
Responsibility of States for Injuries to the Economic Interests of Aliens: II. Draft
Convention on the International Responsibility of States for Injuries to Aliens

Author(s): Louis B. Sohn and R. R. Baxter

Source: *The American Journal of International Law*, Jul., 1961, Vol. 55, No. 3 (Jul.,
1961), pp. 548-584

Published by: Cambridge University Press

Stable URL: <https://www.jstor.org/stable/2195879>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at
<https://about.jstor.org/terms>



JSTOR

Cambridge University Press is collaborating with JSTOR to digitize, preserve and extend access
to *The American Journal of International Law*

II

DRAFT CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES
FOR INJURIES TO ALIENS *

SECTION A

GENERAL PRINCIPLES AND SCOPE

ARTICLE 1

(Basic Principles of State Responsibility)

1. A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State, and causes an injury to an alien. A State which is responsible for such an act or omission has a duty to make reparation therefor to the injured alien or an alien claiming through him, or to the State entitled to present a claim on behalf of the individual claimant.

2. (a) An alien is entitled to present an international claim under this Convention only after he has exhausted the local remedies provided by the State against which the claim is made.

(b) A State is entitled to present a claim under this Convention only on behalf of a person who is its national, and only if the local remedies and any special international remedies provided by the State against which the claim is made have been exhausted.

ARTICLE 2

(Primacy of International Law)

1. The responsibility of a State under Article 1 is to be determined according to this Convention and international law, by application of the sources and subsidiary means set forth in paragraph 1 of Article 38 of the Statute of the International Court of Justice.

2. A State cannot avoid international responsibility by invoking its municipal law.

3. Nothing in this Convention shall adversely affect any right which an alien enjoys under the municipal law of the State against which the claim is made if that law is more favorable to him than this Convention.

SECTION B

WRONGFUL ACTS AND OMISSIONS

ARTICLE 3

(Categories of Wrongful Acts and Omissions)

1. An act or omission which is attributable to a State and causes an injury to an alien is "wrongful," as the term is used in this Convention:

(a) if, without sufficient justification, it is intended to cause, or to facilitate the causing of, injury;

(b) if, without sufficient justification, it creates an unreasonable risk of injury through a failure to exercise due care;

* Copyright, 1961, by the President and Fellows of Harvard College. Reprinted by their permission.

- (c) if it is an act or omission defined in Articles 5 to 12; or
- (d) if it violates a treaty.

2. The wrongfulness of such an act or omission may be the result of the fact that the law of the State does not conform to international standards or of the fact that the law, although conforming to international standards, has been misapplied.

ARTICLE 4

(Sufficiency of Justification)

1. The imposition of punishment for the commission of a crime for which such punishment has been provided by law is a "sufficient justification" within the meaning of sub-paragraph 1(a) of Article 3, except when the decision imposing the punishment is wrongful under Article 8.

2. The actual necessity of maintaining public order, health, or morality in accordance with laws enacted for that purpose is a "sufficient justification" within the meaning of sub-paragraphs 1(a) and 1(b) of Article 3, except when the measures taken against the injured alien clearly depart from the law of the respondent State or unreasonably depart from the principles of justice or the principles governing the action of the authorities of the State in the maintenance of public order, health, or morality recognized by the principal legal systems of the world.

3. The valid exercise of belligerent or neutral rights or duties under international law is a "sufficient justification" within the meaning of sub-paragraphs 1(a) and 1(b) of Article 3.

4. The contributory fault of the injured alien, or his voluntary participation in activities involving an unreasonable risk of injury, to the extent that such fault or voluntary participation bars the claim of a person under both the law of the respondent State and the principles recognized by the principal legal systems of the world, is a "sufficient justification" within the meaning of sub-paragraph 1(b) of Article 3.

5. In circumstances other than those enumerated in paragraphs 1 to 4 of this Article, "sufficient justification" within the meaning of sub-paragraphs 1(a) and 1(b) of Article 3 exists only when the particular circumstances are recognized by the principal legal systems of the world as constituting such justification.

ARTICLE 5

(Arrest and Detention)

1. The arrest or detention of an alien is wrongful:

- (a) if it is a clear and discriminatory violation of the law of the arresting or detaining State;
- (b) if the cause or manner of the arrest or detention unreasonably departs from the principles recognized by the principal legal systems of the world;
- (c) if the State does not have jurisdiction over the alien; or
- (d) if the arrest or detention otherwise involves a violation by the State of a treaty.

2. The detention of an alien becomes wrongful after the State has failed:

- (a) to inform him promptly of the cause of his arrest or detention, or to inform him within a reasonable time after his arrest or detention of the specific charges against him;
- (b) to grant him prompt access to a tribunal empowered both to determine whether his arrest or detention is lawful and to order his release if the arrest or detention is determined to be unlawful;
- (c) to grant him a prompt trial; or

(d) to ensure that his trial and any appellate proceedings are not unduly prolonged.

3. The mistreatment of an alien during his detention is wrongful.

ARTICLE 6

(Denial of Access to a Tribunal or an Administrative Authority)

The denial to an alien of the right to initiate, or to participate in, proceedings in a tribunal or an administrative authority to determine his civil rights or obligations is wrongful:

(a) if it is a clear and discriminatory violation of the law of the State denying such access;

(b) if it unreasonably departs from those rules of access to tribunals or administrative authorities which are recognized by the principal legal systems of the world; or

(c) if it otherwise involves a violation by the State of a treaty.

ARTICLE 7

(Denial of a Fair Hearing)

The denial to an alien by a tribunal or an administrative authority of a fair hearing in a proceeding involving the determination of his civil rights or obligations or of any criminal charges against him is wrongful if a decision or judgment is rendered against him or he is accorded an inadequate recovery. In determining the fairness of any hearing, it is relevant to consider whether it was held before an independent tribunal and whether the alien was denied:

(a) specific information in advance of the hearing of any claim or charge against him;

(b) adequate time to prepare his case;

(c) full opportunity to know the substance and source of any evidence against him and to contest its validity;

(d) full opportunity to have compulsory process for obtaining witnesses and evidence;

(e) full opportunity to have legal representation of his own choice;

(f) free or assisted legal representation on the same basis as nationals of the State concerned or on the basis recognized by the principal legal systems of the world, whichever standard is higher;

(g) the services of a competent interpreter during the proceedings if he cannot fully understand or speak the language used in the tribunal;

(h) full opportunity to communicate with a representative of the government of the State entitled to extend its diplomatic protection to him;

(i) full opportunity to have such a representative present at any judicial or administrative proceeding in accordance with the rules of procedure of the tribunal or administrative agency;

(j) disposition of his case with reasonable dispatch at all stages of the proceedings; or

(k) any other procedural right conferred by a treaty or recognized by the principal legal systems of the world.

ARTICLE 8

(Adverse Decisions and Judgments)

A decision or judgment of a tribunal or an administrative authority rendered in a proceeding involving the determination of the civil rights or

obligations of an alien or of any criminal charges against him, and either denying him recovery in whole or in part or granting recovery against him or imposing a penalty, whether civil or criminal, upon him is wrongful:

- (a) if it is a clear and discriminatory violation of the law of the State concerned;
- (b) if it unreasonably departs from the principles of justice recognized by the principal legal systems of the world; or
- (c) if it otherwise involves a violation by the State of a treaty.

ARTICLE 9

(Destruction of and Damage to Property)

1. Deliberate destruction of or damage to the property of an alien is wrongful, unless it was required by circumstances of urgent necessity not reasonably admitting of any other course of action.

2. A destruction of the property of an alien resulting from the judgment of a competent tribunal or from the action of the competent authorities of the State in the maintenance of public order, health, or morality shall not be considered wrongful, provided there has not been:

- (a) a clear and discriminatory violation of the law of the State concerned;
- (b) a violation of any provision of Articles 6 to 8 of this Convention;
- (c) an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; or
- (d) an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

EXPLANATORY NOTE

Paragraph 1: The Convention distinguishes a destruction of property or the damaging of property from an uncompensated taking of property or the deprivation of the use or enjoyment of property. The present paragraph comprehends only physical injury to the property through the deliberate action of the State, as contrasted with those takings and interferences with property which form the subject of Article 10. Destruction of property or damage to property which is the consequence of the negligence of an organ, agency, official, or employee of the government does not fall within this Article but is included within the scope of Article 3, dealing in general with categories of wrongful acts and omissions. Examples of destruction of or damage to property which would be wrongful under this Article would be: the deliberate burning by the police of a car owned by an alien; or physical damage to mercantile premises owned by an alien enterprise resulting from the intentional acts of employees of the State, whether such persons were acting under orders of higher authority or on their own initiative but within the scope of their function.

There is excepted from the scope of wrongful destruction of or damage to property such action as was required by circumstances of urgent necessity. The classic example of such destruction or damage is the tearing down of buildings in order to prevent the spread of fire. The destruction of property in actual combat operations during an international conflict or the destruction or damaging of property of an alien in order to interdict

its use by the enemy typify legitimate destruction of property in time of war.

Paragraph 2: The deliberate destruction of property is justified if it is accomplished in pursuance of the judgment of a competent tribunal or in exercise of the police power of the State and is not otherwise unlawful. The justification for destruction of or damage to property which has been inserted in this Article is a more particular application of the justification to be found in paragraph 2 of Article 4. In Article 4, only measures which clearly depart from the law of the respondent State or which unreasonably depart from the principles of justice and of maintenance of public order, health, and morality generally recognized by the principal legal systems of the world fall outside the scope of the justification and restore acts or omissions to the category of wrongful acts or omissions. In paragraph 2 of Article 9, the justification is also rendered inapplicable if there has been a violation of Article 6, 7, or 8 or an abuse of judicial authority or police powers for the purpose of depriving an alien of his property. In this last respect, the paragraph invokes the familiar concept of "abuse of rights."

