election of President Kirchner. The Tribunal marks these dates as the beginning and end of the period of extreme crisis in view of the notorious events that occurred during this period.

231. Evidence has been put before the Tribunal that the conditions as of December 2001 constituted the highest degree of public disorder and threatened Argentina's essential security interests. This was not merely a period of "economic problems" or "business cycle fluctuation" as Claimants described (Claimants' Post-Hearing Brief, ¶ 14). Extremely severe crises in the economic, political and social sectors reached their apex and converged in December 2001, threatening total collapse of the Government and the Argentine State.

* * *

237. All of these devastating conditions – economic, political, social – in the aggregate triggered the protections afforded under Article XI of the Treaty to maintain order and control the civil unrest.

238. The Tribunal rejects the notion that Article XI is only applicable in circumstances amounting to military action and war. Certainly,

the conditions in Argentina in December 2001 called for immediate, decisive action to restore civil order and stop the economic decline. To conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. When a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion.

239. Claimants contend that the necessity defense should not be applied here because the measures implemented by Argentina were not the only means available to respond to the crisis. The Tribunal rejects this assertion. Article XI refers to situations in which a State has no choice but to act. A State may have several responses at its disposal to maintain public order or protect its essential security interests. In this sense, it is recognized that Argentina's suspension of the calculation of tariffs in U.S. dollars and the PPI adjustment of tariffs was a legitimate way of protecting its social and economic system.

240. The Tribunal has determined that Argentina's enactment of the Emergency Law was a necessary and legitimate measure on the part of the Argentine Government. Under the conditions the Government faced in December 2001, time was of the essence in crafting a response. Drafted in just six days, the Emergency Law took the swift, unilateral action against the economic crisis that was necessary at the time (Hearing on the Merits, 25 January 2005, Ratti, Spanish Transcript, pp. 415–419).

241. In drafting the Emergency Law, the Government considered the interests of the foreign investors, and concluded that it “could not leave sectors of the economy operating with the brutally dollarized economy – [the] system was in crisis, so we had to cut off that process, and we had to establish a new set of rules for everybody.” (Hearing on the Merits, 25 January 2005, Ratti, Spanish Transcript, p. 417). Argentina's strategy to deal with the thousands of public utility contracts that could not be individually assessed during the period of crisis was to implement “across-the-board solutions” and then renegotiate the contracts (Hearing on the Merits, 26 January 2005, Roubini, Spanish Transcript, p. 635). The Tribunal accepts the necessity of approaching enactment of a stop-gap measure in this manner and therefore rejects Claimants' objection that Argentina's unilateral response was not necessary.

242. The Tribunal accepts that the provisions of the Emergency Law that abrogated calculation of the tariffs in U.S. dollars and PPI adjustments, as well as freezing tariffs were necessary measures to deal with the extremely serious economic crisis...

243. The Tribunal will now turn to Article IV(3) of the Treaty, which provides:

“Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, *state of national emergency*, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.”
(Emphasis added)

244. Article IV(3) of the Treaty confirms that the States Party to the Bilateral Treaty contemplated the state of national emergency as a separate category of exceptional circumstances. That is in line with the Tribunal's interpretation of Article XI of the Treaty. Furthermore, the Tribunal has determined, as a factual matter that the grave crisis in Argentina lasted from 1 December 2001 until 26 April 2003. It has not been shown convincingly to the Tribunal that during that period the provisions of Article IV(3) of the Treaty have been violated by Argentina. On the contrary, during that period, the measures taken by Argentina were “across the board.”

245. In the previous analysis, the Tribunal has determined that the conditions in Argentina from 1 December 2001 until 26 April 2003 were such that Argentina is excused from liability for the alleged violation of its Treaty obligations due to the responsive measures it enacted. The concept of excusing a State for the responsibility for violation of its international obligations during what is called a “state of necessity” or “state of emergency” also exists in international law. While the Tribunal considers that the protections afforded by Article XI have been triggered in this case, and are sufficient to excuse Argentina's liability, the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected

in Article 25 of the ILC's Draft Articles on State Responsibility) supports the Tribunal's conclusion.

246. In international law, a state of necessity is marked by certain characteristics that must be present in order for a State to invoke this defense. As articulated by Roberto Ago, one of the mentors of the Draft Articles on State Responsibility, a state of necessity is identified by those conditions in which a State is threatened by a serious danger to its existence, to its political or economic survival, to the possibility of maintaining its essential services in operation, to the preservation of its internal peace, or to the survival of part of its territory. In other words, the State must be dealing with interests that are essential or particularly important.

247. The United Nations Organization has understood that the invocation of a state of necessity depends on the concurrent existence of three circumstances, namely: a danger to the survival of the State, and not for its interests, is necessary; that danger must not have been created by the acting State; finally, the danger should be serious and imminent, so that there are no other means of avoiding it.

248. The concept of state of necessity and the requirements for its admissibility lead to the idea of prevention: the State covers itself against the risk of suffering certain damages. Hence, the possibility of alleging the state of necessity is closely bound by the requirement that there should be a serious and imminent threat and no means to avoid it. Such circumstances, in principle, have been left to the State's subjective appreciation, a conclusion accepted by the International Law Commission. Nevertheless, the Commission was well aware of the fact that this exception, requiring admissibility, has been frequently abused by States, thus opening up a very easy opportunity to violate the international law with impunity. The Commission has set in its Draft Articles on State Responsibility very restrictive conditions to account for its admissibility, reducing such subjectivity.

249. James Crawford, who was rapporteur of the Draft Articles approved in 2001, noted that when a State invokes the state of necessity, it has full knowledge of the fact that it deliberately chooses a procedure that does not abide an international obligation. This deliberate action on the part of the State is therefore subject to the requirements of Article 25 of the Draft Articles, which must concur jointly and without which it is not possible to exclude under international law the wrongfulness of a State's act that violates an international obligation.

250. Taking each element in turn, Article 25 requires first that the act must be the only means available to the State in order to protect an interest. According to S.P. Jagota, a member of the Commission, such requirement implies that it has not been possible for the State to "avoid by any other means, even a much more onerous one that could have been adopted and maintained the respect of international obligations. The State must have exhausted all possible legal means before being forced to act as it does."...

251. The interest subject to protection also must be essential for the State. What qualifies as an "essential" interest is not limited to those interests referring to the State's existence. As evidence demonstrates, economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests. Roberto Ago has stated that essential interests include those related to "different matters such as the economy, ecology or other."...

252. James Crawford has stated that no opinion may be offered *a priori* of "essential interest," but one should understand that it is not the case of the State's "existence", since the "purpose of the positive law of self-defense is to safeguard that existence." Thus, an interest's greater or lesser essential, must be determined as a function of the set of conditions in which the State finds itself under specific situations. The requirement is to appreciate the conditions of each specific case where an interest is in play, since what is essential cannot be predetermined in the abstract.

253. The interest must be threatened by a serious and imminent danger. The threat, according to Roberto Ago, "must be 'extremely grave' and 'imminent.'" In this respect, James Crawford has opined that the danger must be established objectively and not only deemed possible. It must be imminent in the sense that it will soon occur.

254. The action taken by the State may not seriously impair another State's interest. In this respect, the Commission has observed that the interest sacrificed for the sake of necessity must be, evidently,

less important than the interest sought to be preserved through the action. The idea is to prevent against the possibility of invoking the state of necessity only for the safeguard of a non-essential interest.

255. The international obligation at issue must allow invocation of the state of necessity. The inclusion of an article authorizing the state of necessity in a Bilateral Investment Treaty constitutes the acceptance, in the relations between States, of the possibility that one of them may invoke the state of necessity.

256. The State must not have contributed to the production of the state of necessity... The Tribunal considers that, in the first place, Claimants have not proved that Argentina has contributed to cause the severe crisis faced by the country; secondly, the attitude adopted by the Argentine Government has shown a desire to slow down by all the means available the severity of the crisis.

257. The essential interests of the Argentine State were threatened in December 2001. It faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace. There is no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity. In this circumstances, an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed. It cannot be said that any other State's rights were seriously impaired by the measures taken by Argentina during the crisis. Finally, as addressed above, Article XI of the Treaty exempts Argentina of responsibility for measures enacted during the state of necessity.

258. While this analysis concerning Article 25 of the Draft Articles on State Responsibility alone does not establish Argentina's defense, it supports the Tribunal's analysis with regard to the meaning of Article XI's requirement that the measures implemented by Argentina had to have been necessary either for the maintenance of public order or the protection of its own essential security interests.

* * *

261. Following this interpretation the Tribunal considers that Article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability. This exception is appropriate only in emergency situations; and once the situation has been overcome, i.e. certain degree of stability has been recovered; the State is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately.

(iv). Consequences of the State of Necessity

262. Three relevant issues arise with respect to the Tribunal's finding Argentina is entitled to invoke the state of necessity as contemplated by Article XI, and general international law.

263. The first issue deals with the determination of the period during which the state of necessity occurred. As previously indicated, in the view of the Tribunal, the state of necessity in this case began on 1 December 2001 and ended on 26 April 2003, when President Kirchner was elected (see the Tribunal's Analysis). All measures adopted by Argentina in breach of the Treaty before and after the period during which the state of necessity prevailed, shall have all their effects and shall be taken into account by the Tribunal to estimate the damages.

264. The second issue related to the effects of the state of necessity is to determine the subject upon which the consequences of the measures adopted by the host State during the state of necessity shall fall. As established in the Tribunal's Analysis, Article 27 of ILC's Draft Articles, as well as Article XI of the Treaty, does not specify if any compensation is payable to the party affected by losses during the state of necessity. Nevertheless, and in accordance with that expressed under paragraphs 260 and 261 *supra*, this Tribunal has decided that the damages suffered during the state of necessity should be borne by the investor.

265. The third issue is related to what Argentina should have done, once the state of necessity was over on 26 April 2003. The very following day (27 April), Argentina's obligations were once again effective. Therefore, Respondent should have reestablished the tariff scheme offered to LG&E or, at least, it should have compensated

Claimants for the losses incurred on account of the measures adopted before and after the state of necessity.

(v). Conclusions of the Tribunal

266. Based on the analysis of the state of necessity, the Tribunal concludes that, first, said state started on 1 December 2001 and ended on 26 April 2003; second, during that period Argentina is exempt of responsibility, and accordingly, the Claimants should bear the consequences of the measures taken by the host State; and finally, the Respondent should have restored the tariff regime on 27 April 2003, or should have compensated the Claimants, which did not occur. As a result, Argentina is liable as from that date to Claimants for damages.

[5]. Implied Termination or Waiver

[a]. *Mobil Oil Iran Inc., et al. v. Government of the Islamic Republic of Iran, et al.* (IUSCT Case Nos. 74, 76, 81, 150), Award No. 311-74/76/81/150-3 of 14 July 1987⁽⁸²⁾ [Michel Virally (pres.), Charles N. Brower, Parviz Ansari Moin]

[See *supra* p. 624.]

[6]. Changed Circumstances

One common reason for arguments based on internationalization of contracts is to seek to avoid governmental action by the state party, constitutional or lawful under its own law, which abrogate or vary the contract. In this context, reliance is often placed on doctrines such as fundamental change of circumstances or frustration to justify such changes; alternatively it is argued that the narrow limits placed on these doctrines (e.g. the rule against self-induced frustration) operate to invalidate the state action complained of.

[a]. *Mobil Oil Iran Inc., et al. v. Government of the Islamic Republic of Iran, et al.* (IUSCT Case Nos. 74, 76, 81, 150), Award No. 311-74/76/81/150-3 of 14 July 1987⁽⁸³⁾ [Michel Virally (pres.), Charles N. Brower, Parviz Ansari Moin]

[For summary of facts, see *supra* p. 624.]

119. In the instant Cases, the concept of “changed circumstances,” in so far as it can be distinguished from *force majeure*, can refer only to the dramatic political changes brought about in Iran by the success of the Islamic Revolution and the decision of the Islamic Government to follow a policy radically different from that of the previous Government in the oil industry. Changes of such a character and magnitude could not be without consequences to the contractual relationship between Iran and the Consortium. By themselves, however, they could not have had any effect on the validity of the Agreement before materializing in specific measures. As a matter of fact, the 10 March 1979 letter was the first expression of such a new policy in relation to the Agreement.

[b]. *Phillips Petroleum Company Iran v. The Islamic Republic of Iran and The National Iranian Oil Company* (IUSCT Case No. 39), Award No. 425-39-2 of 29 June 1989⁽⁸⁴⁾ [Robert Briner (pres.), Seyed K. Khalilian, George H. Aldrich]

[See *supra* p. 621.]

§8.03. DISCRIMINATORY CONDUCT: WHAT IS THE CUSTOMARY INTERNATIONAL LAW STANDARD?

Despite the characteristic of generality of law, governmental measures frequently differentiate between different actors. The challenge for international investment tribunals is determining when lawful differential treatment constitutes unlawful discrimination.

[A]. *BP Exploration Company (Libya) Limited v. The Government of the Libyan Arab Republic*, Award of 10 October 1973 and 1 August 1974, 53 *Int'l L. Rep.* 297, 329, 346-348, 353-354 (1979)⁽⁸⁵⁾ [Gunnar Lagergren (sole arbitrator)]

[In December 1957, the Government of Libya granted a concession for oil exploration to Mr. Hunt, who subsequently sold 50% of it to British Petroleum Exploration Company (Libya) Limited. On December 7, 1971, the Government passed a law nationalizing

rights to the concession. It said that the nationalization was in retaliation for Iranian occupation of three islands, which were regarded as Arab. This event was blamed by several Arab states, including Libya, on Great Britain as the islands were still technically under British protection and the British Government did not react to the occupation. On December 11, the company initiated arbitration proceedings against Libya, contending that the nationalization amounted to a unilateral and unacceptable repudiation of the concession. The Tribunal held that the nationalization law was a breach of the concession, for which the company was entitled to damages, but not to restoration of its rights under the concession. The excerpt below addresses remedies for breach of contract available under public international law.]

(Citations selectively omitted)

... The BP Nationalisation Law, and the actions taken thereunder by the Respondent, do constitute a fundamental breach of the BP Concession as they amount to a total repudiation of the agreement and the obligations of the Respondent thereunder, and, on the basis of rules of applicable systems of law too elementary and voluminous to require or permit citation, the Tribunal so holds. Further, the taking by the Respondent of the property, rights, and interests of the Claimant clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character. Nearly two years have now passed since the nationalisation, and the fact that no offer of compensation has been made indicates that the taking was also confiscatory.

The Tribunal concludes, on the basis of the material considered in paragraphs (ii) and (iii) above, that it is arguable that when an international contractual obligation is unlawfully abrogated by one party, the other party may regard the agreement as still existing until it elects, within a reasonable time, to terminate it, and that such innocent party further, during the intervening period, may suspend its performance thereunder. However, the stated principle of the continuing validity of the agreement rests only on a basis of extreme generality and has never been fully considered in the context of facts such as those which are at issue here where one party is a sovereign State.

The important question is what remedies would be available to the party claiming the continuance of the agreement.

In considering this question, it is appropriate to refer initially to the following cautious statement in Oppenheim-Lauterpacht:

The principle legal consequences of an international delinquency are reparation of the moral and material wrong done. The merits and the conditions of the special cases are, however, so different that it is impossible for the Law of Nations to prescribe once and for all what legal consequences an international delinquency should have. The only rule which is unanimously recognised by theory and practice is that out of an international delinquency arises a right for the wronged State to request from the delinquent State the performance of such acts as are necessary for reparation of the wrong done. What kind of acts these are depends upon the merits of the case.
(Oppenheim-Lauterpacht, *International Law*, Vol. I, Eighth Edition, 1963, § 156.)

The survey of cases and other relevant materials presented above demonstrates that there is no explicit support for the proposition that specific performance, and even less so *restitutio in integrum*, are remedies of public international law available at the option of a party suffering a wrongful breach by a co-contracting party. An analysis of the cases shows instead that while declaratory awards have often been made in terms of defining the rights and obligations of parties to a concession contract, these cases never involved the total expropriation or taking by the State of the property, rights and interests of the concessionaire; and indeed in the most important of the cases the validity and continued existence of the contract has not been questioned. The case analysis also demonstrates that the responsibility incurred by the defaulting party for breach of an obligation to perform a contractual undertaking is a duty to pay damages, and that the concept of *restitutio in integrum* has been employed merely as a vehicle for establishing the amount of damages. This becomes nowhere more apparent than in certain remarks on the concept made in 1927 by the late Sir Hersch Lauterpacht:

A problem of a similar kind is involved in the question as to how far the general principles of private law, that in awarding damages *restitutio in integrum* should, as

a rule, be aimed at, applies in cases when damages are to be awarded under international law. That principle means that the injured person is placed in the position he occupied before the occurrence of the injurious act or omission; it means that, to use the Roman law terminology, not only the *damnum emergens*, but also *lucrum cessans* is taken into consideration. (Lauterpacht, *Private Law Sources and Analogies of International Law*, 1929, p. 147.)

Hence *restitutio in integrum* is not to be understood in its literal sense of being a remedy for physical reinstatement of a concessionaire party into a position from which it has been effectively and definitively removed by the other, sovereign party.

* * *

The real issues of substance which require a resolution by the Tribunal are novel in character and scope in that they have not previously been scrutinised judicially. While certain trends in the law are discernible, there are no precise and clear rules that provide an obvious answer to any of the issues. The facts must be appraised and the law interpreted and applied in a balanced consideration of the intrinsic merits of the case and the *de facto* position of the Parties.

