The Law Intensifying Reciprocal Actions Against the United States Government's Terrorist Activities.

Collection of Laws for the year 1368 [March 21, 1989-March 20, 1999], at 534

Quoted from *The Official Gazette* No. 13024, dated November 18, 1989 [Aban 27, 1368]

No. 34 q/85516;

Date: November 11, 1989 [Aban 20, 1368]

The Ministry of Justice of the Islamic Republic of Iran - The Ministry of the Interior

[Omitted here: A paragraph attributed to Rafsanjani.]

The Law Intensifying Countermeasures Against the U.S. Government's Terrorist Activities

A Single Article:

In order to confront the United States Government's activities, the [Iranian] president is required to take the necessary steps to arrest and punish American citizens and their direct and indirect agents who have been found guilty in Iranian courts of justice.

Note 1:

All of the foreign countries that either directly or indirectly cooperate with the United States in kidnapping Iranian citizens and/or in conspiring against their [Iranian citizens'] lives are encompassed by this single article.

Note 2:

The citizens and agents of America and the countries that collaborate with the United States in kidnapping and conspiring against the lives of Iranian citizens and the interests of the Islamic Republic of Iran will be tried in local [Iranian] courts according to the Islamic justice.

Note 3:

This law takes effect from the date of ratification and shall be enforced so long as the president of the United States decides to carry out inhumane activities against the lives and interests of Iranian citizens and does not officially abrogate [them].

The above law, consisting of a single article and three notes, was ratified in a session of the Islamic Consultative Assembly on Wednesday, November 1, 1989 [Aban10, 1368], and was confirmed by the Guardian Council on November 2, 1989 [Aban 11, 1368].

The Speaker of the Islamic Consultative Assembly, Mehdi Karrubi

روزنامه رسمی شماره ۱۳۰۲٤ - ۱۳٦۸/۸/۲۷

شماره ۸۵۵۱٦/ق ۳٤ ۱۳٦۸/۸/۲۰

وزارت دادگستری جمهوری اسلامی ایران - وزارت کشور

قانون تشدید مقابله با اقدامات تروریستی دولت آمریکا که در جلسه علنی روز چهارشنبه مورخ دهم آبانماه یکهزار و سیصد و شصت و هشت مجلس شورای اسلامی تصویب و در تاریخ ۱۳٦۸/۸/۱۱ به‌تایید شورای نگهبان رسیده و طی نامه شماره ۱۱٤۹/ق مورخ ۱۳٦۸/۸/۱۳ مجلس شورای اسلامی واصل شده است جهت اجراء به‌پیوست ابلاغ میگردد.

رئیس جمهور - اکبر هاشمی رفسنجانی

قانون تشدید مقابله با اقدامات تروریستی دولت آمریکا

ماده واحده - بمنظور مقابله با مثل در برابر اقدامات دولت آمریکا رئیس جمهور موظف است جهت دستگیری ومجازات آمریکائی‌ها وعوامل مستقیم وغیرمستقیم آنها که در محاکم قضائی ایران محکوم شده‌اند اقدامات لازم بعمل آورند.

تبصره ۱- کلیه کشورهائی که مستقیم یا غیرمستقیم با آمریکا در ربودن اتباع ایرانی ویا توطئه علیه‌جان آنها همکاری نمایند مشمول این ماده واحده می‌باشند.

تبصره ۲- اتباع وعوامل آمریکا وکشورهائی که با آمریکا در آدم‌ربائی وتوطئه علیه‌جان اتباع ایرانی ومنافع جمهوری اسلامی ایران همکاری نمایند در دادگاههای داخل کشور برمبنای قضای اسلامی محاکمه خواهند شد.

تبصره ۳- این قانون از تاریخ تصویب تا زمانی که رئیس جمهور آمریکا اختیار انجام اقدامات ضد انسانی را علیه‌جان ومنافع اتباع ایرانی دارا باشد ونسبت به‌لغو مجوز رسمی اقدام ننماید معتبر ولازم‌الاجراء میباشد.

قانون فوق مشتمل برماده واحده وسه تبصره در جلسه علنی روز چهارشنبه مورخ دهم آبانماه یکهزار و سیصد و شصت و هشت مجلس شورای اسلامی تصویب و در تاریخ ۱۳٦۸/۸/۱۱ به‌تایید شورای نگهبان رسیده است.

رئیس مجلس شورای اسلامی - مهدی کروبی

روزنامه رسمی شماره ۱۳۰۲۷ - ۱۳٦۸/۸/۳۰

شماره ۱۱۰۲/ه ۱۳٦۸/۸/۱٤

پرونده وحدت رویه ردیف : ٤۷/٦۸ هیئت عمومی دیوانعالی کشور

ریاست معظم دیوانعالی کشور

احتراماً باستحضار میرساند : سرپرست محترم دادگاههای کیفری تهران

Annex 159

The Collection of Laws from the Year 1378 [March 21, 1999 – March 20, 2000]

Pages 473-474

Quoted from No. 15950 of *The Official Gazette*, dated November 28, 1999 [Azar 7, 1378]

No. Q-3432 dated November 15, 1999 [Aban 24, 1378]

Dear Hojjatol-Islam Sayyid Mohammad Khatami, the President of the Islamic Republic of Iran.

By virtue of Article 123 of the Constitution, the Law of Jurisdiction of the Justice Department of The Islamic Republic of Iran for Hearing Civil Claims against Foreign Governments that had been approved by The Islamic Consultative Assembly of the Islamic Republic of Iran at the public session held on Monday, November 8, 1999 [Aban 17, 1378], with its two-degree urgency, was ratified with certain amendments to the title and the text [of the law] at the public session of the Islamic Consultative Assembly held on Tuesday, November 9, 1999 [Aban 18, 1378], was confirmed by the Guardian Council and is hereby forwarded for enforcement.

The Speaker of the Islamic Consultative Assembly - Ali Akbar Nateq Nouri

No. 45928

Date: November 21, 1999 [Aban 30, 1378]

The Ministry of Justice.

"The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments" that was ratified at the public session of the Islamic Consultative Assembly held on Tuesday, November 9, 1999 [Aban 18, 1378], that was confirmed by the Guardian Council on November 10, 1999 [Aban 19, 1378], and arrived with cover letter no. Q-3432 dated November 15, 1999 [Aban 24, 1378], is hereby attached for enactment.

The President, Sayyid Mohammad Khatami

The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments

Single Article:

According to this law, Iranian nationals may, in the following instances, file lawsuits at the Justice Department of Tehran against actions taken by foreign governments that have violated judicial immunity resulting from the political immunity of the government of the Islamic Republic of Iran or its officials. In that instance, the court with which the claim has been filed is required, as a counter action, to hear the aforementioned claim and to issue the appropriate judgment according to the law.

The Ministry of Foreign Affairs shall prepare the list of governments covered by reciprocal action and send it to the Judicial Branch.

1. Damages that result from any action or activity by foreign governments that are inconsistent with international law, including interference in the internal affairs of a country [Iran] that leads to death, physical or psychological injuries, or financial loss for individuals.

2. Damages resulting from the action or the activity of terrorist persons or groups who are supported by the foreign government or are authorized to reside in, travel in and out of, or be active in the sovereign territory of the foreign government and such actions lead to death, physical or psychological injuries, or financial loss for Iranian nationals.

Note 1: The claims that constitute the subject matter of this law, whose origin preceded the ratification of this law, can be filed and heard.