An exhaustive list could not be provided of the circumstances under which deliberate destruction of or damage to the property of an alien would not engage international responsibility. A few examples may be provided by way of illustration:

An alien could not complain if explosives or arms which were in his possession in violation of the law of the State concerned were destroyed by the police or by the military authorities, whether summarily or upon authorization by a court. It must be recognized as altogether proper that a tribunal should have the power to order the destruction of buildings which have been condemned as no longer suitable for occupancy and have not been torn down by the owner. Should an alien be in possession of narcotics or liquor or apparatus for the manufacture or processing of these goods, no objection could be raised to their destruction if such action were required or authorized by the law of the State. A variety of other circumstances can readily be envisaged in which it would be unwarranted to tie the hands of the authorities of the State and to make it impossible for them to take measures to protect the public order, health, and morality of its population.

The justification of judicial action or the protection of public order is not operative if other circumstances vitiated the force of what would otherwise be a justification. In the first place, the justification is inapplicable if the destruction or damage was clearly inconsistent with the law of the State concerned and discriminated against an alien or aliens (sub-paragraph 2(a)). The police would not be justified in destroying stocks of certain goods illegally in the possession of an alien if there were no authorization of such action under the law of the State. Similarly, if the "judgment of a competent tribunal" is the result of a procedural denial of justice or constitutes in itself a substantive denial of justice, that judgment is not a sufficient justification for destruction of or damage to the property of an alien (sub-paragraph 2(b)). As in the case of the other wrongs dealt with

in this Section, an alleged justification which departs unreasonably from the "principles of justice recognized by the principal legal systems of the world" actually constitutes no justification at all (sub-paragraph 2(c)). A State could not defend the deliberate destruction by State employees of the shops of aliens by invoking a law purporting to authorize such action. Finally, sub-paragraph 2(d) forbids the abusive use of the powers of the State in order to bring about a concealed taking of the property of an alien, forbidden, unless compensation be paid, under paragraph 2 of Article 10. Such an abusive employment of the rights of the State could, for example, be established if a toll bridge owned by an alien were to be destroyed on the ground that it was a hazard to navigation, although the river which the bridge spanned was in fact not navigable. An intention to deprive an alien of his property might likewise be inferred from the destruction of an alien's factory as a fire hazard when an adjoining building owned by a national of the State, which was in even worse condition, was allowed to stand.

Damages: The factors to be taken into account in computing damages for destruction of or injury to property within the meaning of this Article are set forth in Article 31.

ARTICLE 10

(Taking and Deprivation of Use or Enjoyment of Property)

1. The taking, under the authority of the State, of any property of an alien, or of the use thereof, is wrongful:

- (a) if it is not for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking, or
- (b) if it is in violation of a treaty.

2. The taking, under the authority of the State, of any property of an alien, or of the use thereof, for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking is wrongful if it is not accompanied by prompt payment of compensation in accordance with the highest of the following standards:

- (a) compensation which is no less favorable than that granted to nationals of such State; or
- (b) just compensation in terms of the fair market value of the property or of the use thereof unaffected by this or other takings or by conduct attributable to the State and designed to depress the value of the property in anticipation of the taking; or
- (c) if no fair market value exists, just compensation in terms of the fair value of such property or of the use thereof.

If a treaty requires a special standard of compensation, the compensation shall be paid in accordance with the treaty.

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 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.

(b) A "taking of the use of property" includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time.

4. If property is taken by a State in furtherance of a general program of economic and social reform, the just compensation required by this Article may be paid over a reasonable period of years, provided that:

(a) the method and modalities of payment to aliens are no less favorable than those applicable to nationals;

(b) a reasonable part of the compensation due is paid promptly;

(c) bonds equal in fair market value to the remainder of the compensation and bearing a reasonable rate of interest are given to the alien and the interest is paid promptly; and

(d) the taking is not in violation of an express undertaking by the State in reliance on which the property was acquired or imported by the alien.

5. An uncompensated taking of property of an alien or a deprivation of the use or enjoyment 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 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;

(b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention;

(c) it is not an unreasonable departure from the principles of justice recognized by the principal 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.

6. The compensation and interest required by this Article shall be paid in the manner specified in Article 39.

7. The term "property" as used in this Convention comprises all movable and immovable property, whether tangible or intangible, including industrial, literary, and artistic property, as well as rights and interests in any property.

8. The responsibility of a State for the annulment or nonperformance of a contract or concession is determined by Article 12.

EXPLANATORY NOTE

Definition of a taking under the authority of the State: A "taking" may be either a taking of title or a taking only of the use of property. Premises required by the government of a State may be secured through a complete taking by way of expropriation or of eminent domain. Alternatively, a government desiring merely temporary utilization of the premises may demand the use of the property against the payment of rental and with the understanding that the property will be restored to the owner upon the completion of the government's use. Personal property or movables are likewise susceptible of either permanent appropriation or a temporary taking of use, subject of course to the compensation required by this Article.

A "taking" may be accomplished through, *inter alia*, enforcement of legislation or an executive decree, the taking of an administrative measure, or a failure to take an administrative measure.

The expression "under the authority of the State" has reference to the fact that the taking may be effected directly by officials or employees of the State or by the acts of private persons acting under authority conferred upon them by the law of that State, *e.g.*, in case of expropriation of property for a private school.

Indirect "takings of property" through interference with its use are dealt with in paragraph 3 of this Article (*q.v.*). It may merely be observed at this point that, depending upon the circumstances, an unreasonable interference with the use, enjoyment, or disposal of property may constitute either a "taking of property" or a "taking of the use of property" as those concepts are employed in paragraphs 1 and 2.

The criteria of wrongfulness: All legal systems recognize that there are various circumstances under which it is legitimate for the State to obtain property from a private person against the will of that individual. In most legal systems this compulsory acquisition of property, whether the process be referred to as eminent domain, requisition, preemption, expropriation, or nationalization, entails an obligation to pay at least some compensation to the person from whom it was taken. Since this power to take property is regarded as a right of the State, the State commits no wrong thereby, provided it acts in conformity with the governing rules of municipal law. The most important requirement normally laid upon the State is the payment of compensation. If that compensation is made available, no claim by the former owner of the property for its restoration in kind can be entertained.

In light of the general recognition in municipal legal systems of a government's power of compulsory acquisition of property, international law similarly recognizes the power of a State to take the property of an alien—but subject to several important limitations. The first of these is an obligation to pay compensation for the property taken, subject to certain exceptions analogous to those of municipal law which are detailed in paragraph 5 of this Article. On the assumption that all other requirements of law have been met, the taking of title to or the use of property of an alien becomes wrongful only if the necessary compensation is not paid. The essence of the wrong is accordingly not a taking of property but an *uncompensated* taking of property. The appropriate remedy is therefore the payment of damages.

The other general limitation imposed by international law on the taking of property of aliens is that the taking must be for a "public purpose." Within municipal legal systems, the significance of a public purpose varies greatly, and in many countries the term has never been defined with any degree of precision. Even in the economically and politically most conservative countries of the world, recognition is given to the public purpose served by compulsory acquisition of property by the State for transfer to another private person who is regarded as being able to make a socially more productive use of the property than its former owner. It is not without significance that what constitutes a "public purpose" has rarely been discussed by international tribunals and that in no case has property been ordered restored to its former owner because the taking was considered to be for other than a public purpose. This unwillingness to impose an international standard of public purpose must be taken as reflecting great hesitancy upon the part of tribunals and of States adjusting claims through diplomatic settlement to embark upon a survey of what the public

needs of a nation are and how these may best be satisfied. In view of the fact that there is no precedent—although considerable doctrine—in favor of the restitution in kind of property which has not been taken for a “public purpose,” it is only with some hesitation that reference has been made to the concept in this Convention. Because the verbal formula has so often been employed, it was considered unwise to omit it at this point, empty though it may be of any operative legal content. The expression “public purpose” is qualified by the words “clearly recognized as such by a law of general application in effect at the time of the taking” in order to preclude *ad hoc* determinations of public purpose by government officials acting without any express authority in law. The effect of sub-paragraph 1(a) of this Article is thus to require the articulation of the public purpose to be served by a taking before it is actually undertaken.

The only category of cases in which takings of property have been held to be “wrongful” whether or not compensation was paid and in which the restitution in kind of the property has been required by tribunals are those in which there has been a violation of a treaty. The landmark case is the *Case concerning the Factory at Chorzów (Claim for Indemnity)*, P.C.I.J., Ser. A, No. 17 at 47–48 (1928), in which restitution was held, *ceteris paribus*, to be the appropriate remedy for the violation of a treaty forbidding the taking of certain types of property. Changes in the situation of the property which had been taken were, however, considered to preclude its restoration in kind. It must be borne in mind that the applicable treaty, the German-Polish Convention concerning Upper Silesia, expressly authorized expropriation of property under certain defined circumstances and completely excluded the expropriation, even against compensation, of other properties, the “liquidation” of which was forbidden. Although the property was not restored in kind in this case, there have been a substantial number of cases in which property has been restored in kind to the rightful owner by reason of its having been taken by a belligerent in violation of the treaties regarding the conduct of warfare. Having regard to the fact that there is precedent for the restoration of property which has been taken in violation of treaty, it has been thought appropriate to characterize such takings as “wrongful” in the sense that the payment of compensation will not legitimize the taking.

This Article thus recognizes three types of takings of property as unlawful: (1) those which are uncompensated; (2) those effected other than for a public purpose, even if compensation is paid; and (3) those effected in violation of treaty, even if compensation is paid. The remedies provided are, however, different. In the first instance, damages are the proper reparation for the taking which has been made wrongful by the failure to pay compensation. In the other two cases, restitution is the ordinary remedy. The types of takings are accordingly dealt with in different paragraphs of this Article.

Paragraph 1: As explained above, this paragraph deals with takings of property which are wrongful even if compensation is paid. Paragraph 1 of Article 32 demands that if the taking violates this paragraph, the

property be restored to the owner whenever possible and damages paid for the use of the property. If the owner is tendered compensation for the property taken, he is under no obligation to accept it; if he does accept it, he may be considered to have waived his claim to restitution of the property.