An expropriation, nationalisation or taking, if and when implemented in full, is an act of finality where a State has exercised its sovereign territorial power to expel a foreign enterprise and appropriate its property and other rights. No State has ever reversed such an action by granting *restitutio in integrum*, and it is unlikely that any State exercising diplomatic protection of its nationals will demand such a reversal without offering or eventually accepting the alternative remedy, exercisable at the option of the defaulting State, of reparation in the form of monetary compensation. It has rarely been suggested that the subject-matter in dispute is not property, rights and interests of a purely economic nature on which, thus, a financial value can be put. It has only been argued doctrinally that, where damages are not an adequate remedy (meaning where the State demonstrably is insolvent or incapable of discharging its proper obligations), *restitutio in integrum* should be considered.

* * *

A rule of reason therefore dictates a result which conforms...to international law, as evidenced by State practice and the law of treaties. This is that, when by the exercise of sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalisation of the enterprise and its assets in a manner which implies finality, the concessionaire is not entitled to call for specific performance by the Government of the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages.

[B]. A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. Transnat'l L. & Pol'y 57-59, 67-70 (1998)⁽⁸⁶⁾

(Citations selectively omitted)

The principle of non-discrimination is recognized in international customary practice, as part of general international law, judicial decisions, and treaty law. Furthermore, a great majority of jurists have supported the principle as a yardstick of the legality of various state actions. Thus, no one doubts that in customary international law the principle is now firmly established. This explains the principle's relevance and application in the context of General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources and the 1974 Declaration on Economic Rights and Duties of States, even though neither mentions the principle. The principle of nondiscrimination is not only relevant in the field of foreign investment, which is the main concern of the present article, but also in various other areas such as human rights and international trade. Although a plethora of writings on the subject concern those matters, there is surprisingly little focus on it in the context of foreign investment, except cursory views in the concerned literature. The gravity of the principle in the corpus of international law cannot simply be ignored. Professor Brownlie notes that "the relevance of the principle is considerable." Some jurists have not even hesitated to consider it a matter of *jus cogens*. But a controversy arises as to the meaning and scope of the principle. Different meanings are often attributed to it as a result of the different angles from which one can consider the matter; thus the issue is a contentious one. The principal arguments surround the

rationalization of the principle of nondiscrimination, i.e. non-violation of the principle. A clear understanding of the concept is very important in the context of both customary and conventional international law. Non-discrimination has been employed in most recent multilateral instruments such as the North American Free Trade Agreement (NAFTA), the Energy Charter Treaty, and the Organization for Economic Co-operation and Development (OECD) Draft Multilateral Agreement on Investment, and there is no doubt that the principle of alien non-discrimination will be subject to interpretation in various contexts. Thus, the concept itself merits clarification in the context of both general and conventional international law. The purpose of this brief study is to explore the meaning of the concept in international law of foreign investment in the light of juristic views, arbitral and judicial interpretations, and state practice.

In international law the principle of equality (or equality of treatment) is often expressed in the negative form as one of nondiscrimination. The simple meaning of the concept as 'absence of discrimination' is quite elusive in both international and municipal. The concept of discrimination entails two elements: first, the measures directed against a particular party must be for reasons unrelated to the substance of the matter, for example, the company's nationality. Second, discrimination entails like persons being treated in an inequivalent manner. In its literal or formal sense, the principle of non-discrimination may be described, according to Foighel, that: "the rules of international law against discrimination can be considered to be satisfied when foreigners are given *formal equality with the nationals of the country in question in respect of protection in similar situations.*"

* * *

Recent developments suggest that the presence of discrimination should be determined by evaluating the individual factual circumstances of each particular case. Thus, the legal notion of discrimination is more contextual than hypothetical. Professor Brownlie has suggested that the concept "calls for more sophisticated treatment in order to identify unreasonable (or material) discrimination as distinct from the different treatment of non-comparable situations." In the Third Restatement of the Foreign Relations Law of the United States, the American Law Institute has neatly summarized the position thus:

Discrimination implies unreasonable distinction. Takings that invidiously single out property of persons of a particular nationality, would be unreasonable; classifications, even if based on nationality, that are rationally related to the State's security or economic policies might not be unreasonable...

It must be acknowledged that in all the above cases, the crucial test is whether the concerned State acts in good faith. This good faith criterion is implicit in one writer's objective formulation that "[d]istinctions are reasonable if they pursue a legitimate aim and have an objective justification, and a reasonable relationship of proportionality exists between the aim sought to be realised and the means employed".

* * *

Thus, it seems as appropriate to apply the international law principles of good faith and abuse of rights in determining the legality of discrimination in the matter of expropriation of alien property as in any other field. Although both the principles are subjective, their objective application to concrete factual circumstances may prove simple in determining the reasonableness or unreasonableness of discrimination and hence the legality or illegality of it. Discrimination purely based on racial hatred is unjustifiable. However, discrimination on the basis of race or ethnic origin may sometimes be tolerable on justifiable grounds. It is crucial that discriminatory acts be actionable, both those that are intentionally discriminatory and those discriminatory in effect...

Unreasonable, arbitrary, or invidious distinctions are undoubtedly prohibited by international law, and are actionable. The State's exercise of sovereign authority is subject to the restrictions imposed by international law such as the principle of non-discrimination... As indicated earlier, the principle of permanent sovereignty over natural resources cannot shield a State's wrongful acts.

Having thus examined the principle of non-discrimination in customary international law, it is necessary to address it in the context of conventional international law, where the concept has a wider connotation. One writer has coined the phrase 'non-discrimination *lato sensu*' to refer to the "lack of discrimination both among aliens and foreign countries and products, and between

aliens and nationals (and corresponding products).” Thus the concept in its wider sense encompasses “most-favoured-nation (MFN) treatment” as well as “national treatment.” However, both standards are treaty-made and neither is recognized as part of customary international law... The contents and scope of both are determined by treaties and by their Contracting Parties’ reservations and exceptions applicable in their respective cases.... In various nonbinding Declarations and Guidelines the modalities of the applications of these standards are also prescribed. The common basic feature of both these concepts is equality of treatment or, in another word, non-discrimination. As opposed to customary international law, these treaty-made standards provide the contour of the principle of non-discrimination or equality of treatment in specific cases concerned. In this sense the treaty-made standards are more concrete than abstract; the reverse is often true in customary international law. However, in the context of such treaty-made standards various issues may still arise...

[C]. Comments and Questions

1. Recent ICSID cases have held that there is no general obligation under customary international law to treat all aliens equally or as favorably as nationals. In *Genin and ors v. Estonia*, ICSID Case No. ARB 99/2, IIC 10 (2001), the Tribunal noted that “international law generally requires that a state should refrain from ‘discriminatory’ treatment of aliens and alien property.” But it also asserted that “[c]ustomary international law does not... require that a state treat all aliens (and alien property) equally, or that it treat aliens as favourably as nationals;” “even unjustifiable differentiation may not be actionable.” In *C. Grand River Enterprises Six Nations Ltd and ors v. United States* (ICSID Case No. ARB/10/5), IIC 481 (2011), the Tribunal asserted, “The language of [NAFTA] Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors’ investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection.” Although not all types of differential and discriminatory treatment are actionable under customary international law, most BITs offer specific standards of non-discrimination.
2. In determining whether discriminatory treatment has occurred, tribunals tend to “favor an objective approach that looks at the discriminatory consequences of a particular measure” over “an intention to discriminate.” Christoph H. Schreuer, *Protection against Arbitrary or Discriminatory Measures*, in *The Future of Investment Arbitration* 183, 196-98 (C. A. Rogers & R.P. Alford eds, 2009); see *Eastern Sugar v. Czech Republic* (SCC Case No. 088/2004), IIC 310 (2007); *Siemens A.G. v. The Argentine Republic Award* (ICSID Case No. ARB/02/8), IIC 227 (2007). But see *LG&E v. Argentina* (ICSID ARB/02/1), Decision on Liability (3 October 2006), 46 ILM 36 (2007) (holding that “a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect”).

§8.04. ARBITRARY CONDUCT

Arbitrary conduct, which has been described by the ICJ in *Eletronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* at para 128 as “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety”, may give rise to a violation of customary intentional law.

[A]. Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens – Measures Affecting Acquired Rights: Fourth Report by F. V. García Amador, [1959] 2 Y.B. Int’l L. Comm’n 1, 7-9, U.N. Doc. A/CN.4/119

(Citations selectively omitted)

23. “Wrongful” acts or omissions are those which result from the non-performance by the State of any conventional obligation undertaken by it with respect the patrimonial rights of aliens. The origin or source of this obligation, which imposes a specific standard of conduct, may be a treaty with the State of which the alien is a national or a contractual relation with the alien himself, provided in the latter case that the obligation is genuinely “international” in character. The juridical consequences of non-performance of such an obligation are obvious: as the wrong is “intrinsically” contrary to international law, it not only directly and immediately involves the

responsibility of the State but also imposes on the State the "duty to make reparation" *stricto sensu*, that is to say, the reparation must take the form of restitution in kind or, if restitution is impossible or would not constitute adequate reparation for the injury, of pecuniary damages...

24. "Arbitrary" acts or omissions, on the other hand, although they also involve conduct on the part of the State that is contrary to international law, occur in connexion with acts that are intrinsically "legal". In the various cases of international responsibility examined in this report, the State is in fact exercising a right – the right to "affect" the patrimonial rights of individuals for various reasons and purposes and in various ways – and responsibility will therefore be incurred only if the right is exercised in conditions or circumstances which involve an act or omission contrary to international law. The position is not the same as in the case of "wrongful" acts or omissions, for simple "violation" of the principle of respect for acquired rights does not involve the international responsibility of the State. International responsibility exists and is imputable only if the State's conduct in the exercise of the right in question can be shown to have been "arbitrary". Consequently, in view of the intrinsic legitimacy of the measure "affecting" the alien's rights, any "arbitrary" acts or omissions imputable to the State cannot be regarded as having the same juridical consequences as acts that are merely "wrongful". It will be seen later that international responsibility in such cases cannot and should not imply a "duty to make reparation" *stricto sensu*.

25. The distinction between "wrongful" and "arbitrary" acts or omissions was explicitly recognized by the Permanent Court of International Justice in connexion with expropriations... and it has also been generally recognized in diplomatic practice, international case-law and the writings of publicists concerning State responsibility for the non-performance of obligations stipulated in contracts with aliens. It should be noted that the notion of "arbitrariness" is fully in conformity with the essential idea animating the present system for the international protection of "human rights and fundamental freedoms". The Universal Declaration of Human Rights (article 17, para. 2) states that "No one shall be arbitrarily deprived of his property". The use of the word "arbitrarily" is not accidental but reflects an intention to subordinate to specific conditions the exercise of the State's rights with regard to private property. As the legislative history of article 17 of the Declaration shows, the discussion centred on the problem of determining these conditions or of defining the scope of the word "arbitrarily". In this connexion, reference may appropriately be made to article 1 of the Protocol to the European Convention on Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952, which reads: "... No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." Although not completely precise, this article is much more explicit with regard to the conditions governing the exercise of the State's competence.

26. What are the component elements of the notion of "arbitrariness"? In other words, on the basis of what rule or rules is it possible to decide when an act or omission is "arbitrary"? It is necessary first to distinguish between those criteria which are generally applicable and those applicable only to specific acts or omissions. It is, of course, impossible to discuss the latter in this context; and attention will therefore be directed to the criteria which are *grosso modo* applicable to any situation that may arise. The first of these criteria relates to the motives and purposes of the State's action... In principle at least, the question is of interest to international law and it is, therefore, within the province of international law to determine the motives or purposes that may justify the State's action or, in any event, to prescribe those which cannot justify it. Another generally applicable criterion relates to the method and procedure followed by the State authorities. Although the State's freedom of action is much greater in this respect than it is with regard to the grounds and purposes of the measure taken, this question also undeniably falls within the province of international law. The question that must be answered is whether an act or omission constituting a "denial of justice" is imputable to the State. In such case, as in the case of a measure which cannot be justified on grounds of genuine public interest, the "arbitrary" nature of the act or omission would be evident.

27. The third and last of the generally applicable criteria, and in a sense the most important, relates to discrimination between nationals and aliens. The traditional view in this matter has been that, as in the case of other acts or omissions injuring aliens, the State is responsible if its conduct is not in conformity with the "international standard of justice", even if it has applied the same measure to its nationals. In effect, it was argued that in this matter

also aliens should receive preferential treatment. Apart from the fact that this view has much less justification in the matter of patrimonial rights than in the case of rights inherent in the human person, the problem can no longer be posed in terms of the “minimum standard”. As has more than once been pointed out in the Special Rapporteur’s earlier reports, in giving recognition to human rights and fundamental freedoms contemporary international law makes no distinction between nationals and aliens and necessarily implies a regime of “equality” in the use and enjoyment of such rights and freedoms. Thus, in so far as concerns the notion of “arbitrariness”, the alien is entitled only to claim that the State should not discriminate against him in taking or applying the measure in question, and that the measure should not have been taken solely by reason of his status as an alien.

28. The foregoing considerations emphasize the importance of the “doctrine of abuse of rights” in this area of international responsibility. As was pointed out in the Special Rapporteur’s earlier reports, international responsibility is generally regarded as a consequence of “non-fulfilment or non-performance of an international obligation”. Nevertheless, both in the writings of publicists and in diplomatic and legal practice it has been recognized that international responsibility may also be incurred if a State causes injury through the “abusive” exercise of a right; that is to say, if it ignores the limitations to which State competence is necessarily subject and which are not always formulated in exactly defined and specific international obligations. It is not difficult to understand why it was recently said that “the *arbitrary exercise* of State competences and the use of juridical institutions for purposes alien to them are in fact *abuses of rights*”.

29. The notion of “arbitrary action” is in fact so closely linked to the doctrine of “abuse of rights” as to be largely coterminous in practice. The acts or omissions in which international responsibility may originate in the cases with which the present report is concerned occur in connexion with the exercise of rights of the State. It is for this reason that it is necessary to invoke the limitations placed by international law on the exercise of State competence in this matter. This is not the case if there exist international obligations the non-performance or non-fulfilment of which result in “wrongful” acts giving rise to direct and immediate responsibility on the part of the State. It is, however, necessary in all other cases, since the act or omission imputable to the State is related to an intrinsically lawful action. It is recognized that this view diverges from the traditional approach in that it chars as merely “arbitrary” acts and omissions – like the denial of justice – have always been considered to be “wrongful” and as such to give rise the “duty to make reparation”. Nevertheless, no other course would seem possible if it is desired to work out a system consistent with the special character of the cases of international responsibility with which this report is concerned.

[B]. *Glamis Gold, Ltd. v. United States of America (ad hoc arbitration under the 1976 UNCITRAL Rules), Award of 8 June 2009*⁶⁷⁾ [Michael K. Young, (pres.), David D. Caron, Kenneth D. Hubbard]

[Glamis Gold Ltd., a publicly-held Canadian corporation engaged in the mining of precious metals, claimed that the United States wrongfully delayed approval of its open-pit gold mining project in California. It also alleged that when federal approval seemed likely, the state of California rendered the project economically unfeasible by introducing a mandatory backfilling requirement to protect sacred Native American sites in the area. Glamis submitted a claim to arbitration under the UNCITRAL Arbitration Rules, arguing that the federal and state governments’ actions denied its investments the minimum standard of treatment under international law in violation of NAFTA Article 1105 and resulted in the expropriation of its investments in violation of Article 1110. The Tribunal ultimately dismissed Glamis’ claims in their entirety. The excerpt below is the Tribunal’s analysis of the Claimant’s argument that a host state has an obligation under Article 1105 to provide protection from arbitrary measures.]

(Citations selectively omitted)

623. With respect to the asserted duty to protect investors from arbitrariness, the Tribunal notes Claimant’s citations to several NAFTA arbitrations that have found a violation of Article 1105 in arbitrary state action. Claimant cites to *S.D. Myers* for its holding that “a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust and arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.” Similarly, it quotes *International Thunderbird’s* holding that “manifest arbitrariness falling below acceptable international standards” is prohibited under Article 1105.

624. The Tribunal also notes, however, Respondent's argument that no Chapter 11 tribunal has found that decision-making that appears arbitrary to some parties is sufficient to constitute an Article 1105 violation. In *Mondev*, for instance, the tribunal held: "The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome...."

Respondent understands this to be the case because tribunals consistently afford administrative decision-making a high level of deference. Respondent quotes *S.D. Myers* to illustrate this deference: "determination [that Article 1105 has been breached] must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders." This, Respondent argues, leads to the result that merely imperfect legislation or regulation does not give rise to State responsibility under customary international law.

625. The Tribunal finds that, in this situation, both Parties are correct. Previous tribunals have indeed found a certain level of arbitrariness to violate the obligations of a State under the fair and equitable treatment standard. Indeed, arbitrariness that contravenes *the* rule of law, rather than *a* rule of law, would occasion surprise not only from investors, but also from tribunals. This is not a mere appearance of arbitrariness, however – a tribunal's determination that an agency acted in a way with which the tribunal disagrees or that a state passed legislation that the tribunal does not find curative of all of the ills presented; rather, this is a level of arbitrariness that, as *International Thunderbird* put it, amounts to a "gross denial of justice or manifest arbitrariness falling below acceptable international standards."

626. The Tribunal therefore holds that there is an obligation of each of the NAFTA State Parties inherent in the fair and equitable treatment standard of Article 1105 that they do not treat investors of another State in a *manifestly* arbitrary manner. The Tribunal thus determines that Claimant has sufficiently substantiated its arguments that a duty to protect investors from arbitrary measures exists in the customary international law minimum standard of treatment of aliens; though Claimant has not sufficiently rebutted Respondent's assertions that a finding of arbitrariness requires a determination of some act far beyond the measure's mere illegality, an act so manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective.