Note 2: If other governments provide assistance and cooperation in the course of enforcing judgments that violate the immunity of the Islamic Republic of Iran or its officials, they shall be subject to the provisions of this law.

Note 3: The executive regulations of the present law shall be prepared by the Ministry of Justice and the Ministry of Foreign Affairs within a period of three months and shall be ratified by the Council of Ministers.

The above law, consisting of a single article and three notes, was ratified at the public session of the Islamic Consultative Assembly held on Tuesday, November

9, 1999 [Aban 18, 1378] and was confirmed by the Guardian Council on November 10, 1999 [Aban 19, 1378].

The Speaker of the Islamic Consultative Assembly - Ali Akbar Nategh Nouri

قوّهٔ قضائیّه

دادگستری جمهوری اسلامی ایران

مجموعه قوانین

سال ۱۳۷۸

نشریّه :

روزنامه رسمی جمهوری اسلامی ایران

نقل از شماره ۱۵۹۵۰ ـ ۱۳۷۸/۹/۷ روزنامه رسمی

شماره ۳۴۳۲ ـ ق ۱۳۷۸/۸/۲۴

حضرت حجةالاسلام والمسلمین جناب آقای سیدمحمد خاتمی

ریاست محترم جمهوری اسلامی ایران

طرح صلاحیت محاکم دادگستری جمهوری اسلامی ایران برای رسیدگی به‌برخی دعاوی مدنی علیه دولتهای خارجی که دو فوریت آن در جلسه علنی روز دوشنبه مورخ ۱۳۷۸/۸/۱۷ تصویب شده بود، در جلسه علنی روز سه‌شنبه مورخ ۱۳۷۸/۸/۱۸ مجلس شورای اسلامی با اصلاحاتی در عنوان و متن تصویب و به تأیید شورای نگهبان رسیده است، در اجرای اصل یکصد و بیست و سوم (۱۲۳) قانون اساسی به پیوست ارسال می‌گردد.

رئیس مجلس شورای اسلامی ـ علی‌اکبر ناطق نوری

شماره ۴۵۹۲۸ ۱۳۷۸/۸/۳۰

وزارت دادگستری

قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولت‌های خارجی که در جلسه علنی روز سه‌شنبه مورخ هجدهم آبان ماه یکهزار و سیصد و هفتاد و هشت مجلس شورای اسلامی تصویب و در تاریخ ۱۳۷۸/۸/۱۹ به تأیید شورای نگهبان رسیده و طی نامه شماره ۳۴۳۲ ـ ق مورخ ۱۳۷۸/۸/۲۴ واصل گردیده است، به پیوست جهت اجرا ابلاغ می‌گردد.

رئیس‌جمهور ـ سیدمحمد خاتمی

قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی

ماده واحده ـ به موجب این قانون اتباع ایرانی می‌توانند در موارد ذیل از اقدامات دولتهای خارجی که مصونیت قضائی ناشی از مصونیت سیاسی دولت جمهوری اسلامی ایران و یا مقامات رسمی آن را نقض نموده باشند در دادگستری تهران اقامه دعوا کنند. دراین صورت دادگاه مرجوع‌الیه مکلف است به عنوان عمل متقابل به دعوای مذکور رسیدگی و طبق قانون حکم مقتضی صادر نماید.

فهرست دولتهای مشمول عمل متقابل توسط وزارت امور خارجه تهیه و به قوه قضائیه اعلام می‌شود.

۱ـ خسارات ناشی از هرگونه اقدام و فعالیت دولتهای خارجی که مغایر با حقوق بین‌المللی باشد از جمله دخالت در امور داخلی کشور که منجر به فوت، صدمات بدنی و روانی و یا ضرر و زیان مالی اشخاص گردد.

۲ـ خسارات ناشی از اقدام و یا فعالیت اشخاص یا گروههای تروریستی که دولت خارجی از آنها حمایت نموده و یا اجازه اقامت یا تردد و یا فعالیت در قلمرو حاکمیت

خود به آنان داده باشد و اقدامات مذکور منجر به فوت یا صدمات بدنی و روانی و یا ضرر و زیان مالی اتباع ایران گردد.

تبصره ۱ـ دعاوی موضوع این قانون که منشاء آن قبل از تصویب این قانون بوده قابل طرح و رسیدگی می‌باشد.

تبصره ۲ـ چنانچه دولتهای دیگری در اجرای احکام ناقض مصونیت جمهوری اسلامی ایران و یا مقامات رسمی آن مساعدت و همکاری نمایند مشمول مقررات این قانون خواهند بود.

تبصره ۳ـ آیین‌نامه اجرائی این قانون ظرف مدت سه ماه توسط وزارتخانه‌های دادگستری و امور خارجه تهیه و به تصویب هیأت وزیران می‌رسد.

قانون فوق مشتمل بر ماده واحده و سه تبصره در جلسه علنی روز سه‌شنبه مورخ هجدهم آبان ماه یکهزار و سیصد و هفتاد و هشت مجلس شورای اسلامی تصویب و در تاریخ ۱۳۷۸/۸/۱۹ به تأیید شورای نگهبان رسیده است.

رئیس مجلس شورای اسلامی ـ علی‌اکبر ناطق نوری

نقل از شماره ۱۵۹۵۰ ـ ۱۳۷۸/۹/۷ روزنامه رسمی

شماره ۴۴۳۱۹/ت ۲۱۶۷۰هـ ۱۳۷۸/۸/۲۶

اصلاحیه اساسنامه صندوق حمایت از تحقیقات و توسعه صنایع الکترونیک

وزارت صنایع

هیأت وزیران در جلسه مورخ ۱۳۷۸/۷/۲۵ بنا به پیشنهاد شماره ۱۰۶۱۳۲ مورخ ۱۳۷۸/۵/۱۰ وزارت صنایع و به استناد ماده واحده قانون تأسیس صندوق حمایت از تحقیقات و توسعه صنایع الکترونیک ـ مصوب ۱۳۷۵ ـ تصویب نمود:

در ماده (۱۲) اساسنامه صندوق حمایت از تحقیقات و توسعه صنایع الکترونیک، موضوع تصویب‌نامه شماره ۷۹۶۷۱/ت ۱۸۵۵۸ هـ مورخ ۱۳۷۶/۱۲/۱۶، بعد از عدد «سه» عبارت «تا پنج» اضافه می‌شود.

این اصلاحیه به موجب نامه شماره ۷۸/۲۱/۵۶۰۹ مورخ ۱۳۷۸/۸/۱۳ شورای محترم نگهبان به تأیید شورای یاد شده رسیده است.