Paragraph 2: The view has not been accepted in this Convention that adverse economic circumstances or a strong national policy may in international law justify the taking of property without compensation. To make the duty to compensate contingent upon such factors would pose insuperable difficulties. If the question of justification for a taking without compensation were to be left to the determination of the State which had taken the property, that State would always be in a position to find a valid national need for the seizure of the property and an equally good reason why no compensation should be paid. If, on the other hand, international law were to require compensation in some cases but not in others, it would be necessary to take account of the internal financial and economic problems of the nation taking the property and its purpose in taking the property. Not only would it be difficult to formulate any international standards on this point, but, even if such standards were available, an international tribunal would also have great difficulty in determining whether the economic circumstances of the nation concerned were such as to permit the payment of the requisite compensation.

A rule requiring the payment of compensation under all circumstances has the positive benefit of stimulating international trade and investment by affording protection to the business activities of aliens in foreign countries. It would be inequitable that a government should at one and the same time seek the economic benefits which foreign trade and investment carry with them, and at the same time call for the adoption of a rule placing such foreign activities at the mercy of the very government which seeks this economic assistance. In terms of social justice, the taking of the property of aliens may create greater hardships to the aliens whose property it is than it brings benefits to the State seizing the property. The events of two World Wars have demonstrated in a tragic fashion that a man may be as effectively killed by depriving him of his property as he can by his being executed. Finally, the provision of compensation to aliens whose property is taken is consistent with that special protection which is given to aliens, even in cases where such protection may place aliens in a privileged position vis-à-vis the nationals of the State concerned.

Account has, however, been taken of the special economic needs of the State for the limited purpose of allowing deferment of compensation under the terms and conditions set forth in paragraph 4. That paragraph does not, it must be emphasized, in any way reduce the total amount of the compensation which must be paid.

Sub-paragraph 2(a) is intended to establish as a minimum a principle of non-discrimination between aliens and nationals in compensating aliens for property which has been taken. The succeeding sub-paragraph 2(b) points, consistently with Article 2, to the existence of an international

standard. This standard is based on the concept of the "fair market value." The possibility exists, of course, that the "fair market value" of the particular property may have been depressed by anticipation of the taking or conversely that the prospect of a taking by eminent domain may actually enhance the value of property. It is required that "fair market value" be established independently of these influences. A State thus cannot profit from a gradual and well-publicized program of nationalization which depresses the value of all property which may be subjected to that nationalization.

Property owned by an alien may be of a distinctive character or of a highly specialized nature for which no market value in the country or area concerned can be established. The value of the sole railroad in an underdeveloped country could not be determined on the basis of the price it would command on the market, since no market for such enterprises would in all likelihood exist within that country. The standard of "fair value" incorporated in sub-paragraph 2(c) allows some latitude in determining what would be an equitable price for the property taken.

Account has also been taken of the possibility that a treaty may prescribe a special standard of compensation, which may be either higher or lower than that required by sub-paragraphs 2(a), 2(b), and 2(c). That a treaty may prescribe a lower measure of compensation than is otherwise provided by this Article is specifically taken into account in Article 25, dealing with the waiver, compromise, or settlement of claims by States.

Subject to the special exception dealt with in paragraph 4, the requirement of "prompt" compensation does not necessarily call for payment in advance but does require that compensation be paid within a reasonable period of time after the taking. Vague assurances at the time of the taking of property to the effect that compensation will be paid in the future are insufficient if action is not taken within a reasonable time thereafter to grant that compensation. While no hard and fast rule may be laid down, the passage of several months after the taking without the furnishing by the State of any real indication that compensation would shortly be forthcoming would raise serious doubt that the State intended to make prompt compensation at all. Except for the special case taken up in the next paragraph, compensation may not be deferred or paid in installments other than with the express assent, freely given, of the injured alien.

Nothing in this Article is intended to preclude the compromise of claims for the taking of property, provided such compromise is not effected through duress, as long as the conditions stipulated in Articles 22 and 24 are complied with.

Paragraph 3: A State which is desirous not to subject itself to liability to pay compensation for property of an alien which it wishes to secure may attempt to accomplish by indirection what it cannot for financial reasons do directly. There are a variety of methods by which an alien natural or juridical person may have the use or enjoyment of his property limited by State action, even 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 be had not the alien's use of it been subjected to interference by the State.

The measures which a State might employ for this purpose are of infinite variety. A State may make it impossible for an alien to operate a factory which he owns by blocking the entrances on the professed ground of maintaining order. It may, through its labor legislation and labor courts, designedly set the wages of local employees of the enterprise at a prohibitively high level. If technical personnel are needed from outside the country, entry visas may be denied them. Essential replacement parts or machinery may be refused entrance, or allocations of foreign exchange may deliberately be denied with the purpose of making it impossible to import the requisite machinery. Any one of these measures, if done with the requisite intent and if not justified under paragraph 5, could make it impossible for the alien owner to use or enjoy his property. More direct interferences may also be imagined. The alien may simply be forbidden to employ a certain portion of a building which he occupies, either on a wholly arbitrary basis or on the authority of some asserted requirement of the local law. A government, while leaving ownership of an enterprise in the alien owner, might appoint conservators, managers, or inspectors who might interfere with the free use by the alien of its premises and its facilities. Or, simply by forbidding an alien to sell his property, a government could effectively deprive that property of its value.

Whether an interference with the use, enjoyment, or disposal of property constitutes a "taking" or a "taking of use" will be dependent upon the duration of the interference. Although a restriction on the use of property may purport to be temporary, there obviously comes a stage at which an objective observer would conclude that there is no immediate prospect that the owner will be able to resume the enjoyment of his property. 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 with the use, enjoyment, or disposal of property must be determined in conformity with the general principles of law recognized by the principal legal systems of the world. No attempt has been made to particularize on the expression used in the text, since the matter seems one best worked out by international tribunals. It would be open to such a tribunal to take account of the justifications referred to in paragraph 5 of this Article as a basis for proceeding by analogy to a definition of reasonableness in the context of interferences with the use of property.

Paragraph 4: A certain economic and legal circularity is frequently found in the nationalization or expropriation of property in furtherance of a "general program of economic and social reform." A State may consider it desirable to resort to these measures because of the poverty of its treasury, the demands of its internal economy, or an adverse balance of payments. These very circumstances make it impossible for the State to pay prompt compensation under the standards laid down in paragraph 2 of

this Article. The State is then faced with the dilemma of a possible breakdown of its economy, which, in its view, only a program of State ownership can cure, or the assumption of an overwhelming financial burden, which it cannot possibly discharge, in making payment for the property so nationalized. There seems to be no alternative but to adopt a *via media*, which will in time afford compensation to the aggrieved alien without imposing upon the State a financial burden which might lead it into bankruptcy. In the practice of States, deferred compensation for the nationalization of large segments of the economy of a country is not without its precedents.

The present paragraph looks to such nationalizations as are directed to land reform, to the taking of industry in general or certain types of industry into State control, and to other takings which are not limited in scope or specialized in nature. Payments may under these circumstances be made in interest-bearing bonds, which must be promptly tendered to the injured alien. The requisite rate of interest would normally be no less than that stipulated for unpaid damages and compensation under Article 38. Should the nationalizing State default on the payment of interest, the entire amount of compensation then remaining unpaid for the taking of the property would become due and payable. The privilege to defer payment exists only so long as interest is paid promptly. Should the bonds not be paid at maturity, the State would be responsible under Article 12 for the non-payment of its debt. The deferment of compensation is not a complete one, since a reasonable part of the compensation must be paid promptly, as stipulated in sub-paragraph 4(b). This might be expected, if the practice of States is accepted as a guide, to be a flat sum which would be paid to each and every injured person or person claiming through him, rather than a percentage of the total amount due. The purpose of such partial prompt compensation is in particular to protect those aliens of limited wealth who might otherwise be left destitute by the taking of all of their property within the territory of the respondent State. The governing principle should necessarily be that an alien must be afforded prompt compensation to the extent of his needs and should not be forced to accept all of his compensation in the form of evidences of debt, even though interest-bearing, which look to payment at some date in the future.

Sub-paragraph 4(a) requires that the "method" and "modalities" of payment to aliens not be less favorable than those to nationals. This requirement reflects the normal rule of non-discrimination between aliens and nationals. In addition to meeting the international standards here prescribed, the State must furnish the alien part compensation and, for the remainder of the compensation, bonds which, as to amount, interest, terms, and so forth, are at least as favorable as those granted to its nationals.

Sub-paragraph 4(d) treats of the special situation in which the respondent State has induced reliance on its promise that it would not take the property in question, whether by way of nationalization, expropriation, confiscation, eminent domain, or otherwise. The undertaking may have been given by treaty or other international agreement, by a contract or

concession with an alien, by the terms of a municipal law which gave a guarantee against taking for a specified period of time, or by some other form of assurance given the alien, whether or not for a countervailing benefit. A State cannot be allowed to take affirmative measures to induce the acquisition or importation of property by an alien, only to take the property against deferred compensation once it has been brought into existence by the alien. Not only is the alien deprived of the property which he was justifiably induced to acquire but he is also, despite assurances to the contrary, put in the position of having to make a forced loan to the government of the respondent State.

Paragraph 5: Were paragraphs 1 and 2 of this Article not to be qualified by the present paragraph, a State would be denied the means of depriving an alien of property, without compensation, under circumstances which are universally recognized as properly calling for such action. Under Article 3, "sufficient justification" may excuse an otherwise wrongful act or omission which is negligent or intentional. That Article is, on the other hand, so drafted that sufficiency of justification is not to be read as a qualification on Articles 5 through 12. What constitutes "sufficient justification" for depriving an alien of his property must accordingly be found within the confines of the present Article alone.

It is recognized, in the first place, that the incidence of taxation may deprive an alien of some of his assets and that a failure to pay taxes may lead to the seizure of the alien's property. A revaluation of the currency of a particular State, if not adopted in a manner which discriminates against aliens individually or collectively, may deprive an alien of a portion of his economic wealth, but the measure is not on that account wrongful. As examples of the taking or deprivation of property of an alien arising out of the action of the competent authorities of the State in the maintenance of public order, health, and morality may be mentioned the confiscation of goods which have been smuggled into a country and the seizure of such articles as narcotics, liquor, obscene materials, firearms, and gambling devices which are unlawfully in a person's possession.