* * *

627. The Tribunal holds that Claimant has not met its burden of proving that something other than the fundamentals of the *Neer* standard apply today. The Tribunal therefore holds that a violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105. Such a breach may be exhibited by a "gross denial of justice or manifest arbitrariness falling below acceptable international standards;" or the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations. The Tribunal emphasizes that, although bad faith may often be present in such a determination and its presence certainly will be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1).

* * *

828. Thus addressing the record as a whole, the Tribunal holds that Claimant has not established that the acts complained of fall short of the customary international law minimum standard of treatment. The complained-of acts were not egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons. There was no specific inducement of Claimant's expectations. There was no causal focus on the nationality of the investor. There was no corruption exhibited at any level of government. The Imperial Project, although certainly highlighted as a triggering event for some of the measures, was not the subject of discriminatory targeting.

829. There is simply not the egregiousness necessary to breach the fair and equitable treatment standard of Article 1105 as it currently stands. The State Parties to the NAFTA can always choose to negotiate a higher standard against which their behavior will be judged. It is very clear, however, that they have not yet done so and therefore a breach of Article 1105 still requires acts that exhibit a

high level of shock, arbitrariness, unfairness or discrimination.

[C]. Comments and Questions

1. For further discussion on the relationship between unreasonable/arbitrary measures and customary international law, see Christoph H. Schreuer, *Protection Against Arbitrary or Discriminatory Measures*, in *The Future of Investment Arbitration* 183, 188-89 (C. A. Rogers & R.P. Alford eds, 2009).
2. See also "'Case Specific Mandates' versus 'Systemic Implications': How Should Investment Tribunals Decide?: The Freshfields Arbitration Lecture," in *29:2 Arbitration International*, p. 131-152 (2013).

§8.05. DENIAL OF JUSTICE

Under customary international law, states may be held liable for failing to provide foreign investors with due process and recourse to fair and reasonably efficient trials.

[A]. *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003⁽⁸⁸⁾ [Anthony Mason (pres.), Abner J. Mikva, Michael Mustill]

[This dispute arose of litigation brought against the Loewen Group and its American subsidiary, Loewen Group International, in a Mississippi state court by Jeremiah O'Keefe Sr. and his family who owned a number of companies. Both parties were competitors in the funeral home and funeral insurance business in Mississippi. O'Keefe sued Loewen on various charges relating to three contracts between the parties valued by O'Keefe at around \$980,000 and an exchange of two O'Keefe funeral homes, valued at \$2.5 million, for a Loewen insurance company, valued at \$4 million. The jury awarded O'Keefe \$500 million damages, including \$75 million for emotional distress and \$400 million punitive damages. To appeal the verdict, Loewen was required to post bond for 125% of the judgment in order, as the court refused to reduce the bond for "good cause." Loewen initiated arbitration proceedings under NAFTA. One of its claims, which the tribunal discussed in the excerpt below, was a denial of justice under NAFTA Article 1105. The tribunal eventually dismissed the case for lack of jurisdiction, since there was no longer diversity of citizenship and since Loewen had not exhausted local remedies.]

(Citations selectively omitted)

123. ... [W]e take it to be the responsibility of the State under international law and, consequently, of the courts of a State, to provide a fair trial of a case to which a foreign investor is a party. It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice. In the United States and in other jurisdictions, advocacy which tends to create an atmosphere of hostility to a party because it appeals to sectional or local prejudice, has been consistently condemned and is a ground for holding that there has been a mistrial, at least where the conduct amounts to an irreparable injustice (*New York Central R.R. Co. v Johnson* 279 US 310, 319 (1929); *Le Blanc v American Honda Motor Co. Inc.* 688 A 2d 556, 559). In *Walt Disney World Co. v Blalock* 640 So 2d 1156, 1158, a new trial was ordered where closing argument was pervaded with inflammatory comment and personal opinion of counsel, although the offensive comments were not objected to... In such circumstances the trial judge comes under an affirmative duty to prevent improper tactics which will result in an unfair trial (*Pappas v Middle Earth Condominium Association* 963 F 2d 534 539, 540; *Koufakis v Carvel* 425 F 2d 892, 900).

* * *

124. Article 1105 which is headed "Minimum Standard of Treatment" provides:

"1. Each party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

The precise content of this provision, particularly the meaning of the reference to "international law" and the effect of the inclusory clause has been the subject of controversy.

125. On July 31, 2001, the Free Trade Commission adopted an interpretation of Article 1105(1). The Commission's interpretation is

in these terms:

“Minimum Standard of Treatment in Accordance with International Law

(1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

(2) The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

(3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”

126. An interpretation issued by the Commission is binding on the Tribunal by virtue of Article 1131(2).

127. Although Claimants, in their written materials, submitted that the Commission's interpretation adopted on July 31, 2001 went beyond interpretation and amounted to an unauthorized amendment to NAFTA, Claimants did not maintain that submission at the oral hearing. The oral argument presented by Mr Cowper QC on behalf of Claimants was consistent with the Commission's interpretation of Article 1105(1). Mr Cowper QC submitted that, accepting that Article 1105(1) prescribes the customary international law standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of an investor of another Party, the treatment of Loewen by the Mississippi courts violated that minimum standard.

128. The effect of the Commission's interpretation is that “fair and equitable treatment” and “full protection and security” are not free-standing obligations. They constitute obligations only to the extent that they are recognized by customary international law. Likewise, a breach of Article 1105(1) is not established by a breach of another provision of NAFTA. To the extent, if at all, that NAFTA Tribunals in *Metalclad Corp v United Mexican States* ICSID Case No. ARB(AF)/97/1 (Aug 30, 2000), *S.D. Myers, Inc. v Government of Canada* (Nov 13, 2000) and *Pope & Talbot, Inc. v Canada*, Award on the Merits, Phase 2, (Apr 10, 2001) may have expressed contrary views, those views must be disregarded.

129. It is not in dispute between the parties that customary international law is concerned with denials of justice in litigation between private parties. Indeed, Respondent's expert, Professor Greenwood QC, acknowledges that customary international law imposes on States an obligation “to maintain and make available to aliens, a fair and effective system of justice” (Second Opinion, para. 79).

130. Respondent submits that, in conformity with the accepted standards of customary international law, it is for Loewen to establish that the decisions of the Mississippi courts constituted a manifest injustice. Professor Greenwood states in his Second Opinion:

“the awards and texts make clear that error on the part of the national court is not enough, what is required is “manifest injustice” or “gross unfairness” (Garnier, “International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice”, 10 BYIL (1929), p 181 at p 183), “flagrant and inexcusable violation” (Arechaga, [“International Law in the Past Third of a Century”, 159 “Recueil des Cours” (1978) at p 282]) or “palpable violation” in which “bad faith not judicial error seems to be the heart of the matter” (O'Connell, *International Law*, 2nd ed, 1970) p 498). As Baxter and Sohn put it (in the Commentary to their Draft Convention on the Responsibility of States for Injuries to Aliens) “the alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice”.

131. In *Pope & Talbot Inc. v Canada*, Award in respect of damages, May 31, 2002 a NAFTA Tribunal considered the effect of the Interpretation of July 31, 2001. The Tribunal concluded (para. 62 of its Award) that the content of custom in international law is now represented by more than 1800 bilateral investment treaties which have been negotiated. Nevertheless the Tribunal did not find it necessary to go beyond the formulation by the International Court of

“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law... It is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety.”

132. Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms.

133. In the words of the NAFTA Tribunal in *Mondev International Ltd v United States of America* ICSID Case No. ARB (AF)/99/2, Award dated October 11, 2002,

“the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to ‘unfair and inequitable treatment’.”

134. If that question be answered in the affirmative, then a breach of Article 1105 is established. Whether the conduct of the trial amounted to a breach of municipal law as well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against the decisions of municipal courts.

135. International law does, however, attach special importance to discriminatory violations of municipal law (Harvard Law School, Research in International Law, Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Persons or Property of Foreigners (“1929 Draft Convention”) 23 American Journal of International Law 133, 174 (Special Supp. 1929) (“a judgment [which] is manifestly unjust, especially if it has been inspired by ill-will towards foreigners as such or as citizens of a particular states”); Adede, A Fresh Look at the Meaning of Denial of Justice under International Law, XIV Can YB International Law 91 (“a... decision which is clearly at variance with the law and discriminatory cannot be allowed to establish legal obligations for the alien litigant”). A decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.

136. In the present case, the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant.

137. In the light of the conclusions reached in paras. 119-123 (inclusive) and 136, the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment. However, because the trial court proceedings are only part of the judicial process that is available to the parties, the rest of the process, and its availability to Loewen, must be examined before a violation of Article 1105 is established. We address this question in paras. 142-157 (inclusive), 165-171 (inclusive) and 207-217 (inclusive).

* * *

241. We think it right to add one final word. A reader following our account of the injustices which were suffered by Loewen and Mr. Raymond Loewen in the Courts of Mississippi could well be troubled to find that they emerge from the present long and costly proceedings with no remedy at all. After all, we have held that judicial wrongs may in principle be brought home to the State Party under Chapter Eleven, and have criticised the Mississippi proceedings in the strongest terms. There was unfairness here towards the foreign investor. Why not use the weapons at hand to put it right? What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?

242. This human reaction has been present in our minds throughout but we must be on guard against allowing it to control our decision. Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of

every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort...

[B]. *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002⁽⁸⁹⁾ [Ninian Stephen (pres.), James Crawford, Stephen M. Schwebel]

(Citations selectively omitted)

1. This dispute arises out of a commercial real estate development contract concluded in December 1978 between the City of Boston ("the City"), the Boston Redevelopment Authority ("BRA") and Lafayette Place Associates ("LPA"), a Massachusetts limited partnership owned by Mondev International Ltd., a company incorporated under the laws of Canada ("Mondev" or "the Claimant"). In 1992, LPA filed a suit in the Massachusetts Superior Court against the City and BRA. The trial was held in 1994 and culminated in a jury verdict in favour of LPA against both defendants. The trial judge upheld the jury's verdict for breach of the Tripartite Agreement against the City, but rendered a judgment notwithstanding the verdict in respect of BRA, holding BRA immune from liability for interference with contractual relations by reason of a Massachusetts statute giving BRA immunity from suit for intentional torts. Both the City and LPA appealed. The Massachusetts Supreme Judicial Court ("SJC") affirmed the trial judge's decision in respect of BRA but upheld the City's appeal in respect of the contract claim. LPA petitioned for rehearing before the SJC on both claims, and sought *certiorari* to the United States Supreme Court in respect of its contract claim against the City. Each of these petitions was denied. In the event, therefore, LPA eventually lost both its claims.

2. Mondev subsequently brought a claim pursuant to Article 1116 of the North American Free Trade Agreement ("NAFTA") and the Additional Facility Rules of the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") on its own behalf for loss and damage caused to its interests in LPA. Mondev claims that due to the SJC's decision and the acts of the City and BRA, the United States breached its obligations under Chapter Eleven, Section A of NAFTA. In particular, the Claimant alleges violations of NAFTA Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation) and seeks compensation from the United States of no less than US\$50 million, plus interest and costs.

* * *

125. ... [I]n [the Tribunal's] view, there can be no doubt that, by interpreting Article 1105(1) to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party under NAFTA, the term "customary international law" refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for "fair and equitable" treatment of, and for "full protection and security" for, the foreign investor and his investments. Correspondingly the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment and to full protection and security.

* * *

126. Enough has been said to show the importance of the specific context in which an Article 1105(1) claim is made. As noted already, in applying the international minimum standard, it is vital to distinguish the different factual and legal contexts presented for decision. It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits,

it is not the function of NAFTA tribunals to act as courts of appeal. As a NAFTA tribunal pointed out in *Azinian v. United Mexican States*:

“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA.”

The Tribunal went on to hold:

“A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way... There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of ‘pretence of form’ to mask a violation of international law. In the present case, not only has no such wrongdoing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.”

127. In the *ELSI* case, a Chamber of the Court described as arbitrary conduct that which displays “a wilful disregard of due process of law... which shocks, or at least surprises, a sense of judicial propriety”. It is true that the question there was whether certain administrative conduct was “arbitrary”, contrary to the provisions of an FCN treaty. Nonetheless (and without otherwise commenting on the soundness of the decision itself) the Tribunal regards the Chamber’s criterion as useful also in the context of denial of justice, and it has been applied in that context, as the Claimant pointed out. The Tribunal would stress that the word “surprises” does not occur in isolation. The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.

* * *

128. Mondev questioned the decisions of the United States courts essentially on four grounds. The Tribunal will take these in turn. Because the United States Supreme Court denied *certiorari* without giving any reasons, it is necessary in each case to focus on the unanimous decision of the SJC, delivered by Judge Fried...

[In an omitted portion, the tribunal considered and rejected the first three of the claimant’s four claims.]

139. The Tribunal turns to the question of BRA’s statutory immunity for intentional torts under the Massachusetts Tort Claims Act (PL 258). Under § 10(c) of that Act, a public employer which is not an “independent body politic and corporate” is immune from “any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations”. As recalled above, the trial judge declined to enter the jury’s verdict against BRA, holding that it was entitled to immunity as a “public employer” under the Massachusetts Tort Claims Act. That decision was affirmed by the SJC, which emphasised “the desirability of making the [Massachusetts Tort Claims Act] regime as comprehensive as possible”. That decision was not challenged on *certiorari* to the United States Supreme Court, no doubt on the basis that the matter involved the interpretation of a Massachusetts statute and presented no federal claim or issue.

140. In the present proceedings, Mondev did not challenge the correctness of this decision as a matter of Massachusetts law.

Rather, it argued that for a NAFTA Party to confer on one of its public authorities immunity from suit in respect of wrongful conduct affecting an investment was in itself a failure to provide full protection and security to the investment, and contravened Article 1105(1). For its part the United States argued that Article 1105(1) did not preclude limited grants of immunity from suit in respect of tortious conduct. It noted that there is no consensus in international practice on whether statutory authorities should be subject to the same rules of tortious liability as private parties. In the absence of any authority under customary international law requiring statutory authorities to be generally liable for their torts, or any consistent international practice, it could not be said that the immunity of BRA infringed Article 1105(1).

* * *

154. After considering carefully the evidence and argument adduced and the authorities cited by the parties, the Tribunal is not persuaded that the extension to a statutory authority of a limited immunity from suit for interference with contractual relations amounts in this case to a breach of Article 1105(1). Of course such an immunity could not protect a NAFTA State Party from a claim for conduct which was substantively in breach of NAFTA standards – but for this NAFTA provides its own remedy, since it gives an investor the right to go directly to international arbitration in respect of conduct occurring after NAFTA's entry into force. In a Chapter 11 arbitration, no local statutory immunity would apply. On the other hand, within broad limits, the extent to which a State decides to immunize regulatory authorities from suit for interference with contractual relations is a matter for the competent organs of the State to decide.

155. In the same context Mondev complained that the Massachusetts Act dealing with unfair or deceptive practices in trade and commerce (G.L. Chapter 93A) was held by the trial judge to be inapplicable to BRA notwithstanding that it engaged in the regulation of commercial activity or acted for commercial motives. But if what has been said above as to the partial immunity of BRA from suit is correct, then *a fortiori* there could be no breach of Article 1105(1) in holding Chapter 93A inapplicable to BRA. NAFTA does not require a State to apply its trade practices legislation to statutory authorities.

156. In reaching these conclusions, the Tribunal has been prepared to assume that the decision to allow BRA's statutory immunity could have involved conduct of the Respondent State in breach of Article 1105(1) after NAFTA's entry into force on 1 January 1994. That assumption may be questioned. The United States' courts, operating in accordance with the rule of law, had no choice but to give effect to a statutory immunity existing at the time the acts in question were performed and not subsequently repealed, once they had concluded that the statute in question did apply. It is not disputed by the Claimant that this decision was in accordance with Massachusetts law, and it did not involve on its face anything arbitrary or discriminatory or unjust, i.e., any new act which might be characterised as in itself a breach of Article 1105(1). In other words, if it was not in December 1993 a breach of NAFTA for BRA to enjoy immunity from suit for tortious interference (and, because NAFTA was not then in force, it could not have been such a breach), it is far from clear how the (*ex hypothesi* correct) decision of the United States courts as to the scope of that immunity, after 1 January 1994, could have been in itself unfair or inequitable. On this ground alone, it may well be that Mondev's Article 1105(1) claim was bound to fail, and to fail whether or not one classifies BRA's statutory immunity as "procedural" or "substantive".

[C]. *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Award of 5 June 1990, 1 ICSID Rep. 569, 602-605 (1993)⁽⁹⁰⁾ [Rosalyn Higgins (pres.), Marc Lalonde, Per Magid]

[AMCO agreed to participate in a joint venture to build and manage a hotel in Jakarta, Indonesia. As part of this agreement, AMCO promised to invest at least \$3 million in foreign currency in return for a package of concessions. After completion of the hotel, the Indonesian joint venture partner had numerous complaints, and the Indonesian government alleged that AMCO had not lived up to its foreign currency commitment. Indonesian police and military personnel seized the hotel on March 30, 1980. An ICSID tribunal found against Indonesia in 1983, but the award was annulled by the *ad hoc* Committee in 1986. A second tribunal then handed down the decision excerpted below.

The Tribunal explored the arguments set forth by the parties. It concluded that that Indonesian law does not clearly stipulate

whether a procedurally unlawful act per se generates compensation or whether a decision tainted by bad faith is necessarily unlawful. It also observed that cases under the European Convention on Human Rights, which were cited by Indonesia, deal with compensation not as a matter of general international law, but by reference to the specific treaty requirements of Article 50 of the Convention, which requires “just satisfaction” to be given by the Court if the local law allows of only partial reparation.]