معاون اول رییس‌جمهور ـ حسن حبیبی

نقل از شماره ۱۵۹۵۰ ـ ۱۳۷۸/۹/۷ روزنامه رسمی

شماره ۲۹۸۵۰/ت۲۰۶۶۸هـ ۱۳۷۸/۸/۲۹

اصلاح آیین‌نامه اجرایی تبصره (۳) قانون بودجه سال ۱۳۷۷ کل کشور

وزارت امور اقتصادی و دارایی ـ سازمان برنامه و بودجه ـ بانک مرکزی جمهوری اسلامی ایران

هیأت‌وزیران در جلسه مورخ ۱۳۷۸/۸/۱۶ با توجه به نظریه ریاست محترم مجلس شورای اسلامی (موضوع نامه شماره۲۱۰۵هـ/ب مورخ ۱۳۷۷/۹/۲۹) تصویب نمود:

The Collection of Laws from the Year 1379 [March 21, 2000 – March 20, 2001]

Pages 1423-1424

Quoted from No. 16284 of *The Official Gazette* dated January 17, 2001 [Dey 28, 1379]

No. Q-296, dated November 6, 2000 [Aban 16, 1379]

Dear Hojjatol-Islam Sayyid Mohammad Khatami, the President of the Islamic Republic of Iran,

By virtue of Article 123 of the Constitution, the bill amending "The Law of Jurisdiction of the Justice Department of Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments," bearing two-degree urgency, which was approved by the Islamic Consultative Assembly of the Islamic Republic of Iran at the public session held on Tuesday, October 31, 2000 [Aban 10, 1379], and which was ratified, with certain amendments, at the public session of the Islamic Consultative Assembly held on Wednesday November 1, 2000 [Aban 11, 1379], has been confirmed by the Guardian Council and is hereby forwarded for enforcement.

The Speaker of the Consultative Assembly - Mehdi Karrubi

No. 35993

Date: November 11, 2000 [Aban 21, 1379]

The Ministry of Justice

"The Law Amending the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments," which was enacted at the public session of the Islamic Consultative Assembly held on Wednesday November 1, 2000 [Aban 11, 1379], and which was confirmed by the Guardian Council on November 1, 2000 [Aban 11, 1379], and which was received under cover letter No. Q-296 dated November 6, 2000 [Aban 16, 1379], is hereby forwarded for enforcement.

The President, Sayyid Mohammad Khatami

The Law Amending the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments

Single Article:

In order to confront and prevent further violation of international laws and standards by the governments that ignore the judicial immunity of the Government of the Islamic Republic of Iran, the following paragraph is hereby added as Paragraph (3) to "The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing the Civil Claims against Foreign Governments," and was enacted on November 9, 1999 [Aban 18, 1378]:

> Paragraph 3. With regard to the principle of reciprocal action in evaluating the physical and emotional damages of the victims, as well as punitive damages, if necessary, the standard shall be similar to [that of] the judgments entered by the courts in foreign countries.
>
> Note 1:
>
> The judgment debt shall be fixed in Rials and its equivalent in gold, at the price of gold at the time when the judgment is entered, and it shall be calculated and mentioned in the judgment.
>
> Note 2:
>
> Court charges and the tax of for the plaintiffs' attorneys for this type of claim shall, after the judgment is enforced, be deposited in the general treasury.

The above law, consisting of a single article, was enacted at the public session of the Islamic Consultative Assembly held on Wednesday, November 1, 2000 [Aban 11, 1379] and was confirmed by the Guardian Council on November 1, 2000 [Aban 11, 1379].

The Speaker of the Islamic Consultative Assembly - Mehdi Karrubi

قوّهٔ قضائیّه

روزنامه رسمی جمهوری اسلامی ایران

مجموعه قوانین

سال ۱۳۷۹

جلد دوم

شماره ۴۵۰۸۰ ۱۳۷۹/۱۰/۱۴

وزارت نفت

قانون اختصاص دو درهزار درآمد ناشی از فروش نفت خام برای عمران و آبادانی مناطق نفت‌خیز که در جلسه علنی روز یکشنبه مورخ بیست‌وهفتم آذرماه یکهزاروسیصدوهفتادونه مجلس شورای‌اسلامی تصویب و در تاریخ ۱۳۷۹/۱۰/۴ به‌تأیید شورای نگهبان رسیده و طی نامه شماره ۳۹۹ـ ق مورخ ۱۳۷۹/۱۰/۶ واصل گردیده است، به پیوست جهت اجرا ابلاغ می گردد.

رئیس جمهور ـ سیدمحمد خاتمی

قانون اختصاص دو درهزار درآمد ناشی از فروش نفت خام برای عمران و آبادانی مناطق نفت‌خیز

ماده واحده ـ دولت مکلف است هر ساله دو درهزار درآمد ناشی از فروش نفت خام در هر سال را از طریق درج در لوایح بودجه سالیانه کل کشور برای عمران وآبادانی مناطق نفت‌خیز (شهری و روستائی) اختصاص دهد.

قانون فوق مشتمل بر ماده واحده در جلسه علنی روز یکشنبه مورخ بیست‌وهفتم آذرماه یکهزاروسیصدوهفتادونه مجلس شورای‌اسلامی تصویب و در تاریخ ۱۳۷۹/۱۰/۴ به تأیید شورای نگهبان رسیده است.

رئیس مجلس شورای‌اسلامی ـ مهدی کروبی

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نقل از شماره ۱۶۲۸۴ـ۱۳۷۹/۱۰/۲۸ روزنامه رسمی

شماره ۲۹۶ ـ ق ۱۳۷۹/۸/۱۶

حضرت حجت‌الاسلام والمسلمین جناب آقای سیدمحمد خاتمی

ریاست محترم جمهوری اسلامی ایران

طرح اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی که دو فوریت آن در جلسه علنی روز سه‌شنبه مورخ ۱۳۷۹/۸/۱۰ تصویب شده بود، در جلسه علنی روز چهارشنبه مورخ ۱۳۷۹/۸/۱۱ مجلس شورای اسلامی با اصلاحاتی تصویب و به تأیید شورای نگهبان رسیده است، دراجرای اصل یکصد و بیست و سوم (۱۲۳) قانون اساسی به‌پیوست ارسال می گردد.

رئیس مجلس شورای اسلامی ـ مهدی کروبی

شماره ۳۵۹۹۳ ۱۳۷۹/۸/۲۱

وزارت دادگستری

قانون اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای

رسیدگی بـه دعاوی مدنی علیه دولتهـای خارجی که در جلسه علنـی روز چهارشنبه مورخ یازدهم آبـان ماه یکهزار و سیصد و هفتاد و نه مجلس شورای اسـلامی تصویب و در تاریخ ۱۳۷۹/۸/۱۱ به تـأیید شورای نگهبان رسیده و طی نـامه شماره ۲۹۶ ـ ق مورخ ۱۳۷۹/۸/۱۶ واصل گردیده است، به‌پیوست جهت اجراء ابلاغ می گردد.

رئیس جمهور ـ سیدمحمد خاتمی

قانون اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی

ماده واحده ـ برای مقابلـه و جلوگیری از نقض بیشتر مقررات و مـوازین حقوق بین‌الملل توسط دولتهائی که مصونیت قضائی دولت جمهوری اسلامی ایران را نادیده گرفته و می گیرند بند ذیل به‌عنوان بند (۳) به ماده واحده قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی مصوب ۱۳۷۸/۸/۱۸ اضافه می‌شود:

۳ـ بـاتوجـه به اصـل عمل متقـابل میـزان در تقویـم خسارات مـادی و معنوی زیانـدیدگان و درصورت لـزوم خسارات تنبیهی احکـام مشابه صادره از دادگـاههای خارجی خواهدبود.

تبصره ۱ـ محکوم به، به ریال تعیین و به‌علاوه میزان طلای معادل محکوم‌به نیز به قیمت تاریخ صدور حکم در رأی قید می‌شود.

تبصره ۲ـ هزینه دادرسی و مالیات وکلای خواهان این نوع دعاوی پس از اجرای حکم به حساب خزانه‌داری کل واریز خواهدشد.