Without wishing to pass a final judgment on the obligation of a belligerent to return to its opponent property which has been seized during hostilities under legislation dealing with trading with the enemy, paragraph 5 recognizes that there is no obligation to pay compensation for such property to the extent that its retention is consistent with international law. Less controversial is the authority of a State to retain, without the necessity of making compensation, not only enemy ships but also neutral vessels and property which have been condemned in prize on account of breach of blockade, carriage of contraband, and unneutral service. The legality of such takings of property would be determined according to customary international law and the treaties bearing upon naval warfare.

By a taking or deprivation of property which is "otherwise incidental to the normal operation of the laws of the State" is meant the carrying out of a judgment of a court in a civil case or a fine or penalty in criminal proceedings.

None of the foregoing conduct can be characterized as a wrongful taking of property unless any one of the elements listed in sub-paragraphs 5(a) through 5(d) is present.

As already mentioned in connection with other Articles, failure of the authorities of a State to comply with the law of that nation will engage the responsibility of the State if injury is thereby caused to an alien. For the purposes of sub-paragraph 5(a), as in other contexts, the violation of the law of the State must be a clear and discriminatory one before the justifications listed in the body of paragraph 5 lose their force.

Sub-paragraph 5(b) demands that the taking of property not be the consequence of a denial of justice under Articles 6 to 8 of the Convention; such a taking would be wrongful, by reason of being proscribed by those Articles, even in the absence of the present sub-paragraph.

National law must, according to sub-paragraph 5(c), conform to an international standard with respect to uncompensated takings.

Finally, sub-paragraph 5(d) requires that the judicial, fiscal, and police powers of the State not be used to cloak an uncompensated seizure of an alien's property. This sub-paragraph would preclude taxes raised to confiscatory levels from being used as means of securing the property of an alien without paying him for it. A State would likewise act wrongfully if it prescribed an unattainably high standard of conduct for aliens (*e.g.*, in the compensation and benefits it accorded to their employees) and then, pursuant to the same law, seized the property of those aliens as a penalty for their wrongful conduct. The sudden imposition of a requirement that large numbers of the employees and directors of alien companies consist of nationals, subject to forfeiture of the company's assets as a criminal penalty for noncompliance, would be a further example of the type of conduct which this final *caveat* is designed to foreclose.

Paragraph 6: This paragraph is merely a cross-reference to Article 39, dealing with the form in which both damages and compensation are to be paid. Its purpose is to ensure the payment of effective compensation, *i.e.*, compensation in a currency which the claimant can freely use and at an exchange rate which is most favorable to him.

It is improper that compensation which has been promptly paid should immediately be frozen by foreign exchange laws which preclude the removal of the compensation from the State granting it. Account has been taken of the fact that property or the proceeds of the sale thereof, which could not under existing laws and regulations have been transferred abroad, may through a taking by the State acquire a transferable character. Under the generality of circumstances, however, it is considered that the giving of transferable character to compensation of this nature is the only effective manner of giving redress to the owner of the property. To this general principle an exception is made under Article 39. By the terms of that Article, for reasons explained in the Explanatory Note thereto, damages or compensation for the taking of property payable to a natural person who had his habitual residence in the territory of the respondent State for an

extended period of time may be paid in the currency of the State taking the property.

Paragraph 7: The term "property" as used not only in this Article but elsewhere in this Convention, is to be interpreted in a broad sense as comprising all movable and immovable property (or personalty and realty in the language of Anglo-American law), whether tangible or intangible, including industrial, literary, and artistic property, as well as all rights or interests, whether legal or equitable, in any kind of property. (*Cf.* Treaty of Peace with Italy, signed at Paris, Feb. 10, 1947, article 78(9)(c), 49 U.N.T.S. 163, 61 Stat. 1245, T.I.A.S. No. 1648.) The term "property" does not include for these purposes, a "means of livelihood," which is dealt with in Article 11, or contracts or concessions, which, as pointed out in paragraph 8 of this Article, form the subject of Article 12. It may be noted that the beneficial interest of an alien shareholder in the property of a corporation in which he holds an interest is protected through the medium of sub-paragraph 2(c) of Article 20 which, under certain specified conditions, gives to that alien the right to prosecute a claim for an injury to the juristic person in which he holds an interest.

Some interests in property will obviously be too remote to be deserving of the protection of this Article. This question of what sort of interest is so remote, uncertain, or contingent as not to constitute "property" within the meaning of this Article must be left to judicial determination, for it would be impossible to draw any precise line of demarcation for the purposes of this Convention.

It has been considered unnecessary to use the term "acquired rights" in this Convention, in view of the broad definition given to property and the separate provisions of the Convention relating to the destruction of property, deprivation of means of livelihood, and violation of contracts and concessions. There do not appear to be any "acquired rights" recognized by international law which do not fall within Articles 9 to 12. On the other hand, since each of the categories of wrongful acts and omissions dealt with in those Articles is treated somewhat differently under positive international law, it would be incorrect to treat all of them uniformly as violations of "acquired rights."

Paragraph 8: The reasons why annulment and nonperformance of contracts and concessions have been treated separately from takings of property are set forth in the Explanatory Note to that Article.

Damages: The factors to be taken into account in computing damages for the uncompensated taking of property and for deprivation of the use or enjoyment of property are dealt with in Article 32.

ARTICLE 11

(Deprivation of Means of Livelihood)

1. To deprive an alien of his existing means of livelihood by excluding him from a profession or occupation which he has hitherto pursued in a State, without a reasonable period of time in which to adjust his affairs, by

way of obtaining other employment, disposing of his business or practice at a fair price, or otherwise, is wrongful if the alien is not accorded just compensation, promptly paid in the manner specified in Article 39, for the failure to provide such period of adjustment.

2. Paragraph 1 of this Article has no application if an alien:

(a) has, as a result of professional misconduct or of conviction for a crime, been excluded from a profession or occupation which he has hitherto pursued, or

(b) has been expelled or deported in conformity with international standards relating to expulsion and deportation and not with the purpose of circumventing paragraph 1.

EXPLANATORY NOTE

Paragraph 1: The practice is widespread of reserving many occupations and professions to nationals of the State concerned. The exclusion of aliens from these pursuits has obvious logic in terms of protecting national security, of maintaining professional standards, and of making possible the discipline or regulation of persons engaged in certain professions and occupations. Such restrictions, if operative only as to persons desiring to enter a profession or occupation in the future, are generally unexceptionable from the point of view of international law, and it is not proposed to call them in question here. It may be noted, however, that many international treaties provide for the abolition of such restrictions and that a violation of such a treaty provision on the subject would result in international responsibility.

A situation less clear in terms of law and of policy is created when a State desires to change its law in order to exclude aliens from professions and occupations in which they may already be engaged. On the one hand, it would be intolerable that a State should be denied the power to change its law with respect to those who have already entered upon certain pursuits. If a State has reason to doubt the loyalty of certain aliens, no objection could be made to the State's taking measures to exclude such persons from professions and occupations having to do with the security of the nation. On the other hand, dangers lurk in an unrestrained power to deprive aliens of means of livelihood which they have enjoyed for years. If dictated by the desire to harm foreigners, action of this character may be employed to deprive them of their property and of their means of support as effectively as if their possessions had been confiscated by the State without compensation. Even a measure restricting or prohibiting the pursuit of certain employments, which on its face has application to both nationals of the State and to aliens, may affect only aliens if that employment is one solely or preponderantly that of aliens. For these reasons, the present text has taken the position that an alien who is excluded from his current occupation or profession without a period of time in which to adjust his affairs must be granted compensation, and that failure to provide such compensation is a wrongful act or omission.

The burden of the Article is thus that an alien has a right to a period of time for readjustment if he is to be denied his profession or occupation but

that the State may, consistently with law, take this period of time away from him against the payment of just compensation. The period for readjustment is subject to taking in the same way that property is subject to taking under Article 10. In both cases, it must be emphasized, the wrongful act or omission consists in an uncompensated taking. A State is fully within its powers in denying an alien an occupation or profession immediately upon notice. Its responsibility is engaged only if it fails to pay just compensation for the exercise of this privilege. If a reasonable period of time is granted for the adjustment of the alien's affairs, no obligation to pay compensation can exist.

Several qualifications must be noted to the principle just enunciated. The first of these is that the exclusion must be such as to deprive the alien of "his existing means of livelihood." In this aspect, the provision has an essentially humanitarian character, designed to secure aliens in their human right to means of earning their daily bread. A second qualification is that the Article refers only to the denial of a "profession" or "occupation" and not to businesses themselves. To a certain extent, the concepts of an "occupation" or a "profession" overlap with that of a "business," for the former may entail the conduct of the latter. However, the exclusion of an alien from an interest in a business which is not his "existing means of livelihood" and which does not constitute his profession or occupation does not fall within the scope of this Article. Such action may, however, be a violation of Article 10, relating to the taking of property, if unaccompanied by the measure of compensation demanded by that Article.

The period of adjustment provided before the exclusion becomes effective will vary with the nature of the vocation which the alien is to be denied. If the profession or occupation is of a relatively unskilled character or involves no capital expenditure for the conduct of a "business" or "profession," the adjustment will probably take the form of the alien's shifting to other employment within a relatively short period of time. In the case of professions or occupations which involve business activities as an essential attribute thereof or which are capable of purchase and sale, an opportunity must be provided for the disposal of the business or profession at a fair price. The requirements of a reasonable period of time and of a fair price are designed to protect the alien against a forced sale which will produce less than the fair value of the business or practice. Normally, the period required for this purpose will be longer than that needed for an unskilled individual to adjust his affairs.