(Citations selectively omitted)

130. Three further cases cited by Amco remain for consideration. The first of these is the *Idler* case *U.S. v. Venezuela*, 1898 (New Legal Exhibits to Claimants' Memorial, tab. 112). *Idler* was a United States citizen, who contracted with agents acting for Venezuela, for the provision of military equipment. Certain invoices for very large sums remained substantially unpaid. After the union of Venezuela and New Grenada in 1819-21, arguments occurred as to whether it was the new Republic of Colombia that was liable for the debt, or the “Department of Venezuela”. Without here entering into the very complicated history of *Idler's* attempts to recover the sums owed, we note that judgment was eventually entered for *Idler*, but the Treasury refused to pay, contesting the jurisdiction of the court concerned. This question, too, was decided by the Venezuela Supreme Court in favour of *Idler*. Still unable to secure payment, *Idler* returned to the United States where he sought diplomatic support for his claim. In 1836 the Venezuelan Government applied to the Supreme Court for an order to annul the judgment. This followed two years of written submissions by the Government to the Supreme Court, of which *Idler* was never notified. *Idler* was instructed by the Court to appear before it, but learned of this only twelve days before the commencement of proceedings, when it was impossible to get to Venezuela in time. The Supreme Court found it had no jurisdiction to annul the earlier judgments in favour of *Idler*, and that the action should have been brought in front of the same judge who had given the original judgment. The matter then reverted to the Superior Court of Caracas, which did set aside the judgment in favour of *Idler*, and indeed condemned him to pay “judicial tax” and a portion of the costs. This was in turn affirmed by the Supreme Court.

131. In the international arbitral proceedings brought by the United States against Venezuela, the arbitral commission stated that one of the key questions was whether the general effect of the proceedings of 1836-39 constituted a denial of justice. *Idler* received no notification of the proceedings in the lower court, but rather, a notification to appear in the Supreme Court in a suit instituted there; and the Commission took the view that, as it was the lower court that alone had jurisdiction, to summon him before one tribunal, when the business affecting his interests was to be done in another, was misleading. Further, the Commission stated that, even if no notification had been required, a notification of the sort given would be misleading. ... “[W]e are inclined to think the act, from the standpoint of justice, would vitiate the whole proceedings”. The Commission, emphasising that a foreign citizen before the courts of a sovereign was entitled only to “ordinary justice”, found that *Idler* did not get it and that therefore the proceedings against him were “a nullity”. The Commission did not consider whether, on substantive grounds, the decisions annulling the earlier judgments might not have been correct. Rather, it found that the denial of justice rendered them a nullity.

132. The second remaining case relied on by Amco was the *Chattin* case, 1927 (Legal Exhibits to Claimants' Memorial, tab. 119; Legal App. to the Counter-Memorial, tab. KK). This arbitration between the United States and Mexico also concerned irregularities in judicial proceedings in criminal proceedings. Acts of the judiciary, in the view of presiding Commissioner Van Vollenhoven, alone could constitute a denial of justice, executive and legislative wrongs always being subject to judicial redress. Such judicial acts would only amount to a denial of justice if they constituted “an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man” (Legal Exh. to Claimant's memorial, tab. 119, Internal p. 287). Commissioner Van Vollenhoven found, on the facts of the case, that “the whole of the proceedings discloses a most astonishing lack of seriousness on the part of the Court” (*ibid.*, p. 292) and that the proceedings were unjust. It matters not that in his powerful dissent Commissioner MacGregor found that local law had not been violated, and doubted too, on his analysis of the facts, that international law had been violated, for in the present case the finding of the First Tribunal that there had been procedural unlawfulness stands as *res judicata*.

133. It is relevant, too, that the Commission makes no supposition about the guilt or otherwise of *Chattin* – indeed, it was not prepared to make a finding of illegality of his arrest. Against the background of a denial of justice, damages were nonetheless awarded.

134. Finally, in the *Walter Fletcher Smith* case, 1929,... an expropriation of a US citizen's property was found to be neither consistent with the constitutional requirements of Cuba nor with international law. Whereas the property could lawfully have been nationalised for a public purpose, it was found that the purpose was "amusement and private profit". The emphasis was not so much on the requirement of public international law that a taking of property be for "public utility" purposes, as on the good faith aspect:

From a careful examination of the testimony and of the records, the Arbitrator is impressed that the attempted expropriation of the claimant's property was not in compliance with the constitution, nor with the laws of the Republic; that the expropriation proceedings were not, in good faith, for the purpose of public utility. They do not present the features of an orderly attempt by officers of the law to carry out a formal order of condemnation. The destruction of the claimant's property was wanton, riotous, oppressive. It was effected by about one hundred and fifty men whose action appears to have been of a most violent character. There is some evidence that, before the expropriation proceedings, certain persons, being unable to purchase the property from the claimant, threatened to destroy it... (*ibid.*, Internal p. 387).

135. The arbitration concluded that the property should be restored to the claimant... An award of damages was made "if the land is not to be restored" (*ibid.*).

136. One can see from these international cases that the question in international law is not whether procedural irregularities generate damages *per se*. Rather, the international law test is whether there has been a denial of justice. They show equally that not every procedural irregularity constitutes a denial of justice. To this effect, see also Opinion of Professor Bowett (Legal App. to the Counter-Memorial, vol. VIII, tab. TTT, at p. 10). At the same time, as Commissioner Nielson reminded in the *McCurdy* case, (*op. cit.*, supra, para. 124, at Internal page 150) even if no single act constitutes a denial of justice, such denial of justice can result from "a combination of improper acts". In the recent case of *Elettronica Sicula SpA (ELSI) (USA v. Italy)*, ICJ Reports, 1989, the International Court of Justice drew a distinction between unlawfulness in municipal law and arbitrariness under international law. The distinction it drew is, in the view of the Tribunal, equally germane to the distinction between procedural unlawfulness and a denial of justice. The Court stated that arbitrariness "is not so much something opposed to a rule of law, as something opposed to the rule of law" (*ibid.*, para. 128). The test, said the Court, was "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety" (*ibid.*).

137. It thus is necessary to decide whether the procedural irregularities and other background factors in this case amounted to a denial of justice, that would taint the decision of BKPM, regardless of whether BKPM might have had substantive grounds for its action against Amco. The first question is whether it is correct, as Commissioner Van Vollenhoven contended in the *Chattin* case, that acts of the judiciary alone can constitute a denial of justice. Most arbitral awards do not make this distinction in the context of denial of justice. While all those cases cited above happened to concern, at some phase, judicial decisions, the Tribunal sees no provision of international law that makes impossible a denial of justice by an administrative body. BKPM was an administrative, rather than a strictly judicial, body. It has not been argued to us by Indonesia that the acts of BKPM, taken in context, could not themselves constitute a wrong in international law, if unlawful, but that only a failure of the courts to rectify them could constitute such a wrong. And if one applies the test of the *ELSI* case "a wilful disregard of due process of law"; or in the *Idler* case (the need for "ordinary justice"); or in the *Chattin* case ("bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man") it can be seen that the BKPM handling of PT Wisma's complaint, which led in turn to the approval of the President of the Republic to the proposal for revocation, constituted a denial of justice.

138. There are thus indications, both as a matter of Indonesian and international law, that the circumstances surrounding BKPM's decision tainted the proceedings irrevocably.

139. The Tribunal therefore finds that, although certain substantive grounds might have existed for the revocation of the licence, the circumstances surrounding BKPM's decision make it unlawful.

[In this case, residents of nearby villages challenged a decision to renew the operating license of a nuclear power plant.]

(Citations selectively omitted)

35. The applicants complained that they were denied effective access to a court in breach of Article 6(1) of the Convention, the relevant part of which provides:

In the determination of his civil rights and obligations...
..., everyone is entitled to a fair... hearing...by [a]...
tribunal...

The applicants complained in particular that it had not been open to them under Swiss law to seek judicial review contesting the lawfulness of the decision of the Federal Council of 12 December 1994 granting the Nordostschweizerische Kraftwerke AG ("NOK") a limited operation licence for the Beznau II nuclear power plant.

* * *

51. Having regard to the foregoing, the Court considers that the facts of the present case provide an insufficient basis for distinguishing it from the *Balmer-Schafroth* case. In particular, it does not perceive any material difference between the present case and the *Balmer-Schafroth* case as regards the personal circumstances of the applicants. In neither case had the applicants at any stage of the proceedings claimed to have suffered any loss, economic or other, for which they intended to seek compensation... The Court consequently cannot but arrive in the present case at the same conclusion on the facts as in the *Balmer-Schafroth* case, namely that the connection between the Federal Council's decision and the domestic law rights invoked by the applicants was too tenuous and remote.

52. Indeed, the applicants in their pleadings before the Court appear to accept that they were alleging not so much a specific and imminent danger in their personal regard as a general danger in relation to all nuclear power plants; and many of the grounds they relied on related to safety, environmental and technical features inherent in the use of nuclear energy. Thus, in their reply to the questions put by the Court, the applicants linked the danger to their physical integrity to the alleged fact that "every atomic power station releases radiation during normal operation... and thus puts the health of human beings at risk", and they concluded:

To summarise, it needs to be said that, from the medical point of view, the operation of an atomic power plant involves a specific and direct risk to health both when the plant is working normally and when minor malfunctions occur.... [I]t is necessary to take a decision of principle in respect of nuclear energy. The operation of atomic power plants involves high risks and it may – and with a considerable degree of probability will – damage the property and physical integrity of those living in the vicinity.

53. To this extent, the applicants are seeking to derive from Article 6(1) of the Convention a remedy to contest the very principle of the use of nuclear energy, or at the least a means for transferring from the Government to the courts the responsibility for taking, on the basis of the technical evidence, the ultimate decision on the operation of individual nuclear power stations. As the applicants put it in their memorial, "if the authority responsible is to take proper account of such risks" – namely "a high residual risk of unforeseen scenarios and of an unforeseen sequence of events leading to serious damage" – "and assess whether the relevant back-up systems are acceptable, then it is required to be particularly independent, and only courts usually possess this independence...
..."

54. The Court considers, however, that how best to regulate the use of nuclear power is a policy decision for each Contracting State to take according to its democratic processes. Article 6(1) cannot be read as dictating any one scheme rather than another. What Article 6(1) requires is that individuals be granted access to a court whenever they have an arguable claim that there has been an unlawful interference with the exercise of one of their (civil) rights recognised under domestic law. In this respect, Swiss law empowered the applicants to object to the extension of the operating licence of the power station on the grounds specified in section 5 of the Federal Nuclear Act. It did not, however, give them any rights as regards the subsequent extension of the licence and operation of the station beyond those under the ordinary Civil Code for nuisance and

de facto expropriation of property. It is not for the Court to examine the hypothetical question whether, if the applicants had been able to demonstrate a serious, specific and imminent danger in their personal regard as a result of the operation of the Beznau II power plant, the Civil Code remedies would have been sufficient to satisfy these requirements of Article 6(1), as the Government contended in the context of its preliminary objection.

* * *

55. In sum, the outcome of the procedure before the Federal Council was decisive for the general question whether the operating licence of the power plant should be extended, but not for the “determination” of any “civil right”, such as the rights to life, to physical integrity and of property, which Swiss law conferred on the applicants in their individual capacity.

Article 6 §1 is consequently not applicable in the present case.

* * *

56. Before the Commission, the applicants also alleged a violation of Article 13 of the Convention on the ground that, in relation to the decision to renew the operating licence of the Beznau II nuclear power plant, no effective remedy was available to them under domestic law enabling them to complain of a violation either of their right to life under Article 2 or of their right to respect for physical integrity as safeguarded under Article 8. Article 13 provides:

Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

57. The Commission and the Government considered Article 13 to be inapplicable for the same reasons as for Article 6 § 1...

58. Article 13 has been consistently interpreted by the Court as requiring a remedy only in respect of grievances which can be regarded as “arguable” in terms of the Convention.

59. As pleaded, the applicants' complaint under Article 13, like that under Article 6(1), was directed against the denial under Swiss law of a judicial remedy to challenge the Federal Council's decision. The Court has found that the connection between that decision and the domestic law rights to protection of life, physical integrity and property invoked by the applicants was too tenuous and remote to attract the application of Article 6(1). The reasons for that finding likewise lead to the conclusion, on grounds of remoteness, that in relation to the Federal Council's decision as such no arguable claim of violation of Article 2 or Article 8 of the Convention and, consequently, no entitlement to a remedy under Article 13 have been made out by the applicants. In sum, as in the *Balmer-Schafroth* case the Court finds Article 13 to be inapplicable.

[E]. Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States (ICSID Case No. ARB(AF)/97/2), Award of 1 November 1999⁹² [Jan Paulsson (pres.), Benjamin R. Civiletti, Claus von Wobeser]

[In October 1992, Mr. Azinian, writing as the President of Global Waste Industries, sent a letter to the Ayuntamiento, the Naucalpan city council, proposing his firm's services to address to the city's solid waste problem. Pursuant to Mexican law, whereby the state legislature has to approve such projects, the offer was presented to a legislative committee and eventually approved. In November 1993, a 15-year concession agreement was signed with DESONA, a new firm constructed for the purposes of the agreement. In January 1994, a new administration took over the Ayuntamiento. It observed that that there were some procedural irregularities relating to the conclusion and performance of the agreement. DESONA initiated proceedings before the State Administrative Tribunal. The claim was dismissed by a judgment upheld by subsequent appellate courts. In May 1997, DESONA initiated arbitration proceedings against the Government of Mexico under Chapter 11 of NAFTA.]

(Citations selectively omitted)

101. The Arbitral Tribunal does not, however, wish to create the impression that the Claimants fail on account of an improperly pleaded case. The Arbitral Tribunal thus deems it appropriate, *ex abundante cautela*, to demonstrate that the Claimants were well advised not to seek to have the Mexican court decisions characterised as violations of NAFTA.

102. A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. There is no evidence, or even argument, that any such defects can be ascribed to the Mexican proceedings in this case.

103. There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law. In the present case, not only has no such wrongdoing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the *bona fides* of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.

104. To reach this conclusion it is sufficient to recall the significant evidence of misrepresentation brought before this Arbitral Tribunal. For this purpose, one need do no more than to examine the twelfth of the 27 irregularities, upheld by the Mexican courts as a cause of nullity: that the Ayuntamiento was misled as to DESONA's capacity to perform the concession.

105. If the Claimants cannot convince the Arbitral Tribunal that the evidence for this finding was so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious, they simply cannot prevail. The Claimants have not even attempted to rebut the Respondent's evidence on the relevant standards for annulment of concessions under Mexican law. They did not challenge the Respondent's evidence that under Mexican law a public service concession issued by municipal authorities based on error or misrepresentation is invalid. As for factual evidence, they have vigorously combated the inferences made by the Ayuntamiento and the Mexican courts, but they have not denied that evidence exists that the Ayuntamiento was misled as to DESONA's capacity to perform the concession.

106. At the presentation of the project to the Ayuntamiento in November 1992, where Mr Goldenstein "of Global Waste" explained that his company would employ some 200 people and invest approximately US\$ 20 million, Mr Ted Guth of Sunlaw Energy – identified as a company to be associated in the creation of DESONA – also appeared and articulated some "essential elements" of the project... ..

107. As indicated above (see paragraph 32), this prospect – apparently devoid of any feasibility study worth the name – strikes the Arbitral Tribunal as unrealistic. This was the grandiose plan presented to the Ayuntamiento, which was told at the same meeting that the city of Naucalpan would be given a carried interest of 10% in DESONA "without having to invest one single cent and that after 15 years it would be theirs." One can well understand how members of the Ayuntamiento would be impressed by ostensibly experienced professionals explaining how a costly headache could be transformed into a brilliant and profitable operation.

108. The Claimants obviously cannot legitimately defend themselves by saying that the Ayuntamiento should not have believed statements that were so unreasonably optimistic as to be fraudulent.

109. So when the moment came, one year later, for the Concession Contract to be signed, an absolutely fundamental fact had changed: the Claimants had fallen out with Sunlaw Energy, who had disappeared from the project, as best as the Arbitral Tribunal can determine, by October 1993.

110. For the Claimants to have gone ahead without alerting the Ayuntamiento to this factor was unconscionable. The Arbitral Tribunal cannot believe that the matter was adequately covered by alleged oral disclosures; Article 11 of the Concession Contract states flatly that "[t]he Concessionaire is obligated to install an electricity generating plant which will utilize biogas out of Rincon Verde, Corral del Indio, or other." (Claimants' Translation, Claimants' Memorial, Section 3, p. 22.)

111. It is more than a permissible inference that the original text of the Concession Contract had been prepared on the basis, from the Claimants' perspective, that they would be able to form an operating consortium, that they had envisaged a programme dependent on the contributions of such third parties, and that once the text had been approved by the legislature they did not wish to endanger what they had achieved by disclosing that key partners had defected.

112. The testimony of Mr Ronald Proctor, although he was proffered by the Claimants, was unfavourable to them. His written statement explains that during late October and early November 1993, he attended meetings with Naucalpan officials, including the Mayor,

during which he explained that his company, BFI, was assisting DESONA and

“would commit the necessary start-up effort, capital and operational expertise to DESONA in order to ensure the performance of the Concession Contract.”