قانون فوق مشتمـل بر ماده واحده در جلسه علنی روز چهارشنبـه مورخ یازدهم آبان مـاه یکهزار و سیصد و هفتـاد و نه مجلس شـورای اسلامـی تصویب و در تـاریخ ۱۳۷۹/۸/۱۱ به تأیید شورای نگهبان رسیده است.

رئیس مجلس شورای اسلامی ـ مهدی کروبی

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نقل از شماره ۱۶۲۸۴ـ۱۳۷۹/۱۰/۲۸ روزنامه رسمی

شماره ۴۶۴۲۴/ت۲۳۹۳۶هـ ۱۳۷۹/۱۰/۱۷

تصویب نامه درخصوص موارد افزایش یافته به قسمت(ب) تبصره (۲۹) قانون بودجه سال ۱۳۷۹ کل کشور

سازمان مدیریت و برنامه ریزی کشور

هیأت وزیران در جلسه مورخ ۱۳۷۹/۱۰/۱۱ بنـا به پیشنهاد رییس جمهور و

The Collection of Laws from the Year 1390 [March 21, 2011 – March 20, 2012]

Page 769

Quoted from No. 19566 of *The Official Gazette* dated May 8, 2012 [Ordibehesht 19, 1391]

No. 6360

Dated May 6, 2012 [Ordibehesht 17, 1391]

The Managing Director of *The Official Gazette of the Nation*,

With respect to the expiration of the time limit set forth in Article (1) of the Civil Code, and in the course of enacting the content of the note of Article (1) of the aforementioned Code, a photo-copy of "The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments" will be forwarded for insertion in *The Official Gazette*.

The Speaker of the Islamic Consultative Assembly - Ali Larijani

No.: 421/3509

Date: April 18, 2012 (Farvardin 30, 1391)

Dear Dr. Mahmud Ahmadinejad,

The President of the Islamic Republic of Iran

In the course of executing Article 123 of the Constitution of the Islamic Republic of Iran, "The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments" that was submitted to the Islamic Consultative Assembly with one-degree of urgency, that was ratified at the public session of the Islamic Consultative Assembly on Wednesday, March 7, 2012 [Esfand 17, 1390] and confirmed by the Guardian Council, is attached.

The Head of the Islamic Consultative Assembly - Ali Larijani

The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments.

Article 1:

According to this law, in order to confront and prevent the violation of the rules and standards of international rights, actual persons and legal entities may file a lawsuit at the Justice Department of Tehran against the actions of foreign governments that breach the judicial immunity of the government of the Islamic Republic of Iran or its officials. In that case, the court with which the claim is filed is required, as a reciprocal action, to hear such claims and to issue an appropriate judgment according to the law. A list of governments included in reciprocal action shall be prepared by the Ministry of Foreign Affairs and shall be sent to the Judicial Branch.

The instances covered by this article consist of:

a) Damages resulting from any type of action or activity of foreign governments, inside or outside of Iran, that is contrary to international rights and that leads to death, physical or psychological injuries, or to financial loss for individuals.
b) Damages resulting from the action and or the activity of persons or groups inciting terror (terrorist), inside or outside of Iran, that is encouraged or supported by a foreign government, or a foreign government authorizes them to reside, pass through, or be active inside its own sovereign territory, and the aforementioned actions lead to death, physical or psychological injuries, or financial loss for individuals.

Note: The list of persons or groups inciting terror (terrorist) shall be prepared by the Ministry of Intelligence and shall be announced to the Judicial Branch.

Article 2:

Claims pertaining to this law or originating before its ratification may be filed and heard.

Article 3:

If other governments provide assistance or cooperation in the course of enacting the judgments that violate the immunity of the Islamic Republic of Iran or its officials, they shall be subject to the provisions of this law.

Article 4:

With regard to the principle of reciprocal action, the evaluation of physical and emotional damages, and the punitive damages of the victims, the standard shall resemble the judgments issued by the foreign courts.

Note: The judgment debt shall be fixed in Rials and its equivalent in gold, calculated at the price of gold when the judgment was issued, and mentioned in the judgment.

Article 5:

Court charges and the tax for the plaintiffs' attorneys for this type of claim shall be deposited in the treasury after the judgment is issued.

Article 6:

The courts of Iran (the Justice Department of Tehran) have jurisdiction to hear claims against foreign governments in the following cases:

1. If the victim or those who survive them are of Iranian nationality at the time of the incident or at the time the claim is filed.
2. If the victim is employed by the government of the Islamic Republic of Iran at the time the damage is inflicted.

Article 7:

Claims against the representatives, officials, or entities affiliated with or under the control of the foreign government, with regard to the principle of reciprocal action, is liable to be heard when damages result from the actions constituting the subject matter of this law.

Article 8:

The properties belonging to the government, its officials, its representatives, affiliated entities, or under the control of a foreign government covered by this law, with regard to the principle of reciprocal action, are not immune from prosecution.

Article 9:

The provisions specified in international treaties that must be enforced relative to the government of the Islamic Republic of Iran are not covered by the ruling of Article (8) of this law except in the following instances:

a) Income that is collected from the leasing, mortgage, or sale of possessions of the foreign government.

b) The possessions of the foreign government that are transferred to others with the intention of evading the execution of this law.

c) Possessions that have immunity based upon international regulations that covered by this law in the foreign country are subject to execution.

Article 10:

The executive regulations of this law shall be prepared within three months by the Ministry of Justice, the Ministry of Foreign Affairs, and the Ministry of Intelligence, and shall be ratified by the Council of Ministers.

Article 11:

As of the date on which this law is ratified, "The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments," ratified on November 9, 1999 [Aban 18, 1378], and its subsequent amendments ratified on November 1, 2000 [Aban 11, 1379], are superseded.

The above law, consisting of eleven articles, was ratified at a public session of Wednesday, March 7, 2012 [Esfand 17, 1390] and it was confirmed by the Guardian Council on April 11, 2012 [Farvardin 23, 1391].

The Head of the Islamic Consultative Assembly - Ali Larijani

قوّهٔ قضائیّه

روزنامه رسمی جمهوری اسلامی ایران

مجموعه
قوانین و مقررات

سال ۱۳۹۰

جلد اول

نقل از شماره ۱۹۵۶۶ ـ ۱۳۹۱/۲/۱۹ روزنامه رسمی

شماره ۶۳۶۰ ۱۳۹۱/۲/۱۷

مدیرعامل محترم روزنامه رسمی کشور

با توجه به انقضای مهلت مقرر در ماده «۱» قانون مدنی و در اجرای مفاد تبصره ماده «۱» قانون مذکور، یک نسخه تصویر «قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی» برای درج در روزنامه رسمی ارسال می‌گردد.

رئیس مجلس شورای اسلامی ـ علی لاریجانی

شماره ۴۲۱/۳۵۰۹ ۱۳۹۱/۱/۳۰

جناب آقای دکتر محمود احمدی‌نژاد

ریاست محترم جمهوری اسلامی ایران

در اجرای اصل یکصد و بیست و سوم (۱۲۳) قانون اساسی جمهوری اسلامی ایران قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی که با عنوان طرح یک فوریتی به مجلس شورای اسلامی تقدیم گردیده بود، با تصویب در جلسه علنی روز چهارشنبه مورخ ۱۳۹۰/۱۲/۱۷ و تأیید شورای محترم نگهبان به پیوست ابلاغ می‌گردد.