Because of the absence of judicial authority on the point, it has not been thought desirable to attempt a definition of what constitutes "just compensation." The matter has accordingly been left to judicial determination. It may be noted, however, that the compensation to which an alien is entitled must take account only of those losses traceable to the denial of the requisite period of adjustment. Thus if an alien doctor excluded from the practice of medicine ought reasonably to be allowed a period of two years for adjustment and is forced to leave his wonted profession at the end of one year, thereby suffering a considerable loss in the price he ob-

tains for his practice, the compensation payable to him would be the difference between his estimated income for the two-year period and the final price for his practice which he would have obtained at the end of two years and what his income over the one-year period and proceeds of sale actually were.

Sub-paragraph 2(a): A State commits no violation of international law if it denies certain vocations to persons, whether nationals or aliens, who are convicted of crimes of such nature as to call for their exclusion from those callings or are otherwise guilty of professional misconduct. An alien doctor cannot complain of his immediate exclusion from the practice of medicine if he has been convicted of having committed an abortion in violation of law. While the determination of the necessity of excluding persons from certain callings on account of certain types of conduct will normally be left to municipal law, there is in this respect, as in others, a minimum international standard to be observed. It thus follows that it would be a wrongful act upon the part of a State to exclude an alien from all gainful employment on account of the commission of some trifling offense.

Sub-paragraph 2(b): In the absence of a special exception, an alien who has been expelled or deported from a country might claim that he was entitled to compensation for the means of livelihood thus denied him or a suspension of his deportation to permit him to adjust his affairs. To impose such requirements would be to place qualifications on the undoubted right of States to deport or expel aliens and would be particularly vexatious when such action was required for the maintenance of public order or for the preservation of the security of the State. It would be ludicrous, for example, to require a State to pay an alien or to suspend his deportation if that alien is being deported for the commission of a crime or because he is unlawfully within the territory of the State.

The exemption of a State from the requirements of paragraph 1 of this Article applies only if the deportation is effected in accordance with international standards, that is, conducted humanely and in conformity with the procedures provided by the law of the country concerned. If the purpose of the deportation or expulsion is actually to deprive the alien, without adequate compensation, of the enjoyment of his property, profession, or occupation, the resulting deprivation of property or period of readjustment would constitute a violation of Article 10 or 11, as the case might be.

Damages: The factors to be taken into account in computing damages for failure to provide the period of readjustment required by this Article are set forth in Article 33.

ARTICLE 12

(Violation, Annulment, and Modification of Contracts and Concessions)

1. The violation through an arbitrary action of the State of a contract or concession to which the central government of that State and an alien are parties is wrongful. In determining whether the action of the State is arbitrary, it is relevant to consider whether the action constitutes:

(a) a clear and discriminatory departure from the proper law of the contract or concession as that law existed at the time of the alleged violation;

(b) a clear and discriminatory departure from the law of the State which is a party to the contract or concession as that law existed at the time of the making of the contract or concession, if that law is the proper law of the contract or concession;

(c) an unreasonable departure from the principles recognized by the principal legal systems of the world as applicable to governmental contracts or concessions of the same nature or category; or

(d) a violation by the State of a treaty.

2. If the violation by the State of a contract or concession to which the central government of a State and an alien are parties also involves the taking of property, the provisions of Article 10 shall apply to such taking.

3. The exaction from an alien of a benefit not within the terms of a contract or concession to which the central government of a State and an alien are parties or of a waiver of any term of such a contract or concession is wrongful if such benefit or waiver was secured through the use of any clear threat by the central government of the State to repudiate, cancel, or modify any right of the alien under such contract or concession.

4. The annulment or modification by a State, to the detriment of an alien, of any contract or concession to which the alien and a person or body other than the central government of a State are parties is wrongful if it constitutes:

(a) a clear and discriminatory departure from the proper law of the contract or concession;

(b) an unreasonable departure from the principles recognized by the principal legal systems of the world as applicable to such contracts or concessions; or

(c) a violation by the State of a treaty.

EXPLANATORY NOTE

Paragraph 1: Contracts and concessions to which applicable: This Article speaks expressly only of a "contract" or a "concession," but the term "contract" is intended to include debts and quasi-contractual obligations as well.

Concessions are, by the express terms of the Article, placed in the same category as contracts. It has on occasion been suggested that a concession constitutes a property right as well as a contract and that in the former aspect it is subject to expropriation or nationalization, provided compensation is paid in the measure stipulated in paragraph 2 of Article 10. The logical consequence of the adoption of such a view would be to place a concession in the category of "property of an alien" within the meaning of Article 10. This theory has, however, been rejected in the present draft, which proceeds instead on the theory that concessions should be treated in the same way as contracts.

It does not appear possible either on logical grounds or in terms of policy to make a distinction between contracts and concessions, for the latter are nothing more than a species of the former. To provide that obligations under concessions and contracts may be terminated against the payment of compensation is to embrace the theory, now discredited, that a promisor

has an option of performing his contract or paying the stipulated price for nonperformance in the form of damages. Such a view suggests that compliance with contracts, including concessions, is a matter of expediency, and that no moral opprobrium attaches to the violation of the promisor's pledged word. In strong contrast stands the power of a State to take property for its own use or for that of other persons—a power which is recognized by the principal legal systems of the world, although the purposes for which it may be exercised may vary from State to State.

Debts: The responsibility of a State for the annulment of or arbitrary failure to pay its debts has been beclouded by the commingling of other issues with that of the responsibility of the State for non-payment of its obligations. Historically, in the classical international law of Grotius, Wolff, and Vattel, the international obligation of a nation to discharge its debts was considered in the context of the reprisals to which resort might be had if the State failed in its duty. In more recent times, the use by powerful nations of armed intervention and other forms of self-help for the collection of debts owed by foreign States to aliens has kept alive the impression that force and international responsibility for a nation's debts march together. The Drago Doctrine, which, although not universally accepted, has received the support of a substantial number of States, and the Hague Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts of October 18, 1907, 3 Martens, N.R.G., 3d ser., 414, represent significant attempts to divorce the two matters. The question of the responsibility of a State for its debts has likewise been complicated by the acute practical problem posed by the bankruptcy of a State and its consequent inability to meet its obligations. But when these extraneous considerations of the use of force, of the taking of reprisals, and of bankruptcy are laid aside, it appears that there is no substantial dissent from the proposition that a State still is responsible for its debts and that it incurs international responsibility in the sense of the present Convention when through "an arbitrary action" it defaults on those debts.

Contract or concession to which the central government of a State is a party: Paragraphs 1 and 3 apply only to concessions and contracts, including debts, of the central government of a State. The contracts and concessions, including debts, of provinces, states, municipalities, and other political subdivisions are not within the scope of this paragraph and are to be treated on the same basis as private obligations. If contracts and concessions of governmental entities other than the central government of a State are annulled or modified by any organ, agency, official, or employee of the State, the act of modification or annulment may be a wrongful one falling within paragraph 4 of this Article if any of the conditions prescribed in that paragraph is fulfilled. In addition, the failure of a province, state, municipality, or other political subdivision to honor its obligations, other than through an annulment or modification of the contract or concession by action of the central government may, if not redressed by the courts of the State concerned, constitute a denial of justice such as to bring the situation within the provisions of Articles 6 to 8.

The distinction between the contracts and concessions of the central government and those of subordinate political entities is not dictated by logic but by history. The differing treatment of the two types of obligations has, however, become so firmly established in law that it does not seem desirable to depart from it in connection with the present codification.

Circumstances under which a violation of a contract or concession is wrongful: No contract or concession exists in a legal vacuum. It draws its binding force, its meaning, and its effectiveness from a legal system, which must be so developed and refined as to be capable of dealing with the great range of problems to which the performance and violation of promises gives rise. *Pacta sunt servanda* is undoubtedly the basic norm of any system of law dealing with agreements, but the principle speaks on such a high level of abstraction that it affords little or no guidance in the resolution of concrete legal disputes relating to agreements. What is *pactum* and when and how and if it is to be *servandum* are questions which must be answered by a system of law capable of reacting in a sophisticated manner to these problems. What that system of law is can be determined by the private international law of the forum, whether national or international. As a general matter, the forum will accept as the proper law of the contract the system of law which has been selected by the parties, although it may, as to such matters as the existence of the agreement, find it necessary to look to some other system of law, such as that of the place of the making of the contract. The law elected by the parties to an agreement between the central government of the State and an alien may be the municipal law of the contracting State, the law of some other State, the principles of law shared by several States, the general principles of law (*ius gentium*), or international law itself. Even when the parties select a particular body of law as being the proper law of the contract, it is normally their understanding that the proper law is not necessarily the law as it existed at the time of the conclusion of the agreement but rather the law in its state at the time of any violation of the agreement which might be alleged.

In determining whether there has been a violation of a contract or concession between the central government of a State and an alien, two extremes must be avoided. The first of these would be to test every alleged breach of a contract or concession immediately and directly by an international standard, notwithstanding any choice of law which the parties might have incorporated in the agreement. If every violation, as determined by an international standard, of a contract or concession between a State and an alien were to be regarded as engaging State responsibility, the contract or concession would in effect be raised to the dignity of a treaty or other international agreement between two States. But the application of such a standard would be in flagrant disregard of the intention of the parties, who had either chosen some other system of law as the proper law of the contract or by remaining silent had indicated that the agreement was to be governed by a system of municipal law to be determined by the application of principles of private international law. Moreover, if contracts were to bind States in every instance as firmly as international agreements—and this

does not appear to be the current state of the law—governments might be reluctant to enter into contractual relationships with aliens, to the resulting prejudice of free economic intercourse between nations.

The opposite extreme would be to treat a contract or concession as being governed exclusively by the municipal law of the contracting State, even though the contract invoked some other legal system as the proper law of the contract. According to this view, the validity of the choice of some foreign system of law as the proper law of the contract would be determined by the law of the contracting State as that law might from time to time provide. This view would leave the alien contractor defenseless against the modification or termination of the contract by the State which was the other party thereto. Legislation adopted in conformity with municipal law and administered by the courts with scrupulous fairness might nevertheless strip the alien of any rights he was to enjoy under the contract or concession as originally concluded. The possibility that the State could by legislative or executive action alter the terms or effectiveness of the contract at will would mean that its obligation would be wholly illusory. Absolute freedom to perform or not to perform would, as in the case of holding the State to a rigid international standard of performance, operate to the discouragement of commercial relations between States and private persons extending across national boundaries.