113. There is no doubt about BFI's capacity; it is a billion-dollar company with unquestioned credibility in the industry. The point is rather that this testimony flatly contradicts an ostensible foundation of the Concession Contract with DESONA. There is not a shred of written evidence that Mexican officials were content to rely on DESONA because BFI was there, in effect, to do everything: start-up, funding, and operations. Quite to the contrary, the contemporaneous written evidence relating to the period prior to signature shows reliance on the representations of the Claimants as to their own capabilities. The Concession Contract itself does not contemplate assignments, subcontracts, or surrogates – let alone any suggestion that DESONA could ensure performance of the Concession Contract only if it found an able joint venture partner.

114. In a phrase, Mr Proctor's testimony, perhaps unintentionally, supports the conclusion that the Claimants' main effort was focussed on getting the Concession Contract signed, after which they intended to offer bits and pieces of valuable contract rights to more capable partners.

115. The Ayuntamiento was entitled to expect much more.

116. The Concession Contract says nothing about assignability. The Respondent has proffered evidence of Mexican law to the effect that public service concessions are granted *intuitu personae* to a physical person or legal entity on the basis of particular qualities. The Claimants have not contradicted this evidence.

117. The Claimants also sought to rely on an unsigned letter said to have been written by the previous Mayor of Naucalpan in March 1994. The substance of the letter is in support of the Claimants, who of course at that point in time were in imminent danger of losing DESONA's concession. The Respondent does not accept this document as genuine. But taking it as proffered by the Claimants, it is highly damaging to their case in connection with the alleged misrepresentations,....

119. The only evidence the Claimants have to support their contention that they made adequate disclosures before signature of the Concession Contract – as is clear from their post-hearing “Closing Memorial” – is the self-serving oral assertion of Mr Goldenstein that he fully informed city officials in various unrecorded conversations. This evidence is not consistent with the record. It is rejected.

120. To resume: the Claimants have not even attempted to demonstrate that the Mexican court decisions constituted a fundamental departure from established principles of Mexican law. The Respondent's evidence as to the relevant legal standards for annulment of public service contracts stands un rebutted. Nor do the Claimants contend that these legal standards breach NAFTA Article 1110. The Arbitral Tribunal finds nothing in the application of these standards with respect to the issue of invalidity that appears arbitrary or unsustainable in light of the evidentiary record. To the contrary, the evidence positively supports the conclusions of the Mexican courts.

121. By way of a final observation, it must be said that the Claimants' credibility suffered as a result of a number of incidents that were revealed in the course of these arbitral proceedings, and which, although neither the Ayuntamiento nor the Mexican courts would have been aware of them before this arbitration commenced, reinforce the conclusion that the Ayuntamiento was led to sign the Concession Contract on false pretences. It is hard to ignore the consistency with which the Claimants' various partners or would-be partners became disaffected with them. A Mexican businessman, Dr Palacios, appears to have contributed US\$ 225,000, as well as equipment, in the mistaken belief that he was making a capital contribution which would lead to his becoming a DESONA shareholder. On 5 June 1994 he brought a criminal action for fraud against Mr Goldenstein, requesting that the police be requested to arrest him on sight. Mr Proctor of BFI, although called as a witness by the Claimants, apparently recommended legal action against the Claimants when he found out that the two vehicles purchased with the proceeds of a loan from BFI were sold by DESONA without repaying the loan...

122. The list of demonstrably unreliable representations made before the Arbitral Tribunal is unfortunately long. The arbitrators are reluctant to dwell on it in this Award, because they believe that the

Claimants' counsel are competent and honourable professionals to whom a number of these revelations came as a surprise...

123. The credibility gap lies squarely at the feet of Mr Goldenstein, who without the slightest inhibition appeared to embrace the view that what one is allowed to say is only limited by what one can get away with. Whether the issue was how non-U.S. nationals could *de facto* operate a Subchapter S corporation, how the importer of vehicles might identify the ostensible seller and the ostensible price to the customs authorities, or how a cheque made out to an official – as reimbursement of a luncheon – but endorsed back to the payer might still be presented as evidence of payment under a lease, Mr Goldenstein seemed to believe that such conduct is not only acceptable in business, but a sign of worldly competence.

124. The Arbitral Tribunal obviously disapproves of this attitude, and observes that it comforts the conclusion that the annulment of the Concession Contract did not violate the Government of Mexico's obligations under NAFTA.

[F]. Comments and Questions

1. In *The International Responsibility of States for Denial of Justice* (1938), Alwyn Freeman explored the meaning of the term "denial of justice" in international law. Having noted that there is much uncertainty regarding the meaning, he described six categories that have evolved within the literature on international law:

(1) For one school of thought it is considered as the equivalent of every international wrong committed to the prejudice of foreigners by any organ of the State. This is what is frequently referred to as the "broad" view. (2) According to a second, more usual definition of the term, it is limited to certain unlawful acts or omissions on the part of judicial authorities. Here, however, we encounter a variety of different conceptions as to the extent of the State's responsibility for judicial organs: (3) A minority group – composed principally of publicists in Latin-America – maintain that denial of justice must be understood in the procedural sense of a refusal of access to court, and that only in the contingency of such a refusal, (or its equivalent), can a diplomatic claim arise. (4) Still another group of writers, to whom reference has already been made, retain the meaning of denial of justice in municipal law but admit that inter-national responsibility is engaged by various other acts of judicial misconduct, including wrongful judgments. In this latter hypothesis, however, the expression "denial of justice" is considered by them as improper. (5) A few authorities contend that the proper sense of the term according to international practice is that of a failure on the part of an alien plaintiff to obtain redress for an earlier wrongful act committed either by a private person or by a State agent. (6) But the view which has come more and more into favor within recent years is that under which a denial of justice includes any failure on the part of organs charged with administering justice to aliens to conform to their international duties.

2. Garcia-Amador's Rapporteur's Report observed that, although measures such as confiscation of property or other measures of a penal character can amount to a "denial of justice," the possibility of a State incurring international responsibility is remote. A State can also be exempt from international responsibility on the basis of its "police power." It also noted that the test of "arbitrariness" can be applied to methods and procedures to determine whether they result in a "denial of justice." However, it observed, obvious examples such as discrimination against aliens or grave procedural irregularities are unlikely. Thus, it concluded:

[I]t may be said that a State is under no obligation to adopt a method or procedure other than those provided for in the relevant provisions of municipal law. A State may even, where special circumstances require and justify such a course, depart from the usual methods and procedures, provided that in so doing it does not discriminate against aliens or commit any other act or omission which is manifestly "arbitrary". In short, the State's freedom of action in regard to methods and procedures is in a sense wider than that it enjoys in regard to the grounds and purposes of expropriation.

3. For further discussion on the concept of denial of justice, see *Glamis Gold Ltd v. United States*, (ad hoc arbitration under the 1976 UNCITRAL Rules), Award of 8 June 2009, IIC 380, signed 14 May 2009 despatched 8 June 2009, *supra* p. 712; *Neer v. Mexico* (U.S.-Mexico Claims Commission, Oct. 15, 1926), 21 Am. J. Int'l L. 555 (1927) *infra* p. 795; International Law Commission, Articles on State Responsibility (2001) *supra* Part III.C; Jan Paulsson, *Denial of Justice in International Law* (2005).
4. Is a denial of justice limited to procedural acts? Is there a concept of substantive denial of justice? If so, under what circumstances should it be engaged?

§8.06. ABUSE OF RIGHTS

States that abuse their lawmaking powers as a means of avoiding contractual obligations are acting contrary to international law.

[A]. Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens – Measures Affecting Acquired Rights: Fourth Report by F.V. García Amador, [1959] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/119

[See *supra* p. 589.]

[B]. Karl-Heinz Böckstiegel, *Arbitration and State Enterprises: A Survey on the National and International State of Law and Practice*, 45-46 (Kluwer Law International 1984)

(Citations selectively omitted)

It is a generally accepted principle in both national and international law, already recognized by the Permanent Court of International Justice, that a state may not abuse legal forms and rights to evade obligation (*abus de droit*, *Rechtsmißbrauch*). This principle has also been applied in national laws with the effect that the corporate veil was lifted. It may in appropriate cases be applied by international arbitrators. Whether it is applicable will, as before national courts, always depend on the specific circumstances of the arbitration case. Though the principle of applicability is beyond doubt, it seems difficult to describe appropriate cases in the abstract.

There is, however, a further and more specific application of that principle which may also be considered in international arbitration with state enterprises.

When a state makes use of its powers of control and legislation to change the legal form of a state enterprise in order to evade the obligations of that state enterprise in a contract and an arbitration clause, this must be considered an abuse of rights. An example is the case *Société des Grands Travaux de Marseille v. (East Pakistan Industrial Development Corporation), Bangladesh Industrial Development Corporation and the Republic of Bangladesh...*

It is only in international arbitrations in which public international law is the applicable law, or at least part of the applicable law, that the corporate veil between the state enterprise and the state itself may have to be lifted if a state has tried to evade its own obligations in

public international law by letting one of its state enterprises perform functions which for the state itself would be a breach of public international law. This is a consequence of the well-known principle that a state may not excuse itself for breaches of obligations in public international law by reference to its own national law and therefore also not by reference to legal forms for state enterprises available in its own national law. An example is cited by Seidl-Hohenveldern: a state that has accepted an obligation in public international law to open an airport to foreign aircraft without discrimination may not fix excessive landing fees, even if they also apply to his own national airline, because the legal separation between that national airline and the state has to be disregarded, since the fees paid by that national airline are again income for the respective state and therefore an economic burden is placed only on foreign aircraft. Similar situations may arise in international arbitration in connection with those many investment protection treaties concluded between western industrialized states and third world states and also in connection with contracts concluded between states and foreign private investors if those states fulfil the requirements mentioned above in section 4.3.3 for the applicability of public international law.

[C]. International Law Commission (ILC) Articles on State Responsibility (2001) [See *supra* p. 579 ff.]

§8.07. UNJUST ENRICHMENT

The doctrine of unjust enrichment holds that when a party has been unjustly enriched at the expense of another party, the former must make restitution to the latter. A number of international tribunals have applied the doctrine of unjust enrichment as a general principle of international law.

[A]. Christoph H. Schreuer, *Unjustified Enrichment in International Law*, 22 *Am. J. Comp. L.* 281, 281, 284-285, 289, 300-301(1974)

A comparative examination of remedies for situations commonly referred to as unjustified enrichment in domestic legal systems, reveals a confusing variety of declarations of the highest degree of abstraction and of prescriptions of the most technical kind. Statements like: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other," will on account of their generality hardly afford a useful guideline for the everyday decision-maker. Taken as a broad equitable concept, such a principle could be claimed to underlie almost all provisions concerning wealth-transactions in any legal system, whether they be categorized under the headings of "property," "contracts," "trusts" or "torts". At such a level of generality, it will have to be regarded as nothing more than an expression of noble sentiments inspiring the creators of the law. Undeniably a large portion of everyday commercial transactions aims at the enrichment of one person at the cost of another, under circumstances which are regarded as perfectly legitimate and within boundaries of acceptable business risks.

* * *

How hopelessly open to manipulation a general concept of unjustified enrichment is, detached from specific prescriptions determining its application, is aptly illustrated by its use in the controversy over compensation for expropriated foreign property. Advocates of a duty to grant "adequate, prompt, and effective" compensation occasionally seek to bolster their case by contending that

[t]he juridical justification for the obligation to pay compensation is to be found in the concept of unjust enrichment, which lies at the basis of the doctrine of acquired rights...

* * *

On the other hand, lawyers less well disposed towards the idea of compensation have contended that it was chiefly the foreign investors against whom the principle should be applied. The conditions of exploitation of the host countries' resources, often based on "unequal treaties", and the degree of the profits extracted, are seen as a basis for claims which have to be set off against the investors' demands, or will give an independent right to restitution.

* * *

There are, however, certain specific international situations in which

judicial practice has granted remedies to reverse accretions of wealth under circumstances in which contractual or delictual principles would have been unable to reach this result. These situations frequently involved, or were caused by, disruptions of normal international intercourse. Under such conditions of crisis or national distress, international law has traditionally tolerated considerable encroachments upon the rights and resources of third persons. In the absence of a claim for damages resulting from an illegal act, the persons affected were often left without a remedy to recover their losses. In cases of a clearly demonstrable benefit to the interfering party, calculable in terms of wealth, decisions have repeatedly granted indemnity to the extent of the actual profit gained.

* * *

Remedies for the restitution of unjustified enrichment can serve as corrective measures in cases where a drastic rupture in an anticipated course of events has led to a lopsided control over assets which seems unacceptable to the international decision-maker. These conditions calling for relief may be brought about by a general crisis situation, an unexpected breakdown or disturbance of an agreed relationship or a fundamental change of social circumstances surrounding a still existing relationship. Where no specific blame giving rise to a responsibility for full reparation can be laid on either party, the usual solution is that each side must bear the losses sustained. However, where one party has demonstrably profited in terms of control over wealth, this solution can be suspended in favor of a different technique. Here the restoration of an economic equilibrium is not achieved, as with delictual remedies, by establishing the *status quo ante* of the deprived person at the cost of a wrongdoer, no matter what his profit, if any, has been. Rather, the previous economic position of the enriched party is re-established regardless of the extent of the deprivation suffered by the other side.

In many cases this method of balancing the economic interests of litigants will produce useful and satisfactory results. However, it must be borne in mind that, with international law in its present state of development, restitution for unjustified enrichment can be considered hardly more than a decision-technique to be applied once the basic policy decisions have been made, and not a normative principle or general rule from which specific "correct" decisions can be logically derived. Most of the task of specifying its precise range of application by determining the types of situation in which restitution is to take place, is yet awaiting international practice. Only after these essential details have been elaborated and clarified, will it be possible to regard it as a coherent precept capable of guiding an international decision-maker.

[B]. International Law Commission (ILC) Articles on State Responsibility (2001)

[See *supra* p. 579 ff.]

[C]. Factory at Chorzow (Germany v. Poland), Claim No. 13 (PCA), Judgment on the Merits of 13 September 1928, [1928] P.C.I.J. Series A – No. 17, 47 (1928)

[See *infra* p. 967.]

[D]. Arthur Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government*, 36 Cornell L. Q. 31, 50-51 (1950-1951)⁽⁹³⁾

[The following is an excerpt from the *Lena* tribunal's decision, reprinted in the article above.] (Citations selectively omitted)

22. Before drawing final conclusions upon the above-mentioned facts it is desirable to state the legal form in which Lena's claim was presented to the Court. It was admitted by Dr. Idelson, counsel for Lena, that on all domestic matters in the U.S.S.R. the laws of Soviet Russia applied except in so far as they were excluded by the contract, and accordingly that in regard to performances of the contract by both parties inside the U.S.S.R. Russian law was "the proper law of the contract," *i.e.*, the law by reference to which the contract should be interpreted.

But it was submitted by him that for other purposes the general principles of law such as those recognized by Article 38. of the Statute of the Permanent Court of International justice at The Hague should be regarded as "the proper law of the contract" and in support of this submission counsel for Lena pointed out that both the Concession Agreement itself and also the agreement of June, 1927, whereby the coal mines were handed over, were signed not only on

behalf of the Executive Government of Russia generally but by the Acting Commissary for Foreign Affairs, and that many of the terms of the contract contemplated the application of international rather than merely national principles of law. In so far as any difference of interpretation might result the Court holds that this contention is correct.

23. The company's claim was put thus. Lena made no claim for damages for any breaches of contract down to the time of the final claim, although it relied on them as part of the history of the case and as an answer to various claims of the Government. Its main claim it put in two alternative ways, preferably the second.

The first was for damages for breach of contract – viz., the present value of the future profits lost by reason of the Government's acts and defaults. The second was for restitution to the company of the full present value of the company's properties, by which in the result, the Government had become "unjustly enriched." This second formulation of the case, rested upon the principle of Continental law, including that of Soviet Russia, which gives a right of action for what in French law is called "*Enrichissement sans cause*"; it arises where the defendant has in his possession money or money's worth of the plaintiffs to which he has no just right.

This right is recognized and enforced in Germany under Article 812 of the Civil Code. It is also recognized in Scottish law, but not fully in English law; although the English right of action "for money had and received" on "total failure of consideration" often leads to the same result. The principle was discussed and approved in, the British House of Lords in the Scotch case of *Cantiare San Rocco S.A. v. Clyde Shipbuilding Company, Limited*, 1924 Appeal Cases, p. 226.

Counsel for Lena contended that the Government was, in fact, in possession, present and future, throughout the remainder of the Concession (25 years for Lenskoi and 45 years for the rest) of Lena's valuable properties, into which Lena had put £3,500,000 sterling, and from which Lena was entitled, if the Government had performed its contract, to great profits; and that, as the Government had wrongfully turned the company out of Russia, it obviously could show no "just cause for its enrichment."

24. It follows that, as the question of "just cause" is in issue, it is material to consider the character of the Government's conduct in doing what the Court decides that it did. On that question the following facts are relevant:

- (a) In the raid on December 15, 1929, a large number of documents throwing light on the best methods of working the difficult metallurgical processes and ore dressing, upon a knowledge of which the successful exploitation of the company's enterprises by anyone else would depend, were taken away by the Government. It is immaterial whether the documents were permanently retained or returned after a certain delay.
- (b) At this time the company's greatest schemes of development of mines, flotation plants, metal extraction, furnaces, &c. covering vast areas of ground – at Sverdlovsk alone 21 acres – were nearly completed, and everything practically in working order – except for the final ascertainment of the best method of dealing with the zinc concentrates in the Altai.
- (c) As Lena's counsel pointed out, these steps so taken by the Government were such as to promote the Five-Year Plan.

25. The Court finds as a fact that this state of affairs in which Lena found itself in February, 1930, brought about (in the words of Lena's telegram demanding arbitration) a "total impossibility for Lena of either performing the Concession Agreement or enjoying its benefits."