رئیس مجلس شورای اسلامی ـ علی لاریجانی

قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی

ماده۱ـ به موجب این قانون برای مقابله و جلوگیری از نقض مقررات و موازین حقوق بین‌الملل، اشخاص حقیقی و حقوقی می‌توانند از اقدامات دولتهای خارجی که مصونیت قضائی دولت جمهوری اسلامی ایران و یا مقامات رسمی آن را نقض نمایند، در دادگستری تهران اقامه دعوی کنند. در این صورت دادگاه مرجوع الیه مکلف است به عنوان عمل متقابل به دعاوی مذکور رسیدگی و طبق قانون، حکم مقتضی صادر نماید. فهرست دولتهای مشمول عمل متقابل توسط وزارت امور خارجه تهیه و به قوه قضائیه اعلام می‌شود.

موارد موضوع این ماده عبارت است از:

الف ـ خسارات ناشی از هرگونه اقدام و فعالیت دولتهای خارجی در داخل یا خارج ایران که مغایر با حقوق بین‌الملل است و منجر به فوت یا صدمات بدنی یا روانی یا ضرر و زیان مالی اشخاص می‌گردد.

ب ـ خسارات ناشی از اقدام و یا فعالیت اشخاص یا گروههای وحشت‌افکن (تروریستی) در داخل یا خارج ایران که دولت خارجی آنها را تشویق یا از آنها حمایت می‌نماید و یا اجازه اقامت یا تردد و یا فعالیت در قلمرو حاکمیت خود را به آنها می‌دهد و اقدامات مذکور منجر به فوت یا صدمات بدنی یا روانی یا ضرر و زیان مالی می‌شود.

تبصره ـ فهرست اشخاص یا گروههای وحشت‌افکن (تروریستی)، توسط وزارت اطلاعات تهیه و به قوه قضائیه اعلام می‌شود.

ماده۲ـ دعاوی موضوع این قانون با منشأ قبل از تصویب آن قابل طرح و رسیدگی است.

ماده۳ـ چنانچه دولتهای دیگری در اجرای احکام ناقض مصونیت جمهوری اسلامی ایران و یا مقامات رسمی آن مساعدت و همکاری نمایند مشمول مقررات این قانون می‌باشند.

ماده۴ـ با توجه به اصل عمل متقابل، میزان، در تقویم خسارات مادی، معنوی و تنبیهی زیان‌دیدگان، مشابه احکام صادره از دادگاه خارجی است.

تبصره ـ محکومٌ به به ریال تعیین و میزان طلای معادل آن به قیمت تاریخ صدور حکم محاسبه و در آن قید می‌شود.

ماده۵ ـ هزینه دادرسی و مالیات وکلای خواهان این نوع دعاوی پس از اجرای حکم به حساب خزانه‌داری کل واریز می‌شود.

ماده۶ ـ دادگاههای ایران (دادگستری تهران) در موارد زیر صلاحیت رسیدگی به شکایت علیه دولتهای خارجی را دارند:

۱ـ زیان‌دیده یا بازماندگان وی در زمان وقوع حادثه یا زمان طرح دعوی تبعه ایران باشند.

۲ـ زیان‌دیده در زمان ورود خسارت در استخدام دولت جمهوری اسلامی ایران باشد.

ماده۷ـ دعاوی علیه نمایندگان یا مقامات یا نهادهای وابسته یا تحت کنترل دولت خارجی با رعایت اصل عمل متقابل، در صورتی قابل رسیدگی است که خسارات، ناشی از اقدامات موضوع این قانون باشد.

ماده۸ ـ اموال متعلق به دولت یا مقامات یا نمایندگان آن یا نهادهای وابسته یا در کنترل دولت خارجی مشمول این قانون با رعایت اصل عمل متقابل، مصون از اقدامات اجرائی نیست.

ماده۹ـ موارد مصرحه در معاهدات بین‌المللی لازم‌الاجراء نسبت به دولت جمهوری اسلامی ایران مشمول حکم ماده (۸) این قانون نمی‌شود مگر در موارد زیر:

الف ـ عوایدی که از اجاره، رهن یا فروش اموال دولت خارجی حاصل می‌شود.

ب ـ اموال دولت خارجی که به قصد فرار از اعمال این قانون به غیر منتقل می‌شود.

پ ـ اموال مصونیت یافته براساس مقررات بین‌المللی که در دولت خارجی مشمول این قانون، موضوع اقدامات اجرائی باشد.

ماده۱۰ـ آیین‌نامه اجرائی این قانون ظرف سه ماه توسط وزارتخانه‌های دادگستری، امور خارجه و اطلاعات تهیه می‌شود و به تصویب هیأت وزیران می‌رسد.

ماده۱۱ـ از تاریخ لازم‌الاجراء شدن این قانون، قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی مصوب ۱۳۷۸/۸/۱۸ و اصلاحیه بعدی آن مصوب ۱۳۷۹/۸/۱۱ لغو می‌گردد.

قانون فوق مشتمل بر یازده ماده در جلسه علنی روز چهارشنبه مورخ هفدهم اسفندماه یکهزار و سیصد و نود مجلس شورای اسلامی تصویب شد و در تاریخ ۱۳۹۱/۱/۲۳ به تأیید شورای نگهبان رسید.

رئیس مجلس شورای اسلامی ـ علی لاریجانی

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نقل از شماره ۱۹۵۷۲ ـ ۱۳۹۱/۲/۲۶ روزنامه رسمی

۱۳۹۱/۲/۱۷

شماره۵۳۸/۶۴۱۱

جناب آقای دکتر محمود احمدی‌نژاد

ریاست محترم جمهوری اسلامی ایران

عطف به نامه شماره ۳۷۹۳۴/۵۳۷۲۶ مورخ ۱۳۹۰/۳/۱۰ در اجرای اصل یکصد و بیست و سوم (۱۲۳) قانون اساسی جمهوری اسلامی ایران قانون اصلاح پروتکل مونترال درمورد مواد کاهنده لایه ازن مصوب یازدهمین اجلاس اعضاء ـ پکن (۱۲ـ ۸ آذرماه ۱۳۷۸ هجری‌شمسی برابر با ۲۹ نوامبر تا ۳ دسامبر ۱۹۹۹ میلادی) که با عنوان لایحه به مجلس شورای اسلامی تقدیم گردیده بود، با تصویب درجلسه علنی روز دوشنبه مورخ ۱۳۹۰/۱۲/۱۵ و تأیید شورای محترم نگهبان به پیوست ابلاغ می‌گردد.

رئیس مجلس شورای اسلامی ـ علی لاریجانی

۱۳۹۱/۲/۲۳

شماره۲۸۳۹۸

سازمان حفاظت محیط زیست

«قانون اصلاح پروتکل مونترال در مورد مواد کاهنده لایه ازن مصوب یازدهمین اجلاس اعضاء ـ پکن (۱۲ـ ۸ آذرماه ۱۳۷۸ هجری شمسی برابر با ۲۹ نوامبر تا ۳ دسامبر ۱۹۹۹ میلادی)» که در جلسه علنی روز دوشنبه مورخ پانزدهم اسفند ماه یکهزار و سیصد و نود مجلس شورای اسلامی تصویب و در تاریخ ۱۳۹۱/۲/۵ به تأیید شورای نگهبان رسیده و طی نامه شماره ۵۳۸/۶۴۱۱ مورخ ۱۳۹۱/۲/۱۷ مجلس شورای اسلامی واصل گردیده است، به پیوست جهت اجراء ابلاغ می‌گردد.