Doctrine and jurisprudence have attempted to maintain a middle course by limiting State responsibility for a violation of a concession or contract to those cases in which there has been a "denial of justice" in litigation in the courts of the respondent State respecting an alleged breach of the contract and to cases in which the breach of the contract or concession has been characterized as "arbitrary" or "tortious." These highly flexible and indefinite standards suggest that there is a certain amount of discretion in the respondent State to interpret or modify the terms of the agreement in a reasonable and non-discriminatory way but call for a response in damages on the international plane when there has been a violation of certain requirements laid down by international law. What constitutes a departure from these requirements cannot be set down with definiteness or precision. It is for this reason that sub-paragraphs 1(a) to 1(d) of this Article merely lay down certain factors which are to be taken into consideration in determining whether the action of the State has been "arbitrary," that concept being the criterion of wrongfulness. The listing of those respects in which the action of the State is arbitrary is not intended to be exhaustive.

Sub-paragraph 1(a): The proper law of the contract may be either the law of the State which is a party to the contract or concession or some other body of law. In the first case, the state of that law at the time of the making of the contract or concession must also be considered, in accordance with sub-paragraph 1(b) of this Article; in the second case, only the state of the applicable law at the time of the alleged arbitrary action would need to be taken into account.

The proper law may be ascertained by application of principles of private international law or may be that designated by the parties in the instrument. The words "clear and discriminatory" are to be read as one expression. In order to avoid putting an international tribunal in the position of a court of appeal from the courts of the State which is a party to the agreement, a "clear" departure from the proper law of the contract is requisite to the establishment of responsibility. The fact that action of the State is "discriminatory" is one element of establishing that there has been a "clear" departure from the law. What appears to the entity making the decision on the international plane to be a "clear departure" from the law may appear less than clear when account is taken of the fact that the interpretation given the contract is applied on a non-discriminatory basis in all cases, whether or not the plaintiff is an alien. For example, State A, which has an agreement with an alien under which the law of State B is the proper law of the contract, may consistently interpret the law of State B in a manner which the entity making the decision on the international plane might consider to be incorrect. But the readiness of the latter to call in question the view entertained by State A would be considerably diminished if it observed that the interpretation given to the law of State B was consistent and non-discriminatory. Discrimination may be established through proof that the alien was discriminated against personally, as a member of a class of aliens or any other class to which he may belong, or as an alien pure and simple.

Sub-paragraph 1(b): If the proper law of the contract or concession is the law of the State which is a party to the agreement, that State cannot be allowed to change its law in order to obtain for its own advantage benefits which are owed to the alien who is a party to the agreement. It is therefore necessary to provide that the law to be applied in such a case must normally be the law of the State concerned at the time the agreement was concluded. This principle is subject to two exceptions: The first is that if the law of the State which is a party to the contract or concession is changed to the advantage of the alien, the alien would be entitled, under sub-paragraph 1(a), to rely on the later state of the law as so modified to his advantage. The second exception would be called for if the agreement of the State and the alien were to provide that the proper law of the contract is the law of the State as it may exist from time to time. In that exceptional case, the provisions of sub-paragraph 1(a) would likewise apply.

What constitutes a "clear and discriminatory departure" from the law of the State is governed by the same standard as was described above in connection with sub-paragraph 1(a). The necessity that there be such a departure from the law is of even greater importance here, since the courts and other agencies of the State party to the agreement are, if acting in good faith, presumptively the soundest interpreters of the law of that State.

It is not the purpose of this provision to foreclose absolutely any change in the law governing a contract or concession between a State and an alien. A non-discriminatory law terminating for reasons of public morality all

gambling concessions granted to nationals and aliens alike might not be considered to be "arbitrary." A shortening of the period of limitation during which an action might be brought for an alleged violation of the agreement might be regarded as both not "arbitrary" and not a "clear and discriminatory departure" from the proper law of the contract, whether that law be that of the State which is a party to the agreement or some other legal system. A change in the canons of interpretation of contracts, applied on a non-discriminatory basis to all contracts, would not necessarily render action of the State taken in reliance on the changed rule of law either "arbitrary" or a "clear and discriminatory departure" from the law of the State which is a party to the agreement. The evil with which this sub-paragraph is intended to deal is action which is clearly violative of the contract under the state of law existing at the time of its conclusion and which is intended to deprive the alien of the fruits of his contract without any other purpose than the enrichment of the State with which the agreement was made.

Sub-paragraph 1(c): This provision precludes the respondent State from relying on a provision of its own law or of any other system of law constituting the proper law of the contract which falls below the international minimum standard, as, for example, by way of providing only an inadequate substantive remedy to the alien in the event of a breach of the contract or concession by the State which is a party to it.

The types of contracts and concessions which a State may conclude with aliens are manifold. At one extreme are simple contracts of sale. At the other are long-term international development contracts, calling for the expenditure of large sums of money and the performance of many obligations by both the State and the alien. All of these agreements are not governed by a uniform body of law good for all contracts concluded by States. Agreements for the production and sale of military supplies are often governed by provisions of national law calling for renegotiation or termination under certain conditions, whereas other public contracts are not so regulated. This sub-paragraph accordingly provides that the principle derived from the principal legal systems of the world must be one appropriate to the particular type of contract or concession which is in issue.

Sub-paragraph 1(d): If the failure of the State to perform under a contract with an alien is in conflict with a treaty, the breach of the contract would be wrongful for international purposes. An example of such a treaty would be one placing certain contracts or concessions under international guaranty. The fact that the action of the State was consistent with the proper law of the contract and with the international standard referred to in sub-paragraph 1(c) would be irrelevant if a failure to perform the obligation in the manner prescribed by the treaty were to be established.

It remains to say a word or so about the position under the above principles of the debts of a State. Either outright repudiation of, or simple failure to pay the principal of or interest on, a debt of the central government of a State might run afoul of any one or more of the sub-paragraphs of paragraph 1. As in the case of contracts and concessions generally, it

would be no defense to such non-payment that repudiation or failure to pay had been authorized or directed by the municipal law of the State concerned.

The poverty of a country or its asserted inability to pay may not be set up as a defense to international responsibility. As in connection with the taking of property, a State can easily allege that it did not have enough funds for its own governmental purposes and therefore would not be in a position to discharge its obligations to aliens. The acknowledgment of any such defense would involve an international court in those inquiries into the internal affairs of States which have already been discussed in connection with Article 10. Particular difficulties are caused by the fact that there is in the international sphere no bankruptcy procedure in order to discharge a State when it becomes in fact totally unable to meet its obligations. In the absence of any such procedure, the release of a State from its obligations under such circumstances must be left to international negotiation.

A number of States, notable amongst which is the United States, have as a matter of domestic policy refrained from espousing the claims of their nationals arising out of the contracts or debts of foreign States. This unreadiness to act has been the result of internal policy rather than of any restraint laid upon the State by international law, and it accordingly does nothing to deny the validity of the general principle of a State's responsibility for improper conduct with respect to its contracts and debts to aliens.

It is irrelevant for these purposes that at the time of the creation of the debt, through, for example, the issuance of bonds, the State was not aware of the fact that the evidences of indebtedness might eventually find their way into the hands of aliens. A State may guard against this possibility by placing restraints on the negotiation of the instruments to foreigners. The alien may have secured the bond at a low price because of uncertainty about payment of the principal or interest and may thus be in a position to profit by the fact that the obligation originally assumed by the State is enforced in literal terms on the international plane. The fact, however, that the international remedy exists should help to prevent extreme drops in the value of public securities which may lawfully be held by aliens and should thus deprive aliens of windfall profits.

It should be emphasized that the parties to a contract or a concession, a State and an alien, may of course agree to terminate their agreement pursuant to another agreement later arrived at, provided, however, that such agreement is freely entered into and is not secured through the coercion referred to in paragraph 3 of this Article. In this category would fall a proper agreement for the settlement of the debts of a State.

Paragraph 2: A contract or concession frequently conveys to an alien certain property rights, such as mineral rights or title to land. The performance of a contract or the exploitation of a concession may also require that the alien acquire property locally or import it. In either case, the alien enjoys simultaneously property rights as well as those contractual rights to which paragraph 1 of this Article refers. If property acquired

under, or in pursuance to a contract or concession is taken from an alien, that "taking" is governed by Article 10, compensation or damages being payable therefor in addition to any damages which may accrue as the result of the violation of the contract or concession itself.

Paragraph 3: The present paragraph is designed to preclude the exaction of benefits by a State through threats to take yet more drastic action—a principle which follows naturally from paragraph 1 of this Article.

Although this paragraph is little more than a specific application of the principles enunciated in paragraph 1 of this Article, it must be acknowledged that there is virtually no international jurisprudence or doctrine dealing with this problem.

Paragraph 4: Whereas paragraphs 1 and 3 of this Article have dealt with transactions to which there are but two parties—the State and the alien with whom the contract or concession has been made—the present paragraph deals with the relationship of three parties, the two parties to the contract or concession and the organ, agency, official, or employee of the State who purports to annul or modify the terms of a concession or contract.

The present provision is concerned with governmental action, whether by the central government of a State or by a subordinate entity, which terminates or modifies a contract between an alien and a private person or a governmental agency subordinate to the central government of the State. A State may deprive an alien of valuable rights, which are fully as important to the alien as the property dealt with in Article 10, by taking measures to relieve its nationals from contractual obligations to aliens, by importing new terms and conditions into existing contracts, or by adopting new rules relating to the interpretation and performance of such instruments. Notwithstanding these possibilities, it is recognized that some leeway must be left to the State in the regulation of the performance of contracts. In order to place some limitations upon the autonomy of the State, it is provided in sub-paragraph 4(a) that the annulment or modification, to be internationally lawful, must be consistent with local law, but consistent only in the sense that there is no "clear and discriminatory departure" from that law. The following sub-paragraph 4(b) again applies an international standard. According to that standard, it would not be unlawful for a State to take reasonable measures to preserve its foreign exchange position, even though this might involve a partial annulment or a modification of existing contracts with aliens. To particularize further, State action respecting gold clauses in contracts and prohibitions on the transmittal of funds abroad would not necessarily fall afoul of paragraph 4, since the propriety of such measures has by now received general recognition.