The Court further decides that the conduct of the Government was a breach of the contract going to the root of it. In consequence Lena is entitled to be relieved from the burden of further obligations thereunder and to be compensated money for the value of the benefits of which it had been wrongfully deprived. On ordinary legal principles this constitutes a right of action for damages, but the Court prefers to base its award on the principle of "unjust enrichment," although in its opinion the money result is the same.

[E]. *Sea-Land Service, Inc. v. The Islamic Republic of Iran and Ports and Shipping Organization of Iran* (IUSCT Case No. 33), Award No. 135-33-1 of 22 June 1984⁽⁹⁴⁾ [Gunnar Lagergren (pres.), Mahmoud M. Kashani, Howard M. Holtzmann]

(Citations selectively omitted)

The Claimant in this case, Sea-Land Service Inc. ("Sea-Land") is a

corporation registered under the laws of Delaware in the United States engaged in the international transportation by water of containerised cargo. The Respondent Ports and Shipping Organization ("PSO") is the governmental instrumentality in Iran charged with the administration and control of Iranian port facilities, and was throughout the period material to this claim under the direction of the Ministry of Roads and Transportation. The essence of Sea-Land's claim, filed on 16 November 1981, is that it was deprived by PSO of the right to continued use of a containerised cargo facility constructed and operated by it at the port of Bandar Abbas, and that it suffered losses as a result.

* * *

(v). The prohibition of unjust enrichment

A further alternative argument advanced by Sea-Land is that PSO or the Government was unjustly enriched at the expense of Sea-Land, and that Sea-Land should be compensated accordingly.

The concept of unjust enrichment had its origins in Roman Law, where it emerged as an equitable device "to cover those cases in which a general action for damages was not available". It is codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals.

The rule against unjust enrichment is inherently flexible as its underlying rationale is "to re-establish a balance between two individuals, one of whom has enriched himself, with no cause, at the other's expense." Its equitable foundation "makes it necessary to take into account all the circumstances of each specific situation." It involves a duty to compensate which is entirely reconcilable with the absence of any inherent unlawfulness of the acts in question. Thus the principle finds an obvious field of application in cases where a foreign investor has sustained a loss whereby another party has been enriched, but which does not arise out of an internationally unlawful act which would found a claim for damages.

There are several instances of recourse to the principle of unjust enrichment before international tribunals. There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.

In the *Landreau* claim, the Arbitral Commission set up between the U.S.A. and Peru held that the Peruvian Government was bound to account to the Claimant on a *quantum meruit* basis for guano deposits worked by the Government as the result of discoveries he had communicated to it, even though the pre-existing contract was held to have been repudiated.

B.. The enrichment

Opinions differ as to the basis of computation of damages. The predominant view seems to be that damages should be assessed to reflect the extent by which the state has been enriched. Judge Jimenez de Arechaga considers that where the "enriched" state has obtained no benefit, no compensation should be payable at all.

Equity clearly requires that cognisance be taken of the de facto situation, and this explains why there is no discernible uniformity in the practice of international tribunals in this respect. Important factual circumstances to be taken into account are the level of investment; the period during which the foreign investor has been able to make a profit; and the benefit actually derived by the host country from its acquisition.

It must not be overlooked that PSO had a long-term interest in the project: at the end of the six-year term of the Facility Agreement, on 28 November 1982, the facility, developed and improved by Sea-Land at its own expense, was to revert to PSO. Sea-Land stated at the Hearing that it was only on the understanding that a satisfactory level of profitability could be achieved, with PSO's co-operation, in those six years that Sea-Land was prepared to invest some three million dollars in setting up the container terminal. The efficiency and success with which Sea-Land and PSO operated it for some eighteen months is evident from the figures laid before the Tribunal in the Affidavit of Mr. Bos. Sea-Land was thereafter able to continue its operations at a reduced level until August 1979. Thus from the beginning of August 1979 the container terminal was, in effect, at PSO's disposal – three years and four months before Sea-Land

anticipated that the facility would revert to PSO.

i). The use of the facility

Sea-Land expresses its claim for damages in terms of *restitutio in integrum*. Sea-Land calculates that it would have achieved an average \$6.4 million annual net revenue for the period until 31 December 1982. It seeks to recover, *inter alia*, future net revenues, representing the profit it could reasonably have been expected to make from its operation of the container facility had it continued in possession for the intended duration of the Facility Agreement.

Compensation for unjust enrichment cannot encompass damages for loss of future profits. The Tribunal must aim instead to place a monetary value on the extent to which PSO was enriched by its premature acquisition of the facility.

* * *

ii). Damages claimed by Sea-Land in respect of moveable property

An application of the theory of unjust enrichment requires that Sea-Land be compensated for those items and assets left in Iran of which PSO or the Government obtained the use and benefit. It does not permit the Tribunal to compensate Sea-Land for the loss of unpaid debts, freight charges, and termination expenses, none of which resulted in the enrichment of PSO or the Government.

[F]. *Flexi-Van Leasing, Inc. v. The Government of the Islamic Republic of Iran* (USCT Case No. 36), Award No. 259-36-1 of 13 October 1986⁽⁹⁵⁾ [Gunnar Lagergren (pres.), Koorosh-Hossein Ameli, Howard M. Holtzmann]

[The case arose out of lease agreements involving marine transport equipment allegedly entered into by Flexi-Van Leasing, Inc. and two companies, Star Line, Co. and Iran Express Lines, Co., allegedly controlled by the Iranian government. Flex-Van raised claims of expropriation, breach of contract, and unjust enrichment, all of which were dismissed by the tribunal. The following is the tribunal's discussion of the unjust enrichment claim.]

(Citations selectively omitted)

e). Unjust enrichment

Finally, the Claimant bases its claim on the further alternative ground of unjust enrichment. The Claimant contends that the Government has been unjustly enriched through the retention and use of Flexi-Van's equipment. In this connection, it asserts that Government organizations took away containers, and that they were used by them and by private individuals for official and private purposes. The Claimant seeks compensation in an amount to be measured according to the terms of the lease agreements and that would thus equal the sum of the accounts receivable, the unpaid rentals and the replacement costs. The Government denies that it has been enriched by the containers that the Claimant left in Iran.

The concept of unjust enrichment appears in various forms in the different legal systems of the world, including Iran and the United States. The Tribunal has confirmed that "[i]t is codified or judicially recognized in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals". The Tribunal has observed that, "[t]his concept represents a principle based on justice and equity". "The rule against unjust enrichment is inherently flexible as its underlying rationale is 'to re-establish a balance between two individuals, one of whom has enriched himself, with no cause, at the other's expense'. Its equitable foundation makes it necessary to take into account all the circumstances of each specific situation".

Before the principle of unjust enrichment can be applied to this claim, the effect of the lease agreements on this cause of action must be considered. The Tribunal has ruled earlier that a substitute right of action based on unjust enrichment does not arise where a contract binding on both parties exists. In that circumstance "the issue of whether a performance of the contract results in any 'enrichment' of a party and whether such enrichment is 'unjust' in relation to the other party, cannot be decided without specifically determining the contractual rights and obligations of the parties." The sole Respondent in the present Case, the Government of Iran, was not a party to any of the lease agreements, which were

concluded between the Claimant and Star Line and Iran Express respectively. Thus, the existence of those agreements does not form an obstacle to the Claimant's bringing a claim for unjust enrichment against the Respondent Government.

It is inherent in the principle of unjust enrichment that there must have been an enrichment of one party to the detriment of the other. Where there is no "beneficial gain" to the party allegedly enriched, the remedy of unjust enrichment is not available. When this theory is relied on to engage a state's international responsibility, the predominant view seems to be that damages for unjust enrichment should be measured in terms of the extent to which that State has been enriched. The benefit obtained by the enriched party is an indispensable element of the remedy of unjust enrichment.

The Claimant is in accord with this when it states that the "Respondent, to avoid unjust enrichment at Flexi-Van's expense, must pay Flexi-Van the value of the benefits received by Iran and its controlled entities through their retention of the equipment". While the Claimant argues that benefit in this sense "is the retention of property regardless of what the wrongdoer does with the property", the Tribunal has held that compensation may be granted only if the Government – either itself or through its organs or departments – had the benefit and made actual use of the property left in Iran.

To support the assertion of retention of the containers by the Government, the Claimant relies on the affidavit of Mr. Maass. Mr. Maass stated that late in 1980 and in 1981 "it became apparent that the containers were either being taken away by various government organizations from terminals and warehouse sites or even leased by the terminal operators to the Ministry of Agriculture, as I learned from Mr. Siyapoosh at Star Line Iran Company". Mr. Maass went on to state that when travelling in the countryside he saw Flexi-Van containers "used by Iranians for storage purposes", that he saw containers converted into housing for people, and that in one place he saw military units housed in containers. Finally, he stated that "I know that the Iranian army also took Flexi-Van... containers for military use".

The Government denies that it was enriched by containers that the Claimant left in Iran. It asserts that the Claimant, through its agent, segregated new and valuable containers from old and dilapidated equipment and exported only the former while leaving the latter behind in Iran. The Government sees this confirmed by the statement of Mr. Maass that he "took note of the condition of each container and recommended to Flexi-Van which pieces of equipment to try to recover". Further, the Government has proposed that the Claimant may recover 149 containers from Star Line provided that the Claimant indemnifies the Government against any third party claims, bears the removal costs and reimburses Star Line for the costs incurred in safeguarding the containers. With respect to Iran Express, the Government contends that all the assets of Iran Express were destroyed in attacks by the Iraqi troops on the port of Khorramshahr that began in September 1980.

Mr. Maass, on whose affidavit the Claimant relies in this respect, has given no figures as to the number of containers he observed or knew were in the possession of the Government. As to those containers that Mr. Maass stated he saw being used by private persons or companies, the Government cannot be deemed to have derived any benefit therefrom. With regard to the containers that Star Line is alleged to have leased to the Ministry of Agriculture – which Mr. Maass stated he learned from a representative of Star Line's Worker's Council – the use of such containers would not constitute an unjust enrichment of the Government, for if there were such a lease the Ministry would have paid rental to Star Line. Only the instance where Mr. Maass stated he saw military units housed in containers could constitute actual use of Flexi-Van equipment by the Government. To similar effect is Mr. Maass' statement that "it became apparent that the containers were... being taken away by various government organizations".

The record also includes a telex, dated 21 February 1980, in which Uiterwyk Corporation, acting on behalf of "Iran Express Lines" and "Iran Express Terminal Corp." as well as various unnamed "container lessors", demanded the return of certain containers said to be in the possession and use of the Ports and Shipping Organization at Port Khorramshahr. That telex, however, does not specify whether these containers were owned by the Claimant or by some other company, and, therefore, does not evidence that the Government had the use and benefit of the Claimant's equipment. Thus, the only evidence on this point is the above-described affidavit of Mr. Maass, the Claimant's agent during the relevant period. In weighing that affidavit, the Tribunal observes that his statements about the whereabouts, identity, and quantity of the containers are so general and imprecise as to be incapable of supporting a fair assessment of the amount of

enrichment, if any. The Claimant did not present Mr. Maass at the Hearing as a witness, so it was impossible to question him and thereby, perhaps, clarify the matter. In these circumstances, the Tribunal could not, in justice, base a monetary award on such a vague affidavit, unexplained by oral testimony. To do so would be arbitrary and improper. Accordingly, the Tribunal finds that the claim for unjust enrichment must be dismissed.

Although the Claimant has not expressly made this argument, it may be inferred from the amounts claimed that it considers the Government also to have been unjustly enriched to the extent that Star Line's and Iran Express' debts were not paid. However, in the absence of further clarification, the Tribunal is not prepared to interpret the unjust enrichment claim as formulated, based on the fact "that the Government has been unjustly enriched through the retention and use of Flexi-Van's equipment", as encompassing a claim for unpaid debts.

[G]. Schlegel Corporation on behalf of Schlegel Linign Technology GmbH v. National Iranian Copper Industries Company (USCT Case No. 834), Award No. 295-834-2 of 27 March 1987⁽⁹⁶⁾ [Robert Briner (pres.), George H. Aldrich, Hamid Bahrami-Ahmadi]

[Claimant Schlegel Corporation agreed, as a subcontractor, to construct a Terminal Reservoir for a project to supply water for the Sar Cheshmeh copper mine and processing plant. The project was managed by the National Iranian Copper Company ("Copper Company") and its engineers Binnie and Partners ("Binnie).]

(Citations selectively omitted)

5. ... Both the Sub-Contract Specification and the Main Contract represented that Schlegel was a "nominated Sub-Contractor" to whom, according to the Main Contract, the Copper Company was entitled to pay directly should the Contractor Fassan fail to pay. Were the Copper Company to effect such a direct payment it was entitled to deduct any amount so paid from any amounts due to be paid by it to Fassan. Schlegel asserts that these provisions induced it to enter into the contract with Fassan because they acted as an assurance that the Copper Company stood behind Fassan's obligations.

6. By the end of June 1976, Schlegel had substantially completed the installation of the reservoir lining. In October of 1976, however, wind damage to the lining occurred, resulting in a dispute over who should bear the costs for the necessary remedial work. This dispute was resolved in a meeting of the representatives of Fassan, Binnie, and Schlegel on 4 and 5 May 1977 at which Schlegel agreed to undertake the remedial work. It also undertook to meet the costs related to a portion of the remedial work. This agreement was telexed to the Copper Company.

7. On 16 November 1977, Binnie issued its Maintenance Certificate signifying that all of Schlegel's work had been satisfactorily completed and that Fassan's obligations to the Copper Company under the Main Contract in that regard had ceased. Schlegel received from Binnie, at the same time, the Engineers' measurement of Schlegel's work and the resulting financial calculations of the gross value of Schlegel's work. On 8 February 1978, Fassan, at Schlegel's request, provided Schlegel with a statement of the total balance due to Schlegel.⁽⁹⁷⁾ Basing its own calculations on Binnie's measurements, Fassan's statement showed a balance due of 12,934,124 rials, or 497,466 Deutschmarks at the contractually agreed rate of exchange.

8. Schlegel made numerous attempts to secure payment of the balance. In December 1980, when the Claimant discovered that Fassan had filed for bankruptcy, the Claimant registered a bankruptcy claim in Iran. In March 1981, the bankruptcy proceedings were lifted, and the Claimant resumed its attempts to collect from Fassan and the Copper Company. These attempts culminated in a telex on 23 September 1981 from the Claimant to the International Legal and Financial Claims Committee of Bank Markazi in Iran, asking for assistance in expediting payment. Evidently informed of that telex, Fassan wrote to Bank Markazi on 11 October 1981, explaining that it did owe the sum claimed by Schlegel and would pay Schlegel when it received from the Copper Company the outstanding amount due on the water supply project, of which the money owed to Schlegel was a portion. Neither the Copper Company nor Fassan ever paid Schlegel nor did the Copper Company ever pay Fassan the amount due to Schlegel.

* * *

10. Of the alternative grounds on which the Claimant has based its claim, the ground of unjust enrichment is the only one in which the Tribunal finds merit in this Case. The Claimant alleges that Schlegel had, pursuant to its contractual obligations, carried out the lining on the reservoir belonging to the Copper Company, including the subsequent repair works on it. The Claimant has alleged further that Schlegel had not been completely reimbursed either by the Copper Company or Fassan for the material provided and work performed. It, therefore, argues that by retention and enjoyment of the lining, the Copper Company was unjustly enriched to the extent of sums still owed to Schlegel.

11. As the Tribunal has confirmed on numerous occasions, the concept of unjust enrichment appears in various forms in the different legal systems of the world and "is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals."

12. The Copper Company, however, argues as a threshold issue that such a claim based on unjust enrichment cannot be asserted in this situation where both, Schlegel and the Copper Company, had separate contracts with Fassan. The existence of the contract with Fassan, according to the Respondent, limits Schlegel's recourse to its remedies under that contract and eliminates the subsidiary or alternative basis for recovery of unjust enrichment against the Respondent.

13. The Tribunal has indeed ruled earlier that a substitute right of action based on unjust enrichment does not arise where a Contract binding on both parties exists, because in that situation, "the issue of whether a performance of the Contract results in any 'enrichment' of a party and whether such enrichment is 'unjust' in relation to the other party, cannot be decided without specifically determining the contractual rights and obligations of the parties." In the same vein, the Tribunal, in setting out guidelines to the availability of principles of unjust enrichment, has stated that "[t]here must be... no contractual or other remedy available to the injured party whereby it might seek compensation from the party enriched." In this Case, however, the Parties have no contractual rights or obligations to each other and Schlegel has no contractual or other remedy against the Copper Company, the party enriched. Moreover, in an earlier case, the Tribunal allowed a claim based on unjust enrichment to be made in a situation where the claimant and the respondent, contractually unrelated, both had contracts with a third party against whom the claimant had a direct contractual remedy. See Benjamin R. Isaiiah and Bank Mellat, Award No. 35-219-2 (30 March 1983). The Tribunal recognizes, however, that the absence of a binding contract between the party enriched and the party impoverished does not necessarily make available remedies based on unjust enrichment, particularly in construction sub-contract cases. In a situation somewhat similar to the present case, the Tribunal held that "[t]he circumstances of the instant case have not been shown to be such as to justify any exception from the established principle that generally a subcontractor has no direct right as against the party with whom the contractor has a Contract."

14. The Tribunal has observed, furthermore, that the rule against unjust enrichment "represents a principle based on justice and equity and therefore 'makes it necessary to take into account all the circumstances of each specific situation.'" Whether or not the relationship among Fassan, Schlegel, and the Copper Company may give rise to a claim based on unjust enrichment can only be determined through examination of the particular circumstances of the Case.