رئیس‌جمهور ـ محمود احمدی‌نژاد

http//dolat.ir/detail/280668

(https//telegram.me/dolat11)

The Law Requiring the Government [of Iran] to Pursue Damages Resulting from the United States' Activities and Crimes was communicated.

[Logo: The government's information site]

The President: The Law Requiring the Government to Pursue Damages Resulting from the United States' Activities and Crimes ***was received****.*

Monday June 6, 2016 [*Khordad 17, 1395*]

Dr. Hasan Rouhani, the President, communicated "The Law Requiring the Government to Pursue Damages Resulting from United States' Activities and Crimes against Iran and Iranian Citizens" to the Ministry of Foreign Affairs for execution.

Based on the report of the government information site, this law was ratified on Tuesday, May 17, 2016 [*Ordibehesht 28, 1395*] *by the Islamic Consultative Assembly in a public session and was confirmed by the Guardian Council on May 18, 2016* [*Ordibehesht 29, 1395*]

The complete text of this law is as follows:

The Law Requiring the Government to Pursue Damages Resulting from the United States' Activities and Crimes against Iran and Iranian Citizens.

Article 1:

In order to secure the rights of the Iranian nation, the government [of Iran] is obligated to take appropriate actions, directly or through supporting persons and citizens of the Islamic Republic of Iran, including legal actions, to seek full compensation and restitution from the government of the United States based upon its role in the following matters:

1. Material and emotional damages resulting from the coup d'état of August 19, 1953 [Mordad 28, 1332].
2. Material and emotional damages resulting from the Nozheh coup d'état.
3. Material and emotional damages resulting from the imposed [Iran-Iraq] war.

4. Material and emotional damages resulting from the death of more than 223,000 individuals and 600,000 inspired persons (freedom fighters and freedom lovers).
5. Material and emotional damages resulting from the death of more than 17,000 martyrs who were the victims of terror.
6. Material and emotional damages resulting from attacks on oil rigs.
7. Material and emotional damages resulting from spying against Iran that was conducted by the United States or was supported and coordinated by the United States.
8. Material and emotional damages resulting from the freezing, confiscation, or taking over of property and assets of the Islamic Republic of Iran or those of the institutions or government or public organizations of the Islamic Republic of Iran or [the properties and assets of] those who head them.
9. All Material and emotional damages resulting from the activities of the usurping Zionist regime [Israel] which were carried out or are being carried out with the support or in coordination with the United States.
10. All Material and emotional damages resulting from the other activities or the situations that have taken place or will take place with the support of, or coordinated by, the United States in the future.

Article 2:

In instances where the United States has not fulfilled its obligations toward the Islamic Republic of Iran, particularly in instances where the immunity of the government of Iran and property belonging to the government and the officials of the Islamic Republic of Iran has been violated, the government [of the Islamic Republic of Iran] is obligated to take all actions, including appropriate legal actions, within the framework of reciprocal actions.

Article 3:

The government [of the Islamic Republic of Iran] is obligated to implement the decisions of competent Iranian authorities for the benefit of the Islamic Republic of Iran and its citizens in third countries where property of the United States is located, within the framework of reciprocal actions.

In instances where the courts of third countries recognize or enforce the judgments of local U.S. courts against Iran, the government [of the Islamic Republic of Iran] is obligated to take appropriate reciprocal actions to recognize

and enforce the judgments of the local courts in Iran in those countries or in other countries.

Article 4:

The legal actions set forth in this law, to the extent that they are taken against a foreign government (i.e. against the United States per Article (2) of this law) or against any other country (per Article (3) of this law), and will be considered a violation of the immunity of that government or its officials, must be within the framework of reacting to the internal obligation of that government and be restricted to the limits of reciprocal action based upon international rights.

Article 5:

The Ministry of Foreign Affairs is required to report to the National Security, Foreign Relations, and Judicial and Rights Committees of the Islamic Consultative Assembly every six months any action it has taken to secure the rights of the nation of Iran that are the subject of the present law.

The above law, consisting of five articles, was ratified by the Islamic Consultative Assembly on Tuesday, May 17, 2016 [Ordibehesht 28, 1395] and was confirmed by the Guardian Council on May 18, 2016 [Ordibehesht 29, 1395].

از سوی رئیس جمهوری: **قانون الزام دولت به پیگیری خسارات ناشی از اقدامات و جنایات آمریکا ابلاغ شد**

دوشنبه ۱۷ خرداد ۱۳۹۵ - ۱۳:۵۰

دکتر حسن روحانی، رئیس جمهوری، قانون الزام دولت به پیگیری جبران خسارات ناشی از اقدامات و جنایات آمریکا علیه ایران و اتباع ایرانی را برای اجرا به وزارت امور خارجه ابلاغ کرد.

دکتر حسن روحانی، رئیس جمهوری، قانون الزام دولت به پیگیری جبران خسارات ناشی از اقدامات و جنایات آمریکا علیه ایران و اتباع ایرانی را برای اجرا به وزارت امور خارجه ابلاغ کرد.
به گزارش پایگاه اطلاع رسانی دولت، این قانون در جلسه علنی روز سه‌شنبه مورخ بیست و هشتم اردیبهشت ماه یکهزار و سیصد و نود و پنج مجلس شورای اسلامی تصویب و در تاریخ ۳۹/۲/۱۳۹۵ به تأیید شورای نگهبان رسیده است.
متن کامل این قانون به شرح زیر است:

قانون الزام دولت به پیگیری جبران خسارات ناشی از اقدامات و جنایات آمریکا علیه ایران و اتباع ایرانی