Certain issues of jurisdiction and of private international law may be pertinent to the determination whether a State had the power to affect the contract or concession in any way. Such questions are, however, outside the scope of the present codification.

Damages: The factors to be taken into account in computing damages for violation of a contract or concession, the exaction of a benefit not within the terms of a contract or concession, and the annulment or modification of a contract or concession within the meaning of this Article are set forth in Article 34.

ARTICLE 13

(Lack of Due Diligence in Protecting Aliens)

1. Failure to exercise due diligence to afford protection to an alien, by way of preventive or deterrent measures, against any act wrongfully committed by any person, acting singly or in concert with others, is wrongful:

- (a) if the act is criminal under the law of the State concerned; or
- (b) the act is generally recognized as criminal by the principal legal systems of the world.

2. Failure to exercise due diligence to apprehend, or to hold after apprehension as required by the laws of the State, a person who has committed against an alien any act referred to in paragraph 1 of this Article is wrongful, to the extent that such conduct deprives that alien or any other alien of the opportunity to recover damages from the person who has committed the act.

SECTION C

INJURIES

ARTICLE 14

(Definitions of Injury and Causation)

1. An "injury," as the term is used in this Convention, is a loss or detriment caused to an alien by a wrongful act or omission which is attributable to a State.

2. Injuries within the meaning of paragraph 1 include, but are not limited to:

- (a) bodily or mental harm;
- (b) loss sustained by an alien as the result of the death of another alien;
- (c) deprivation of liberty;
- (d) harm to reputation;
- (e) destruction of, damage to, or loss of property;
- (f) deprivation of use or enjoyment of property;
- (g) deprivation of means of livelihood;
- (h) loss or deprivation of enjoyment of rights under a contract or concession; or
- (i) any loss or detriment against which an alien is specifically protected by a treaty.

3. An injury is "caused," as the term is used in this Convention, by an act or omission if the loss or detriment suffered by the injured alien is the direct consequence of that act or omission.

4. An injury is not "caused" by an act or omission:

- (a) if there was no reasonable relation between the facts which made the act or omission wrongful and the loss or detriment suffered by the injured alien; or
- (b) if, in the case of an act or omission creating an unreasonable risk of injury, the loss or detriment suffered by the injured alien occurred outside the scope of the risk.

SECTION D

ATTRIBUTION

ARTICLE 15

(Circumstances of Attribution)

A wrongful act or omission causing injury to an alien is "attributable to a State," as the term is used in this Convention, if it is the act or omission of any organ, agency, official, or employee of the State acting within the scope of the actual or apparent authority or within the scope of the function of such organ, agency, official, or employee.

ARTICLE 16

(Persons and Agencies through Which a State Acts)

1. The terms "organ of a State" and "agency of a State," as used in this Convention, include the Head of State and any legislative, deliberative, executive, administrative, or judicial organ or agency of a State.

2. The terms "official of a State" and "employee of a State," as used in this Convention, include both a civilian official or employee of a State and any member of the armed forces or of a para-military organization.

ARTICLE 17

(Levels of Government)

1. The terms "organ of a State," "agency of a State," "official of a State," and "employee of a State," as used in this Convention, include any organ, agency, official, or employee, as the case may be, of:

(a) the central government of a State;

(b) in the case of a federal State, the government of any state, province, or other component political unit of such federal State;

(c) the government of any protectorate, colony, dependency, or other territory of a State, for the international relations of which that State is responsible, or the government of any trust territory or territory under mandate for which a State acts as the administering authority; or

(d) the government of any political subdivision of any of the foregoing.

2. The terms "organ of a State," "agency of a State," "official of a State," and "employee of a State," as used in this Convention, do not include any organ, agency, official, or employee of any enterprise normally considered as commercial which is owned in whole or in part by a State or one of the entities referred to in paragraph 1 if such enterprise is, under the law of such State, a separate juristic person with respect to which the State neither accords immunity in its own courts nor claims immunity in foreign courts.

ARTICLE 18

(Activities of Revolutionaries)

1. In the event of a revolution or insurrection which brings about a change in the government of a State or the establishment of a new State, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is, for the purposes of this Convention, attributable to the State in which the group established itself as the government.

2. In the event of an unsuccessful revolution or insurrection, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is not, for the purposes of this Convention, attributable to the State.

SECTION E

EXHAUSTION OF LOCAL REMEDIES

ARTICLE 19

(When Local Remedies Considered Exhausted)

1. Local remedies shall be considered as exhausted for the purposes of this Convention if the claimant has employed all administrative, arbitral, or judicial remedies which were made available to him by the respondent State, without obtaining the full redress to which he is entitled under this Convention.

2. Local remedies shall be considered as not available for the purposes of this Convention:

(a) if no remedy exists through which substantial recovery could be obtained;

(b) if the remedies are in fact foreclosed by an act or omission attributable to the State; or

(c) if only excessively slow remedies are available or justice is unreasonably delayed.

SECTION F

PRESENTATION OF CLAIMS BY ALIENS

ARTICLE 20

(Persons Entitled to Present Claims)

1. A claim may be presented, as provided in Article 22, by an injured alien or by a person entitled to claim through him.

2. Injured aliens, for the purposes of this Convention, include:

(a) the alien who has suffered an injury;

(b) in the case of the killing of an alien, another alien who is:

(1) a spouse of the decedent;

(2) a parent of the decedent;

(3) a child of the decedent; or

(4) a relative by blood or marriage actually dependent on the decedent for support;

(c) an alien who holds a share in, or other analogous evidence of ownership or interest in a juristic person which is a national of the respondent State or of any other State of which the alien is not a national, and who suffers an injury to such interest through the dissolution of, or any other injury to, such juristic person, if that juristic person has failed to take timely steps adequately to defend the interests of such alien.

3. Upon the death of an alien who has suffered an injury, such claim as may have accrued to him before his death may be presented by an heir, if such heir is an alien, or by the personal representative of the decedent.

4. If a claim has been assigned, it may be presented by the assignee thereof, provided such assignee is an alien.

ARTICLE 21

(Definition of Alien, National, and Claimant)

1. An "alien," as regards a particular State, is, as the term is used in this Convention, a person who is not a national of that State.

2. A "person," as the term is used in this Convention, is a natural person or a juristic person.

3. A "national" of a State, for the purposes of this Convention, shall be considered to include:

- (a) a natural person who possesses the nationality of that State;
- (b) a natural person who possesses the nationality of any territory under the mandate, trusteeship, or protection of that State;
- (c) a stateless person having his habitual residence in that State; and
- (d) a juristic person which is established under the law of that State or of one of the entities referred to in paragraph 1 of Article 17.

4. A member of the armed forces of a State or an official of a State, who does not possess the nationality of that State, is treated as if he were a national of that State as regards injuries incurred by him in the service of that State.

5. A "claimant," as the term is used in this Convention, is a person who asserts that he is an injured alien or a person entitled to claim through such injured alien.

ARTICLE 22

(Procedure)

1. A claimant is entitled to present his claim directly to the State alleged to be responsible.

2. A claimant is entitled to present his claim directly to a competent international tribunal if the State alleged to be responsible has conferred on that tribunal jurisdiction over such claim.

3. Subject to Article 25, a claimant shall not be precluded from submitting his claim directly to the State alleged to be responsible or to an international tribunal by reason of the fact that the State of which he is a national has refused to present his claim or that there is no State which is entitled to present his claim.

4. No claim may be presented by a claimant if, after the injury and without duress, the claimant himself or the person through whom he derived his claim waived, compromised, or settled the claim.

5. No claim under this Convention may be presented by a claimant with respect to any injury listed in sub-paragraphs 2(e), 2(f), 2(g), or 2(h) of Article 14:

(a) if prior to his acquisition of property rights or of a right to exercise a profession or occupation in the territory of the State responsible for the injury, or as a condition of obtaining rights under a contract with or a concession granted by that State, the alien to whom such rights were accorded agreed to waive such claims as might arise out of a violation by the respondent State of any of the rights thus acquired,

(b) if the respondent State has not altered the agreement unilaterally through a legislative act or in any other manner, and has otherwise complied with the terms and conditions specified in the agreement, and

(c) if the injury arose out of the violation by the State of the rights thus acquired by the alien.

6. No claim may be presented by a claimant with respect to any of the injuries listed in paragraph 2 of Article 14, if as a condition of being allowed to engage in activities involving an extremely high degree of risk, which privilege would otherwise be denied to him by the State, the alien has agreed to waive any claim with respect to such injuries and if the claim arises out of an act or omission attributable to the State which has a reasonably close relationship to such activities. Such a waiver is effective, however, only as to injuries resulting from a negligent act or omission or from a failure to exercise due diligence to afford protection to the alien in

question and not as to injuries caused by a wilful act or omission attributable to the State.

7. No claim may be presented by a juristic person if the controlling interest in that person is in nationals of the State alleged to be responsible or in an organ or agency of that State. This provision shall not, however, affect the rights of aliens under sub-paragraph 2(c) of Article 20.

8. The right of the claimant to present or maintain a claim terminates if, at any time during the period between the original injury and the final award, the injured alien, or the holder of the beneficial interest in the claim while he holds such interest, becomes a national of the State alleged to be responsible.

SECTION G

ESPOUSAL AND PRESENTATION OF CLAIMS BY STATES

ARTICLE 23

(Espousal of Claims and Continuing Nationality)

1. A State is entitled to present a claim on behalf of its national directly to the State which is alleged to be responsible and, if the claim is not settled within a reasonable period, to an international tribunal which has jurisdiction of the subject matter and over the States concerned, whether or not its national has previously presented a claim under Article 22. If a claim is being presented both by a claimant and by the State of which he is a national, the right of the claimant to present or maintain his claim shall be suspended while redress is being sought by the State.