15. It is inherent in the principle of unjust enrichment that there must have been an enrichment of one party to the detriment of the other. In this Case there is no dispute that the Copper Company was enriched by Schlegel's provision and installation of the reservoir liner, an integral part of the project and specified expressly by the Copper Company itself. The Copper Company was also clearly enriched by the remedial work performed by Schlegel as a result of dispute resolution requested by the Copper Company, the outcome of which was reported to it. Finally, the Tribunal notes that the Copper Company obtained the benefit of a 10-year warranty on the liner provided for in the Sub-Contract Specification. That document states that, at the completion of the Sub-Contract performance, the warranty was to be transferred to the benefit of the Copper Company.

16. The Tribunal has observed that for a claim of unjust enrichment to succeed, the enrichment must be sufficiently direct. As the Tribunal stated it, the enrichment of one party and the detriment of the other "both must arise as a consequence of the same act or event." The Tribunal finds such a direct enrichment here. The Copper Company had itself provided for the reservoir liner specifications in

the Main Contract's Specification and Bill of Quantities. The Copper Company's consulting engineers Binnie had ordered Fassan to make Schlegel a "nominated sub-contractor" as defined in the Main Contract. Binnie exercised supervisory authority over Schlegel. When Schlegel had performed its work, the result was that the Copper Company had acquired a reservoir lining to its specifications provided by a company it had effectively nominated to do work supervised and approved by its own engineers.

17. The Tribunal finds that the enrichment was and remains unjust. The evidence is clear that the Copper Company has never paid the balance due for Schlegel's work. Nor is there any doubt, given Binnie's issuance of the Maintenance Certificate, that Schlegel's work had been satisfactorily completed... The Tribunal holds, consequently, that the Copper Company has been unjustly enriched and must therefore pay Schlegel the balance due of 12,934,124 rials.

18. In reaching this conclusion, the Tribunal notes that Schlegel made reasonable efforts under difficult circumstances to attempt to recover the sums owed to it. Taking into account the relations of the parties and the other circumstances of this Case, and in the absence of any evidence that the Copper Company had good cause for non-payment to Fassan or directly to Schlegel (which it was entitled to do without risk of double liability), the Tribunal cannot conclude that the Copper Company met the requirements of good faith in meeting its contractual obligations.

[H]. Lockheed Corporation v. The Government of Iran, The Ministry of War & The Iranian Air Force (IUSCT Case No. 829), Award No. 367-829-2 of 9 June 1988⁹⁸ [Robert Briner (pres.), George H. Aldrich, Seyed K. Khalilian]

(Citations selectively omitted)

1. This claim was filed by LOCKHEED CORPORATION ("Lockheed") to recover losses allegedly sustained by three of its corporate divisions in the course of their business activities with the Respondents. Lockheed is a California corporation primarily engaged in the production, sale, and maintenance of aircraft and aerospace equipment.

* * *

7. Claim Two(D) involves the services of two Lockheed personnel hired by the United States Navy through a Foreign Military Sales ("FMS") contract with Iran to support the IAF's P-3F program. Lockheed alleges that after the expiration of the FMS contract, and at IAF-request, these two personnel continued to perform their duties for seven months. Based on a theory of quantum meruit, Lockheed seeks to recover U.S. \$101,602.60 as the reasonable value of the services rendered during the seven months. The IAF defends its non-payment by alleging that there is no contractual basis to the claim, that it did not request the continued performance of these personnel, and that they in fact did not perform any services for the IAF after the expiration of the FMS contract.

* * *

Claim Two (D)

* * *

2. The Merits

63. Whether the principle of unjust enrichment justifies recovery under the circumstances presented requires consideration of several issues. First, as the Tribunal has held in other Cases, the Claimant must establish that there is no valid and enforceable contract on which an action for damages could be based. See, *Dames & Moore and The Islamic Republic of Iran*, Award No. 97-54- 3 (20 December 1983). In the present Case, this is not in dispute. Second, the Claimant must establish that the Respondent has been enriched at the Claimant's expense, the extent of such enrichment and that it would be unfair for the Respondent not to pay for the benefits it has received. Without deciding whether the Respondent has been enriched, the Tribunal finds that any benefits which may have been received by the IAF were conferred by Lockheed at its own peril. By unilaterally deciding to continue the service without first arranging alternative payment arrangements with the IAF, Lockheed accepted the risk that it might encounter difficulty in recovering payment. Although such continued performance may have represented a sensible commercial decision, it is nonetheless clear that, while Lockheed was aware of the risks during the months its performance continued, it took no action to resolve the matter with the IAF until after its performance ceased. It may not now avoid the adverse

consequences of the risk it voluntarily undertook by claiming it was unjust for the IAF to have received the benefit of the service, which there is no evidence the IAF requested. Accordingly, the claim is rejected.

[I]. *Beyeler v. Italy, Judgment of the European Court of Human Rights of 5 January 2000, Application No. 33202/96, ECHR 2000-I 57*

[In 1977, Mr. Beyeler, a Swiss national, purchased a Vincent Van Gogh painting called "Portrait of a Young Peasant" for nearly 310,000 euros, through an intermediary without, however, disclosing to the vendor that the painting was being purchased on his behalf. Consequently, the sale agreement filed by the vendor with the Italian Ministry of Cultural Heritage in accordance with the requirements of Italian law did not mention Mr. Beyeler. In 1983, the Italian Ministry learned that Mr. Beyeler was the real purchaser of the painting. In May 1988, Mr. Beyeler sold the painting for \$8,500,000 to an American corporation. In November 1988, Italy exercised its right of pre-emption and purchased the painting at the 1977 sale price, arguing that Mr. Beyeler had omitted to inform the ministry of the fact that in 1977 the painting had been purchased on his behalf. Consequently, Mr. Beyeler initiated proceedings against the Government of Italy before the European Commission of Human Rights. Having declared that there was no violation of Article 1 of Protocol No. 1 of the European Convention on Human Rights, the Commission referred the case to the European Court of Human Rights.]

(Citations selectively omitted)

85. The applicant submitted lastly that the Italian State had indisputably made a financial gain at his expense. The compensation paid to him bore no reasonable relation to the value of the work, as it was required to do under the Court's case-law, and that evident disproportionateness was also contrary to general principles of international law laid down by, inter alia, well-established international case-law. Thus, any expropriation of a non-national's property should not, among other things, be discriminatory and adequate compensation should be paid for it. The principle of unjust enrichment, applied by international case-law on many occasions, had also been undermined.

* * *

[In paragraphs 107-119, the Court discusses whether there was compliance with Article 1 of Protocol No. 1 by assessing the following: 1) whether the measure complained of amounted to an interference with the applicant's right to the peaceful enjoyment of his possessions; 2) whether the interference was lawful; 3) whether the interference pursued a legitimate aim; and 4) whether a "fair balance" existed between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.]

5. Conclusion

120. The Court considers that the Government have failed to give a convincing explanation as to why the Italian authorities had not acted at the beginning of 1984 in the same manner as they acted in 1988, regard being had in particular to the fact that, under section 61(2) of Law no. 1089 of 1939 (see paragraph 69 above), they could have intervened at any time from the end of 1983 onwards and in respect of anyone "in possession" of the property (and thus without needing first to determine who the owner of the painting was). That is, moreover, apparent from the judgment of the Court of Cassation of 16 November 1995 (see paragraph 63 above). Thus, taking punitive action in 1988 on the ground that the applicant had made an incomplete declaration, a fact of which the authorities had become aware almost five years earlier, hardly seems justified. In that connection it should be stressed that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency.

121. That state of affairs allowed the Ministry of Cultural Heritage to acquire the painting in 1988 at well below its market value. Having regard to the conduct of the authorities between December 1983 and November 1988, the Court considers that they derived an unjust enrichment from the uncertainty that existed during that period and to which they had largely contributed. Irrespective of the applicant's nationality, such enrichment is incompatible with the requirement of a "fair balance".

122. Having regard to all the foregoing factors and to the conditions in which the right of pre-emption was exercised in 1988, the Court

concludes that the applicant had to bear a disproportionate and excessive burden. There has therefore been a violation of Article 1 of Protocol No. 1.

[J]. *Mobil Oil Iran Inc., et al. v. Government of the Islamic Republic of Iran & National Iranian Oil Company (IUSCT Case Nos. 74, 76, 81, 150), Award No. 31174/76/81/150-3 of 14 July 1987*⁽⁹⁹⁾ [Michel Virally (pres.), Charles N. Brower, Parviz Ansari Moin]

[See *supra* p. 624.]

[K]. *Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1), Award of 5 June 1990, 1 ICSID Rep. 569, 607-608 (1993)*⁽¹⁰⁰⁾ [Rosalyn Higgins (pres.), Marc Lalonde, Per Magid]

[For summary of facts, see *supra* p. 722.]

(Citations selectively omitted)

154. Amco advanced as its third cause of action the claim that Indonesia would be unjustly enriched if permitted to retain both the benefits of Amco's investment and the earnings which Amco could have obtained from such investment. Amco contended that the concept of unjust [page "746"](#) enrichment was recognised in the law of Indonesia and also in international law (Memorial, pp. 58-62).

155. Indonesia denied the applicability of the concept to the facts of the case as any beneficiary would have been PT Wisma. Indonesia further offered a legal opinion of Professor S. Gautama (Indonesia, Legal App. vol. II, tab. P) that there was no recognised right of unjust enrichment in Indonesian law. It was further argued, by reference to diverse authorities, that the concept of unjust enrichment was not a sufficiently specific principle of international law to sustain a claim by Amco (see Counter-Memorial, pp. 180-3); and, by reference to a legal opinion of Professor C. Schreuer, that no international law tribunal had ever allowed a claim of unjust enrichment where the applicant was in breach of its obligations under the contract in issue (Indonesia, Legal App. vol. VIII, tab. XXX). For its part, Amco contended that international authority acknowledged the principle of unjust enrichment even if the investor's loss did not arise out of an internationally unlawful act (Reply, pp. 28-30).

156. The Tribunal notes that the beneficiary of any unjust enrichment (whether or not caused by illegal acts and whether or not Amco was itself in default) would have been PT Wisma and not Indonesia. It was PT Wisma that secured the benefit of the termination of PT Amco's entitlement to the share of the profits, once the hotel had been built and was operational. Any advantage to the Indonesian government was too indeterminate to be identified as an unjust enrichment to the State without pronouncing upon whether the factual circumstances for the application of the concept existed, the existence of the concept in Indonesian law or its scope in international law. The Tribunal finds that on this ground Amco's third cause of action fails.

[L]. *Charles N. Brower and Jason D. Brueschke, The Iran-United States Claims Tribunal 427-430 (Martinus Nijhoff Publishers 1998)*⁽¹⁰¹⁾


(Citations selectively omitted)

The Tribunal also has awarded compensation when, having found all other theories of recovery to be unavailable, it has concluded that not to award compensation to the claimant would unjustly enrich the respondent... This theory is accordingly one of last resort, and the Tribunal correctly has noted that "such a claim may not be maintained when a valid and enforceable contract exists." The rationale for this requirement was provided in *T.C.S.B., Inc. and The Islamic Republic of Iran*:

Where a valid contract exists, unjust enrichment is a derivative, or at best a secondary alternative, legal theory to an action on the contract. While there are some precedents, particularly in the United States, for permitting a claimant, if he so chooses, to sue on the basis of unjust enrichment, rather than on the contract, the preponderance of authority is to the contrary.

The Tribunal in that case noted in *dictum*, however, that

[t]his is not to say that the existence of a valid

contract necessarily prevents recovery in other contexts. Thus, a claim may arise from performance going beyond the contract,  [page "747"](#) or from a situation in which the parties to a contract have, by agreement between them, liquidated their original contractual relationship. Furthermore, the assets and liabilities of each party in connection with a contract, may be relevant for claims arising from measures affecting property rights.

The Tribunal's views on unjust enrichment were set out initially in the award in *Sea-Land Service, Inc. and The Islamic Republic of Iran*. The Tribunal described the rule against unjust enrichment as being "inherently flexible," which "makes it necessary to take into account all the circumstances of each specific situation" because "its underlying rationale is 'to reestablish a balance between two individuals, one of whom has enriched himself, with no cause, at the other's expense'." Furthermore, unjust enrichment

involves a duty to compensate which is entirely reconcilable with the absence of any inherent unlawfulness of the acts in question. Thus the principle finds an obvious field of application in cases where a foreign investor has sustained a loss whereby another party has been enriched, but which does not arise out of an internationally unlawful act which would found a claim for damages.


As applied by international tribunals, the Tribunal found that the rule against unjust enrichment will be applied only when (i) there has been an enrichment of one party to the detriment of the other; (ii) both arise as a consequence of the same act or event; (iii) there is no justification for the enrichment; and (iv) no contractual or other remedy is available to the injured party whereby it might seek compensation from the party enriched.

In *Sea-Land* the Tribunal denied claimant's contention that the Government of Iran expropriated its container terminal at Bandar Abbas by interfering with its operation, finding the interference to be due to the general civil unrest at the time... Despite this finding, the Tribunal awarded the claimant \$750,000 as an approximate but "fair assessment" of compensation for the Ports and Shipping Organization's actual use and benefit from Sea Lands's facility on a theory of preventing unjust enrichment.

[M]. Comments and Questions

For further analysis of unjust enrichment as a principle of customary international law, see Ana Vohryzek, *Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims Under ICSID*, 31 Loy. L.A. Int'l & Comp. L. Rev. 501 (2009).

§8.08. UNLAWFUL INTERFERENCE

In some cases, interference with property not amounting to an expropriation has been held to be prohibited under international law.  [page "748"](#)

[A]. *Eastman Kodak Company and others v. The Government of Iran and others (IUSCT Case No. 227) and Eastman Kodak International Capital Company, Incorporated, a claim of less than U.S. \$250,000 presented by the Government of the United States of America v. The Islamic Republic of Iran (IUSCT Case No. 12384), Award No. 329-227/12384-3 of 11 November 1987*⁽¹⁰²⁾
[Michel Virally (pres.), Charles N. Brower, Parviz Ansari Moin]

[Rangiran was an Iranian subsidiary of Eastman Kodak company. It was established to distribute Kodak products in Iran and to operate a photo finishing lab.]


(Citations selectively omitted)

9. On 4 November 1979 the United States Embassy in Tehran and its personnel were seized. On 10 November 1979 the two remaining expatriate officers of Rangiran, the General Manager, Mr. Joseph E. Murphy, and the Operations Manager, Mr. Patrick O'Gorman, both U.S. citizens, left Iran. Before leaving they appointed a management committee consisting of three of the four Rangiran employees who had managed Rangiran during the earlier evacuation. Mr. Murphy has stated that even after his departure he had as his "fulltime responsibility to try to work out the best solutions to the various problems that arose. In furtherance of that end [he] was in constant contact by telephone with Messrs. Paknejad and Chassebi, and to a lesser degree, Mr. Eftekhari. [He] received frequent reports from

them on the status and activities of Rangiran.”

10. Rangiran held checking accounts at Bank Melli and Bank Sepah and an overdraft account, in effect a loan facility, at the Irano-British Bank (now Bank Tejarat). Sometime after 17 November 1979 Rangiran officials sought to withdraw money from one of Rangiran's bank accounts but were refused. Rangiran addressed an inquiry both to Bank Melli and Bank Sepah, to which the banks replied in late December 1979, advising Rangiran that all its bank accounts had been frozen by order of the “General Public Prosecutor of Islamic Revolutionary Republic of Iran” on 17 November 1979. The freeze was to be effective “till next instruction” from the General Public Prosecutor.

11. The Respondent Rangiran explained to the Tribunal that following the appointment of local Iranian management by the departing U.S. officials certain “devoted personnel” of the company were “doubtful about the performance of the said directors.” Accordingly, they “notified to the Follow-Up and Evaluation Board of the Revolutionary Council, Bonyad Mostazafan (Foundation for the Oppressed) and Revolutionary Public Prosecutor of their opinion.” According to Rangiran, the Revolutionary Council and the Bonyad Mostazafan sent representatives to the company but apparently initially took no action. Thereafter the following occurred, in Rangiran's words:

Having noticed no change in the method of management, the personnel applied again to the Revolutionary Public Prosecutor, who, by an order blocked the Bank Account of Rangiran and required the key personnel to make available to the Revolutionary Public Prosecutor's office of all the vouchers for due examination before any payment  page "749" was made. This order aimed at preventing any embezzlement and misappropriation of the public property and of the company's assets. From October to March, even the salary and allowances of the staff and certain expenditures were paid under the supervision of the Revolutionary Public Prosecutor.

12. Ten days after the freeze of Rangiran's bank accounts, on 27 November 1979, Rangiran's Workers' Council, an organization of Rangiran's employees, received a notice from the Investigation Department of the Attorney General's Office which provided that:

Prior to final decision in respect of foreign companies especially American companies, we hereby inform the Council that you should temporarily supervise the importation, delivering and sale of the company's products. And, the company's official are bound to get the employees' council approval for the running of the company's affairs. In the case of observation of anything wrong, it should be reported to this office.

13. Mr. Murphy has further stated that the Workers' Council thereafter exercised virtually all management functions of the company including establishing prices, determining where remaining inventory should be sold, reviewing and approving all payments and expenditures, and setting the salary of management and employees. The Claimants allege that the shareholder-appointed managers were threatened with bodily harm if they refused to cooperate...

14. On 24 December 1979 the Revolutionary Council of the Islamic Republic of Iran appointed Mr. Akbar Khodakhah to supervise Rangiran's affairs. According to the letter of appointment, Mr. Khodakhah was “assigned, until further notice, to have complete supervision on the manner of operation of the workers council, the management, the financial affairs and good performance of Rangiran Photographic Company and to keep this [Revolutionary] Council informed of the manner of operations.”