ماده۱ـ به‌منظور استیفای حقوق ملت ایران، دولت موظف است رأساً یا از طریق حمایت از اشخاص و اتباع جمهوری اسلامی ایران، اقدامات مقتضی از جمله اقدامات حقوقی را جهت جبران خسارت و اخذ غرامت کامل از دولت ایالات متحده آمریکا به جهت نقض این کشور در موارد زیر به‌عمل آورد:
۱ـ خسارت‌های مادی و معنوی ناشی از کودتای ۲۸ مرداد ۱۳۳۲
۲ـ خسارت‌های مادی و معنوی ناشی از کودتای نوژه
۳ـ خسارت‌های مادی و معنوی ناشی از جنگ تحمیلی
۴ـ خسارت‌های مادی و معنوی ناشی از شهادت بیش از ۲۲۳۰۰۰ نفر و ۶۰۰۰۰۰ نفر ایثارگر (جانباز و آزاده)
۵ ـ خسارت‌های مادی و معنوی ناشی از شهادت بیش از ۱۷۰۰۰ شهید ترور
۶ ـ خسارت‌های مادی و معنوی ناشی از حمله به سکوهای نفتی
۷ـ خسارت‌های مادی و معنوی ناشی از جاسوسی علیه ایران توسط ایالات متحده یا با حمایت و نقش‌آفرینی ایالات متحده
۸ ـ خسارت‌های مادی و معنوی ناشی از انسداد، مصادره و یا تصرف در اموال و دارایی‌های جمهوری اسلامی ایران، نهادها و مؤسسات دولتی یا عمومی جمهوری اسلامی ایران یا مقامات آن
۹ـ کلیه خسارت‌های مادی و معنوی ناشی از اقدامات رژیم غاصب صهیونیستی که با حمایت یا نقش‌آفرینی آمریکا انجام پذیرفته یا می‌پذیرد.
۱۰ـ کلیه خسارت‌های مادی و معنوی ناشی از سایر اقدامات یا وقایعی که با حمایت یا نقش‌آفرینی ایالات متحده روی داده است یا در آینده روی خواهد داد.
ماده۲ـ دولت موظف است در مواردی که ایالات متحده تعهدات خود در قبال جمهوری اسلامی ایران، به ویژه در حوزه مصونیت دولت و اموال متعلق به دولت و مقامات جمهوری اسلامی ایران را نقض می‌نماید، در راستای اقدام متقابل کلیه اقدامات از جمله اقدامات حقوقی مقتضی را به عمل آورد.
ماده۳ـ دولت موظف است اجرای تصمیمات مراجع صالح به نفع جمهوری اسلامی ایران و اتباع آن را در کشورهای ثالثی که اموالی از ایالات متحده در آنها وجود دارد، در چهارچوب اقدام متقابل تعقیب کند. در مواردی که دادگاههای کشورهای ثالث نسبت به شناسایی و یا اجرای احکام دادگاههای داخلی ایالات متحده آمریکا علیه ایران اقدام می‌کنند، دولت موظف است اقدام متقابل مقتضی را جهت شناسایی و اجرای احکام دادگاههای داخلی ایران در آن کشورها یا سایر کشورها حسب مورد به عمل آورد.
ماده۴ـ اقدامات حقوقی مذکور در این قانون تا آنجا که در قبال دولت خارجی (ایالات متحده بر اساس ماده (۲) این قانون و یا هر کشور دیگر موضوع ماده (۳) این قانون) اتخاذ می‌شود و نقض مصونیت آن دولت و یا مقامات آن دولت تلقی شود، باید در چهارچوب واکنش به نقض تعهد داخلی آن دولت بوده و محدود به حدود اقدامات متقابل بر اساس حقوق بین‌الملل باشد.
ماده۵ ـ وزارت امور خارجه موظف است گزارش اقدامات به‌عمل‌آمده در راستای استیفای حقوق ملت ایران، موضوع این قانون را هر شش‌ماه به کمیسیون‌های امنیت ملی و سیاست خارجی و قضائی و حقوقی مجلس شورای اسلامی ارائه نماید.
قانون فوق مشتمل بر پنج ماده در جلسه علنی روز سه‌شنبه مورخ بیست و هشتم اردیبهشت‌ماه یکهزار و سیصد و نود و پنج مجلس شورای اسلامی تصویب شد و در تاریخ ۳۹/۲ /۱۳۹۵ به تأیید شورای نگهبان رسید.

کد خبر: ۳۸۰۶۶۸

(https://telegram.me/dolat11)

Executive Regulations of the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments, Enacted in the Year 1999 [1378]

The Collection of Laws from the Year 1379 [March 21, 2000 – March 20, 2001]

Pages 395-396

Quoted from the Official Gazette No. 16095 dated May 30, 2000 [Khordad 10, 1379]

No. H22837T/7530

Dated May 20, 2000 [Ordibehesht 31, 1379]

The Ministry of Justice

The Ministry of Foreign Affairs

By virtue of note (3) of the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims [filed] against Foreign Governments, ratified in 1378 [March 21, 1999 – March 20, 2000], and based on the joint proposal of the Ministry of Justice and Ministry of Foreign Affairs (set forth in letter No. 15/170, dated April 19, 2000 [Farvardin 31, 1379] of the Ministry of Justice), the Council of Ministers, at the meeting held on May 14, 2000 (Ordibehesht 25, 1379), ratified the executive regulations of the said law as set forth below:

> **The Executive Regulations of the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments, Ratified in 1999 [1378]**

Article 1:

With respect to claims of Iranian nationals against foreign governments, the courts of the Justice Department of Tehran may hear a case only if the named government has, in the instances set forth in the Single Article Law mentioned in the present regulations, violated the immunity of the government or the officials of the Islamic Republic of Iran. In that case, the government which has been named as defendant, based on the principle of reciprocal action, will lack immunity before the Justice Department of the Islamic Republic of Iran.

Article 2:

The Ministry of Foreign Affairs, within three months of the date on which these regulations are ratified, shall send a list of the governments that have violated the immunity of the government of the Islamic Republic of Iran or its officials, or that have provided assistance in the course of enforcement of the judgments that violate such immunity, to the Judiciary Branch.

Article 3:

If, in the future, a government violates the judicial immunity of the government of the Islamic Republic of Iran or of its officials, or provides assistance in the course of the enforcement of the judgments that violates that immunity, The Ministry of Foreign Affairs shall notify the Judicial Branch accordingly.

Article 4:

The foreign governments who support the terrorist persons or groups set forth in Paragraph (2) of the aforementioned Single Article Law shall be determined by the Ministry of Foreign Affairs.

Article 5:

The procedure for filing and hearing a claim, issuing a judgment, and enforcing it, shall be in accordance with the Civil Procedure Code and other laws and regulations of the Islamic Republic of Iran.

Note:

The damages resulting from any action or activity of foreign governments that are contrary to international rights shall be determined by observing the principle of reciprocal action.

Article 6:

The Government of the Islamic Republic of Iran shall explore all international means, particularly the contacting of international authorities, that it considers necessary or useful for restoring and revitalizing its immunity, and it shall take appropriate action.

First Deputy to the President - Hasan Habibi

نقل از شماره ۱۶۰۹۵ ـ ۱۳۷۹/۳/۱۰ روزنامه رسمی
شماره ۲۰۹۴۴/۱۹۵۶ ۱۳۷۹/۳/۲

اصلاحیه تصویب‌نامه درخصوص تبدیل روستای ریوش به شهر

وزارت کشور

نظر به اینکه در بند (۴) طرح پیشنهادی تصویب‌نامه شماره ۱۱۵۹۹/ت ۲۰۹۴۴ ک مورخ ۱۳۷۸/۷/۲۷ «شهر ششتمد» به اشتباه «شهرششتمه» اعلام و تصویب‌نامه یاد شده برهمین اساس تنظیم و ابلاغ شده است، مراتب جهت اصلاح اعلام می‌شود.

دبیر هیأت دولت ـ حسین رحیم‌زاده

نقل از شماره ۱۶۰۹۵ ـ ۱۳۷۹/۳/۱۰ روزنامه رسمی
شماره ۷۵۳۰/ت ۲۲۸۳۷هـ ۱۳۷۹/۲/۳۱

وزارت دادگستری ـ وزارت امور خارجه

هیأت وزیران در جلسه مورخ ۱۳۷۹/۲/۲۵ بنا به پیشنهاد مشترک وزارتخانه‌های دادگستری و امور خارجه (موضوع نامه شماره ۱۵/۱۷۰ مورخ ۱۳۷۹/۱/۳۱ وزارت دادگستری) به استناد تبصره (۳) قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی ـ مصوب ۱۳۷۸ ـ آیین‌نامه اجرایی قانون یاد شده را به شرح زیر تصویب نمود:

آیین‌نامه اجرایی قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی ـ مصوب ۱۳۷۸ ـ

ماده ۱ـ دادگاههای دادگستری تهران درخصوص دعاوی اتباع ایرانی علیه دولتهای خارجی فقط درصورتی می‌توانند رسیدگی کنند که دولت خوانده طبق موارد پیش‌بینی شده در ماده واحده قانونی موضوع این آیین‌نامه مصونیت دولت و یا مقامات رسمی جمهوری اسلامی ایران را نقض نموده باشد، که در این صورت براساس اصل عمل متقابل، دولت خوانده فاقد مصونیت در دادگستری جمهوری اسلامی ایران خواهد بود.