2. If so provided in an instrument by which a State has conferred jurisdiction upon an international tribunal pursuant to paragraph 2 of Article 22, the presentation of a claim by any other State on behalf of a claimant shall be deferred until the claimant has exhausted the remedies thus made available to him.

3. A State is not entitled to present a claim on behalf of a natural person who is its national if that person lacks a genuine connection of sentiment, residence, or other interests with that State.

4. A State is not entitled to present a claim on behalf of a juristic person if the controlling interest in that person is in nationals of the State alleged to be responsible or in an organ or agency of that State.

5. A State is entitled to present a claim of its national arising out of the death of another person only if that person was not a national of the State alleged to be responsible.

6. A State has the right to present or maintain a claim on behalf of a person only while that person is a national of that State. A State shall not be precluded from presenting a claim on behalf of a person by reason of the fact that that person became a national of that State subsequent to the injury.

7. The right of a State to present or maintain a claim terminates, if, at any time during the period between the original injury and the final award or settlement, the injured alien, or the holder of the beneficial interest in the claim while he holds such interest, becomes a national of the State against which the claim is made.

ARTICLE 24

(Waiver, Compromise, or Settlement of Claims by Claimants and Imposition of Nationality)

1. A State is not entitled to present a claim if the claimant or a person through whom he derives his claim has waived, compromised, or settled the claim under paragraph 4, 5, or 6 of Article 22.

2. A State is not relieved of its responsibility by having imposed its nationality, in whole or in part, on the injured alien or any other holder of the beneficial interest in the claim, except when the person concerned consented thereto or nationality was imposed in connection with a transfer of territory. Such consent need not be express; it shall be implied if the law of the State provides that an alien thereafter acquiring real estate, obtaining a concession, or performing any other specified act shall automatically acquire the nationality of that State for all purposes and the alien voluntarily fulfills these conditions. Such a requirement may be applied to both natural and juristic persons, subject to the provisions of subparagraph 2(c) of Article 20.

ARTICLE 25

(Waiver, Compromise, or Settlement of Claims by States)

A State may by a treaty waive, compromise, or settle any actual or potential claim of its nationals accruing under this Convention and may make such waiver, compromise, or settlement binding not only on itself but also on any actual or potential claimant who is a national of such State, even if that person became a national of such State after the waiver, compromise, or settlement was effected.

SECTION H

DELAY

ARTICLE 26

(Claims Barred by Lapse of Time)

If the presentation of a claim is delayed, after the exhaustion of local remedies to the extent provided for in Article 19, for a period of time which is unreasonable under the circumstances, the claim shall be barred by the lapse of time.

SECTION I

REPARATION

ARTICLE 27

(Form and Purpose of Reparation)

1. The reparation which a State is required to make for a wrongful act or omission for which it is responsible may take the form of:

(a) measures designed to re-establish the situation which would have existed if the wrongful act or omission attributable to the State had not taken place;

(b) damages; or

(c) a combination thereof.

2. Measures designed to re-establish the situation which would have existed if the act or omission attributable to the State had not taken place may include:

(a) revocation of the act;

(b) restitution in kind of property wrongfully taken;

(c) performance of an obligation which the State wrongfully failed to discharge; or

(d) abstention from further wrongful conduct.

3. Damages are awarded in order to:

(a) place the injured alien or an alien claiming through him in as good a position, in financial terms, as that in which the alien would have been if the act or omission for which the State is responsible had not taken place;

(b) restore to the injured alien or an alien claiming through him any benefit which the State responsible for the injury obtained as the result of its act or omission; and

(c) afford appropriate satisfaction to the injured alien or an alien claiming through him for an injury suffered by the injured alien as the result of an act or omission occasioned by malice, reckless indifference to the rights of the injured alien, any category of aliens, or aliens in general, or a calculated policy of oppression directed against the injured alien, any category of aliens, or aliens in general.

4. Factors normally to be taken into account in the computation of damages are set forth in Articles 28 to 38, but such enumeration in no wise limits the scope of this Article.

ARTICLE 28

(Damages for Personal Injury or Deprivation of Liberty)

Damages for bodily or mental harm, for mistreatment during detention, or for deprivation of liberty shall include compensation for past and prospective:

- (a) harm to the body or mind;
- (b) pain, suffering, and emotional distress;
- (c) loss of earnings and of earning capacity;
- (d) reasonable medical and other expenses;
- (e) harm to the property or business of the alien resulting directly from such bodily or mental injury or deprivation of liberty; and
- (f) harm to the reputation of the alien resulting directly from such deprivation of liberty.

ARTICLE 29

(Damages for Death)

Damages in respect of the death of an alien shall include compensation for the expected contribution of the decedent to the support of the persons specified in sub-paragraph 2(b) of Article 20.

ARTICLE 30

(Damages for Wrongful Acts of Tribunals and Administrative Authorities)

1. If, as set forth in Articles 6, 7, and 8, in any civil proceeding an alien has been denied access to a tribunal or an administrative authority or an adverse decision or judgment has been rendered against an alien or an inadequate recovery obtained by an alien, damages shall include compensation for the amount wrongfully assessed against or denied such alien and any other losses resulting directly from such proceeding or denial of access.

2. If in any criminal proceeding an alien has been arrested or detained as set forth in Article 5 or an adverse decision or judgment has been rendered against an alien as set forth in Articles 7 and 8, damages shall, in addition to damages otherwise payable under this Section, include

compensation for the costs of defense, litigation, and judgment, and any other losses resulting directly from such proceeding.

ARTICLE 31

(Damages for Destruction of and Damage to Property)

1. Damages for destruction of property under Article 9 shall include:
 - (a) an amount equal to the fair market value of the property prior to the destruction or, if no fair market value exists, the fair value of such property; and
 - (b) payment, if appropriate, for the loss of use of the property.
2. Damages for damage to property under Article 9 shall include:
 - (a) the difference between the value of the property before the damage and the value of the property in its damaged condition; and
 - (b) payment, if appropriate, for the loss of use of the property.

ARTICLE 32

(Damages for Taking and Deprivation of Use or Enjoyment of Property)

1. In case of the taking of property or of the use thereof under paragraph 1 of Article 10, the property shall, if possible, be restored to the owner and damages shall be paid for the use thereof.
2. Damages for the taking of property or of the use thereof under paragraph 2 of Article 10, or under paragraph 1 of Article 10 if restoration of the property is impossible, shall be equal to the difference between the amount, if any, actually paid for such property or for the use thereof and the amount of compensation required by paragraph 2 of Article 10.

ARTICLE 33

(Damages for Deprivation of Means of Livelihood)

Damages for the deprivation of an existing means of livelihood under Article 11 shall include compensation for any losses caused the alien by failure to accord him a reasonable period of time in advance of such deprivation in which to adjust his affairs. In particular, such damages shall include the difference between the amount, if any, actually received by the alien in connection with such deprivation of means of livelihood and the compensation required by Article 11.

ARTICLE 34

(Damages for Violation, Annulment, or Modification of a Contract or Concession)

1. Damages for the violation, annulment, or modification of a contract or concession under paragraph 1 or 4 of Article 12 shall include compensation for losses caused and gains denied as the result of such wrongful act or omission or compensation which will restore the claimant to the same position in which the injured alien was immediately preceding such act or omission.
2. Damages for the exaction of a benefit not within the terms of a contract or concession or for the waiver of a term thereof under paragraph 3 of Article 12 shall include compensation for the benefit wrongfully exacted.

ARTICLE 35

(Damages for Failure to Exercise Due Diligence)

Damages for any injury sustained as the result of the failure of a State under Article 13 to exercise due diligence to afford protection to an alien or to apprehend or to hold a person who has committed a criminal act shall be computed as if the State had originally caused such injury directly.

ARTICLE 36

(Costs)

The claimant shall be reimbursed for those expenses incurred by him in the local and international prosecution of his claim which are reasonable in amount and the incurrence of which was necessary to obtain reparation on the international plane.

ARTICLE 37

(Subtraction of Damages Obtained through Other Remedies)

Damages which a State is required to pay on account of an act or omission for which it is responsible shall be diminished by the amount of any recovery which has been obtained through local and international remedies. The amount so recovered must be payable in the form specified in Article 39.

ARTICLE 38

(Interest)

1. The amount of any award shall include interest, either by way of inclusion in the lump sum awarded or by the addition of an amount computed from the date of the injury to the date of the award. If, however, the injured alien is dilatory in presenting his claim, such interest may be computed from the date at which he gave notice of his claim to the responsible State.

2. Interest on the amount of the award shall be due for the period from the date of the award to the date of the payment thereof.

3. The rate of interest under paragraphs 1 and 2 shall be that prevailing with respect to obligations of analogous amount and duration at the time of the award in the place in which the injured alien was habitually resident at the time of the injury.

ARTICLE 39

(Currency and Rate of Exchange)

1. Damages shall, except in the case dealt with in paragraph 2 of this Article, be computed and paid in the currency of the State of which the injured alien was a national at the time of the injury or, in the case of claims accruing under Article 12, in the currency specified in the contract or concession. The respondent State may pay the award either in that currency or in any other currency readily convertible to that currency, computed at the rate of exchange prevailing on the date of the award or payment, whichever is more favorable to the claimant. In the case of a multiple exchange rate, the rate of exchange shall be that approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, a rate which is equitable under the circumstances of the case.

2. If, however, the injured alien was a natural person and had his habitual residence in the territory of the respondent State for an extended period of time prior to the injury, damages under Articles 31 to 34 may, in the discretion of that State, be paid in the currency thereof.

3. The provisions of this Article shall apply also to the compensation payable under Articles 10 and 11.

4. Damages and compensation payable under paragraphs 1 and 3 of this Article shall be exempt from exchange controls.

ARTICLE 40

(Local Taxes Prohibited)

Neither damages nor compensation shall be subjected to special taxes or capital levies within the State paying such damages or compensation pursuant to this Convention.