15. The Respondents contend that Mr. Khodakhah remained as manager of Rangiran only “for a short period of time (less than two months).” The Claimants argue, however, that “although Mr. Khodakhah was physically present at Rangiran's offices only over a limited period, he exercised complete control, during that period and his authority was never revoked. [He] called meetings with all company supervisors and demanded reports and lists concerning sales, inventory and market demand.” In addition the Claimants allege that under Mr. Khodakhah's supervision a meeting was held and a vote taken as to whether the managers chosen by the shareholders should be retained or fired. The employees voted to retain the managers, but Mr. Murphy stated that “it was clear that they remained only at the pleasure of the Workers' Council and Mr. Khodakhah.”

16. On 10 March 1980 the shareholders of Rangiran held an Extraordinary General Meeting in the United States. At this meeting it was decided that Rangiran be placed in liquidation, and a Board of Liquidators was appointed. Rangiran's former outside accountant, Mr. Nezam Motabar, and his partner, Mr. Abbas Hoshi, were appointed by the Board of Liquidators to oversee the liquidation and, specifically, to negotiate termination agreements with the employees and arrange for the payment of liabilities out of realizable assets.

17. The Board of Liquidators decided to cease operations and delivered termination notices to all employees. These notices were initially rejected by the Workers' Council. In Rangiran's [page "750"](#) words, "the personnel decided to continue the company's business until the disposition of service pay of the employees as well as the future of the company was established." Faced with this decision Rangiran's shareholders authorized Mr. Motabar to negotiate with the Workers' Council to resolve the question of termination pay.

18. It appears that ultimately negotiations between Mr. Davoud Beheshti, the head of the Workers' Council, ^(a) 103 and Mr. Motabar were successful, and with the cooperation of the Workers' Council the liquidation proceeded. On 25 June 1980 Mr. Beheshti telexed Mr. Murphy notifying him that:

We have agreed with all the employees to submit our final proposal for termination payment as follows:
[listing conditions].

Your urgent response will be appreciated.

19. Two days later, on 27 June 1980, Eastman Kodak responded by telex to Mr. Beheshti "C/o Nezam Motabar, Price Waterhouse, Intercontinental Hotel, Tehran" rendering its "final proposal" for termination pay to the Rangiran employees. In all essential aspects this proposal corresponded to Mr. Beheshti's proposal. In late 1980 termination checks were issued to Rangiran's ex-employees. According to Mr. Murphy, despite the agreement termination payment was withheld by the Revolutionary Prosecutor from employees of the Bahai faith and certain higher-paid employees.

20. In mid-September 1980, according to Rangiran, "the company's office building was sealed up and the personnel were prevented from working at the order of the officials of the Public Prosecutor's office." Rangiran adds that it was thereafter decided, apparently by the Government, that the representatives of the shareholders "be empowered with full authority for dissolution of the company" so long as the company appoint as a liquidator "one of the members of the company's Staff [i.e., Workers'] Council acceptable to the Public Prosecutor." In fact, on 10 December 1980 the Board of Liquidators appointed by the shareholders of Rangiran addressed a telex to Mr. Hoshi. This telex stated, as follows:

Communication to the office of the Attorney-General,
Revolutionary Republic of Iran, from the Board of
Liquidators of Rangiran... ..

1. The Board of Liquidators of Rangiran... hereby appoints either Nezam Motabar or Abbas Hoshi acting jointly or severally with full power to act on behalf of the Board, provided that Davoud Beheshti, by virtue of his having been appointed by one of the offices of the Attorney General as its representative and having been responsible for the custody of the assets of the company since the departure of management, agrees to act jointly with either Nezam Motabar or Abbas Hoshi and to accept responsibility to implement the following instructions, namely to carry out the existing obligations of the Board of Liquidators to make payment of termination payments to the former employees of Rangiran... in accordance with the schedule of payments prepared by the Employee Council of Rangiran... and already submitted to approved and accepted by the said Board of Liquidators. [page "751"](#)

7. Such foregoing is an official decision of the Board of Liquidators of Rangiran... Any party in Iran asked to act upon the matters covered shall be entitled to rely upon this cable as authority for such action.

57. Based on the facts outlined above (see paragraphs 9-20, supra) Eastman Kodak, as the majority shareholder of Rangiran, alleges that Iran's actions with respect to Rangiran amounted to an

expropriation of its shares in Rangiran and that Iran on that ground is liable to compensate Eastman Kodak for the value of those shares. Iran's defense to this claim is the same as the defense raised against the alleged control over Rangiran by Iran.


58. The question whether, for jurisdictional purposes, a company is controlled by Iran is distinct from that of whether a company has been expropriated. The Tribunal's determination that Rangiran was not an entity controlled by Iran as of 19 January 1981, however, precludes a finding that Iran's interference in Rangiran's affairs amounted to an expropriation of the Claimant's shareholders' rights in Rangiran as of that date. The Tribunal further finds that the facts in this Case do not warrant a finding that Eastman Kodak was deprived of its ownership rights. It is undisputed that the legal title to the shares was unaffected by Iran's interference... In reaching this decision the Tribunal has attached particular importance to the fact that the Claimant, as majority shareholder, was able effectively to decide to liquidate and to declare Rangiran bankrupt at points in time significantly later than the occurrence of the events which the Claimant contends caused the loss of its shareholding interest.

59. The fact that Iran's interference did not rise to the level of an expropriation or of a deprivation of ownership rights does not, however, preclude the Tribunal from considering whether the interference established here was such as to constitute "other measures affecting property rights" as contemplated by Article II, paragraph 1, of the CSD. See Foremost, *supra*, at 32. Such measures, while not amounting to an expropriation or deprivation, may give rise to liability in so far as they give rise to damage to the Claimant's ownership interests.

60. The Tribunal is satisfied that the Claimant's claim for expropriation must be taken to include a claim for a lesser degree of interference with its property rights.

61. The Tribunal determines that an interference of the type described above exists in the present Case, and that this interference is attributable to Iran. The remaining issue for the Tribunal is therefore to determine whether such an interference has caused damage to Eastman Kodak and what compensation, if any, consequently is due to the latter.

[B]. Comments and Questions

1. The conclusion of this chapter's examination of unlawful interference as a mode of expropriation underlines the fact that it is not the modality of taking but rather the interference with the property of an alien that sounds as an expropriation in international law.
2. Can interference by non-state actors in a system with the consequence that it reduces significantly the economic value of an enterprise by a foreign investor be attributed to the state as an expropriation? If so, under what circumstances?  [page "752"](#)

¹ Reproduced with the permission of Koninklijke Brill NV.

² Reproduced with the permission of the American Society of International Law via the Copyright Clearance Center.

³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428-30 (1964).

⁴ *CME Czech Republic B.V. v. Czech Republic*, Final Award of March 14, 2003, paras. 497-98.

⁵ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF) 99/2, para. 117 (Oct. 11, 2002).

⁶ Reproduced with the permission of the Penn St. Int'l L. Rev.

⁷ Available at http://italaw.com/documents/santaelena_award.pdf (accessed 1 September 2013).

⁸ By permission of Oxford University Press. All rights reserved.

⁹ Reproduced with the permission of the Vanderbilt Journal of Transnational Law, who is the copyright holder.

¹⁰ Available at <http://italaw.com/cases/documents/1156> (accessed 1 September 2013).

¹¹ Available at <http://italaw.com/sites/default/files/case-documents/ita0728.pdf> (accessed 1 September 2013).

¹² *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of September 16, 2003, para. 20.22.

¹³ By permission of Oxford University Press. All rights reserved.

¹⁴ *Schneider v. Kingdom of Thailand*, 688 F.3d 68 (2d Cir. 2012).

¹⁵ Available at <http://www.italaw.com/sites/default/files/case->

documents/ita0902.pdf (accessed 1 September 2013).

¹⁶ *American Manufacturing and Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, at 28 (1997) [Annex W115]. Article 11(4) of the Zaïre-United States bilateral investment treaty, much like Article 2(2) of the IPPA, provides that "[i]nvestment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other party." *Id.*, at 28 [Annex W1 [5].

¹⁷ *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, at 545 (1990) [Annex W117; a digested version of the decision has also been provided at Annex E-M35].

¹⁸ *AAPL v. Sri Lanka*, at 546 (quoting Alwyn V. Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces*, 14 (1957)) [Annex W1 17; also Annex E-M35].

¹⁹ Available at <http://www.iusct.net/Default.aspx>.

²⁰ Available at <http://www.iusct.net/Default.aspx>.

²¹ Available at <http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf> (accessed 1 September 2013).

²² Available at http://italaw.com/documents/santaelena_award.pdf (accessed 1 September 2013).

²³ Available at http://www.italaw.com/sites/default/files/case-documents/italaw1094_0.pdf (accessed 1 September 2013).

²⁴ © Permanent Court of Arbitration.

²⁵ Available at <http://www.iusct.net/Default.aspx>.

²⁶ Available at <http://www.iusct.net/Default.aspx>.

²⁷ Available at <http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf> (accessed 1 September 2013).

²⁸ Available at <http://www.iusct.net/Default.aspx>.

²⁹ Available at <http://www.iusct.net/Default.aspx>.

³⁰ Available at <http://www.iusct.net/Default.aspx>.

³¹ Available at <http://www.iusct.net/Default.aspx>.

³² Available at <http://www.iusct.net/Default.aspx>.

³³ The fact that years later (on 5 September 1981) the SPA was "nullified" by Iran pursuant to the Single Article Act of 8 January 1980 suggests that Respondents themselves also perceived no such abandonment had taken place.

³⁴ The Award correctly concludes that the SPA was not "frustrated or terminated at this time" (para. 111) by any cause including force majeure (para. 117).

³⁵ Available at <http://www.italaw.com/sites/default/files/case-documents/ita0900.pdf> (accessed 1 September 2013).

³⁶ Thus in the *Rudloff* case, the council unilaterally terminated the contract and destroyed the building the Claimant was constructing on the land in question: (1905) 9 RIAA 255, 259.

³⁷ E.g., *Libyan American Oil Company v. Government of the Libyan Arab Republic*, (1977) 62 ILR 141, 189-90. See also *Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation* (1978) 56 ILR 258.

³⁸ See the cases reviewed by GH Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996) ch. 5.

³⁹ See, e.g., *Starrett Housing Corporation v. Government of the Islamic Republic of Iran* (1987) 16 Iran-US CTR 112, 230-1 (paras. 361-2).

⁴⁰ See *Shufeldt Claim*, (1930) 2 RIAA 1083, 1097. This was a case of legislative invalidation of a concession agreement 6 years after its inception.

⁴¹ Article 201 defines "measure" as including "any law, regulation, procedure, requirement or practice".

⁴² Available at <http://www.italaw.com/sites/default/files/case-documents/ita0734.pdf> (accessed 1 September 2013).

⁴³ Available at <http://www.iusct.net/Default.aspx>.

⁴⁴ © British Institute of International and Comparative Law. Reprinted with the permission of Cambridge University Press.

⁴⁵ Available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=009&CL=ENG> (accessed 19 December 2013).

⁴⁶ Available at <http://www.iusct.net/Default.aspx>.

⁴⁷ Available at <http://www.iusct.net/Default.aspx>.

⁴⁸ *Tippets v. Tams-Affa Consulting Eng'rs*, (1984) 6 Iran-US CTR 219, 225-6; accord *Int'l Sys. & Control Operations v. Indus. Dev. and Renovation Org.*, (1986) 12 Iran-US CTR 239, para. 97; *Payne v. Iran*, (1986) 12 Iran-US CTR 3, para. 22; *Phelps Dodge Corp. v. Iran*, (1986) 10 US CTR 121, para. 22.

⁴⁹ Available at <http://www.iusct.net/Default.aspx>.

⁵⁰ Available at <http://www.italaw.com/sites/default/files/case-documents/ita0584.pdf> (accessed 1 September 2013).

⁵¹ Available at <http://italaw.com/cases/documents/282> (accessed 19 December 2013).

⁵² Reprinted with permission of Professor Christie; published by

Oxford University Press for the Royal Institute of International Affairs, London.

⁵³ © 1994 E. Lauterpacht. Reprinted with the permission of Cambridge University Press.

⁵⁴ Available at <http://www.italaw.com/sites/default/files/case-documents/ita0902.pdf> (accessed 1 September 2013).

⁵⁵ Available at <http://www.italaw.com/sites/default/files/case-documents/ita0358.pdf> (accessed 1 September 2013).

⁵⁶ Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61994TJ0115> (accessed 1 September 2013). © European Union, <http://eur-lex.europa.edu>.

⁵⁷ Reproduced with the permission of the American Society of International Law via the Copyright Clearance Center.

⁵⁸ Available at <http://www.iusct.net/Default.aspx>.

⁵⁹ Available at http://italaw.com/documents/santaelena_award.pdf (accessed 1 September 2013).

⁶⁰ © 1994 Cambridge University Press. Reprinted with the permission of Cambridge University Press.

⁶¹ Reprinted with permission of Professor Christie; published by Oxford University Press for the Royal Institute of International Affairs, London.

⁶² © 1994 E. Lauterpacht. Reprinted with the permission of Cambridge University Press.

⁶³ Available at <http://www.italaw.com/sites/default/files/case-documents/ita0678.pdf> (accessed 1 September 2013).

⁶⁴ Available at <http://www.iusct.net/Default.aspx>.

⁶⁵ Available at <http://www.iusct.net/Default.aspx>.

⁶⁶ International Legal Materials by American Society of International Law. Reproduced with permission of American Society of International Law, in the format Republish in a book via Copyright Clearance Center.

⁶⁷ © 1994 Cambridge University Press. Reprinted with the permission of Cambridge University Press.

⁶⁸ © 1984 E. Lauterpacht. Reprinted with the permission of Cambridge University Press.

⁶⁹ Available at <http://www.iusct.net/Default.aspx>.

⁷⁰ Please note that the copyright in the International Law Journal is held by the President and Fellows of Harvard College, and that the copyright in the article is held by the author.

⁷¹ Reprinted by permission of Oxford University Press.

⁷² Available at <http://www.iusct.net/Default.aspx>.

⁷³ Available at <http://www.iusct.net/Default.aspx>.

⁷⁴ Available at http://italaw.com/documents/santaelena_award.pdf (accessed 1 September 2013).

⁷⁵ International Legal Materials by American Society of International Law. Reproduced with permission of American Society of International Law, in the format Republish in a book via Copyright Clearance Center.

⁷⁶ © 1984 E. Lauterpacht. Reprinted with the permission of Cambridge University Press.

⁷⁷ © 1984 E. Lauterpacht. Reprinted with the permission of Cambridge University Press.

⁷⁸ Available at <http://www.iusct.net/Default.aspx>.

⁷⁹ Available at <http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf> (accessed 1 September 2013).

⁸⁰ Available at <http://italaw.com> (accessed 19 December 2013).

⁸¹ Available at <http://italaw.com/sites/default/files/case-documents/ita0460.pdf> (accessed 1 September 2013).

⁸² Available at <http://www.iusct.net/Default.aspx>.

⁸³ Available at <http://www.iusct.net/Default.aspx>.

⁸⁴ Available at <http://www.iusct.net/Default.aspx>.

⁸⁵ © 1979 E. Lauterpacht. Reprinted with the permission of Cambridge University Press.

⁸⁶ Reproduced with the permission of the Journal of Transnational Law and Policy, who is the copyright holder.

⁸⁷ Available at <http://italaw.com/sites/default/files/case-documents/ita0378.pdf> (accessed 1 September 2013).

⁸⁸ Available at <http://www.state.gov/documents/organization/22094.pdf> (accessed 1 September 2013).

⁸⁹ Available at <http://www.state.gov/documents/organization/14442.pdf> (accessed 1 September 2013).

⁹⁰ © 1993 Grotius Publications Limited. Reprinted with the permission of Cambridge University Press.

⁹¹ Available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58560> (accessed 1 September 2013).

⁹² Available at <http://www.italaw.com/sites/default/files/case-documents/ita0057.pdf> (accessed 1 September 2013).

- ⁹³ Reproduced with the permission of the Cornell Law Quarterly.
- ⁹⁴ Available at <http://www.iusct.net/Default.aspx>.
- ⁹⁵ Available at <http://www.iusct.net/Default.aspx>.
- ⁹⁶ Available at <http://www.iusct.net/Default.aspx>.
- ⁹⁷ Out of a total of 51,096,412 rials due, Schlegel had already been paid 38,162,288 rials by Fassan.
- ⁹⁸ Available at <http://www.iusct.net/Default.aspx>.
- ⁹⁹ Available at <http://www.iusct.net/Default.aspx>.
- ¹⁰⁰ © 1993 Grotius Publications Limited. Reprinted with the permission of Cambridge University Press.
- ¹⁰¹ Reproduced with the permission of Koninklijke Brill NV.
- ¹⁰² Available at <http://www.iusct.net/Default.aspx>.
- ^a The liquidation report later referred to Mr. Beheshti as “the Trustee of the Attorney General Office.”

© 2015 Kluwer Law International BV (All rights reserved).

Kluwer Arbitration is made available for personal use only. All content is protected by copyright and other intellectual property laws. No part of this service or the information contained herein may be reproduced or transmitted in any form or by any means, or used for advertising or promotional purposes, general distribution, creating new collective works, or for resale, without prior written permission of the publisher.

If you would like to know more about this service, visit www.kluwerarbitration.com or contact our Sales staff at sales@kluwerlaw.com or call +31 (0)172 64 1562.