ماده ۲ـ وزارت امور خارجه ظرف سه ماه از تاریخ تصویب این آیین‌نامه، فهرست کشورهایی که مصونیت دولت جمهوری اسلامی ایران یا مقامات رسمی آن را نقض نموده یا در اجرای احکام ناقض این مصونیتها مساعدت کرده‌اند را به قوه قضاییه اعلام می‌دارد.

ماده ۳ـ درصورتی که دولتی در آینده مصونیت قضایی دولت جمهوری اسلامی ایران یا مقامات رسمی آن را نقض نماید یا در اجرای احکام ناقض این مصونیتها مساعدت کند، مراتب توسط وزارت امور خارجه به قوه قضاییه اعلام می‌شود.

ماده ۴ـ تعیین دولتهای خارجی حامی اشخاص یا گروههای تروریستی موضوع بند (۲) ماده واحده قانون یاد شده با وزارت امور خارجه است.

ماده ۵ـ تشریفات طرح دعوی، رسیدگی، صدور حکم و اجرای آن مطابق قانون آیین دادرسی مدنی و سایر قوانین و مقررات جمهوری اسلامی ایران است.

تبصره ـ خسارات ناشی از هرگونه اقدام و فعالیت دولتهای خارجی که مغایر با حقوق بین‌الملل باشد با رعایت اصل عمل متقابل تعیین می‌شود.

ماده ۶ـ دولت جمهوری اسلامی ایران کلیه راههای بین‌المللی به ویژه مراجعه به مراجع بین‌المللی را که برای اعاده و احیای مصونیت خود لازم و مفید می‌داند نیز بررسی و اقدام مقتضی معمول خواهد داشت.

معاون اول رئیس‌جمهور ـ حسن حبیبی

نقل از شماره ۱۶۰۹۵ ـ ۱۳۷۹/۳/۱۰ روزنامه رسمی شماره ۷۵۳۳/ت ۲۲۹۰۱هـ ۱۳۷۹/۲/۳۱

تصویب‌نامه راجع به قیمت‌گذاری کالاهای قاچاق مکشوفه

وزارت امور اقتصادی و دارایی ـ وزارت بازرگانی ـ وزارت جهاد سازندگی ـ وزارت دادگستری ـ وزارت صنایع ـ وزارت کشور

هیأت وزیران در جلسه مورخ ۱۳۷۹/۲/۱۸ بنا به پیشنهاد وزارت امور اقتصادی و دارایی و به استناد اصل یکصدو سی و هشتم قانون اساسی جمهوری اسلامی ایران تصویب نمود:

قیمت‌گذاری کالاهای قاچاق مکشوفه از طریق مزایده ـ موضوع تبصره (۱) تصویب‌نامه شماره ۵۲۳۹۵/ت ۲۰۴۱۱ هـ مورخ ۱۳۷۷/۸/۱۱ ـ براساس ارزش سیف برمبنای قیمت ارز واریزنامه‌ای بدون احتساب سود بازرگانی و حقوق گمرکی محاسبه شود.

معاون اول رئیس‌جمهور ـ حسن حبیبی

نقل از شماره ۱۶۰۹۵ ـ ۱۳۷۹/۳/۱۰ روزنامه رسمی شماره ۷۶۷۱/ت ۲۲۸۴۴هـ ۱۳۷۹/۲/۳۱

سازمان برنامه و بودجه ـ وزارت فرهنگ و ارشاد اسلامی ـ وزارت امور اقتصادی و دارایی

هیأت وزیران در جلسه مورخ ۱۳۷۹/۲/۱۸ بنا به پیشنهاد شماره ۱۰۲/۵۳۷ـ۴۲/۲۸۳ مورخ ۱۳۷۹/۲/۶ سازمان برنامه و بودجه و به استناد تبصره (۳۶) قانون بودجه سال ۱۳۷۹ کل کشور، آیین‌نامه اجرایی بند (الف) تبصره یاد شده را به شرح زیر تصویب نمود:

آیین‌نامه اجرایی بند (الف) تبصره (۳۶) قانون بودجه سال ۱۳۷۹ کل کشور

ماده ۱ـ تابلوهای تبلیغاتی تجاری موضوع بند (الف) تبصره (۳۶) قانون بودجه سال ۱۳۷۹ کل کشور، عبارت از کلیه تابلوهای دیواری پارچه‌ای، فلزی، رایانه‌ای و

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Quoted from No. 16213 of *The Official Gazette* dated October 21, 2000 [Mehr 30, 1379]

No. H23541 T/31348

Dated October 10, 2000 [Mehr 19, 1379]

The Amendment to the Executive Regulations of "The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments" ratified in 1999 [1378]

The Ministry of Justice The Ministry of Foreign Affairs

With regard to the opinion of the speaker of The Islamic Consultative Assembly (set forth in letter No. B/H 2830 and dated September 20, 2000 [Shahrivar 30, 1379]), The Council of Ministers, at the session held on October 1, 2000 (Mehr 10, 1379], ratified the following provisions:

In the Note to Article (5) of "The Executive Regulations of the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims against Foreign Governments," ratified in the year 1999 [1378] (addressing resolution No. H22837T/7530, dated May 10, 2000 [Ordibehesht 21, 1379]), the phrase “the principle of reciprocal action” is amended to read “relevant regulations”.

The First Assistant to the President - Hassan Habibi

ماده ۶۷ـ دستمزد تشخیص اراضی (دایر و بایر وموات) تا مساحت ۱۰۰۰ مترمربع ۲۰۰,۰۰۰ ریال و برای هریکهزار مترمربع اضافه بیست درصد به‌دستمزد فوق اضافه می‌شود.

ماده ۶۸ـ دستمزد تشخیص علت و برآورد خسارت ناشی از زیان‌های وارده به‌مزارع و باغها، جنگلها ومراتع، شیلات، شبکه‌های آبیاری وزهکشی وآبیاری تحت فشار، دام و محصولات و فرآورده‌های کشاورزی ودامی وتاسیسات کشاورزی ودامپروری وشیلات وتجهیزات کشاورزی وخسارات ناشی از آفات نباتی وحیوانی، مصرف مواد شیمیائی وداروئی نامناسب، آلودگی آب وخاک وموادغذائی بشرح زیر است:

الف ـ تشخیص علت خسارت ۲۰۰,۰۰۰ ریال.

ب ـ برآورد خسارت تا ده میلیون ریال ۲۰۰,۰۰۰ ریال.

پ ـ از ده میلیون ریال به بالا نسبت به مازاد ۲ در هزار.

ماده ۶۹ـ دستمزد افراز املاک کشاورزی براساس تعرفه ارزیابی موضوع ماده (۶۲) به‌اضافه پنجاه درصد خواهدبود. در مواردی که موضوع افراز املاک کشاورزی تقسیم ترکه باشد، چهل درصد به دستمزد ارزیابی مربوطه افزوده می گردد.

ماده ۷۰ـ در صورتی که انجام امر کارشناسی مستلزم تهیه نقشه باشد، دستمزد نقشه‌برداری برطبق تعرفه مربوطه محاسبه خواهدشد.

ماده ۷۱ـ دستمزد ارزیابی تجهیزات ومواد اولیه ومحصولات و فرآورده‌های کشاورزی ودامی و جنگلی وشیلات و غیره موجود در انبارها براساس تعرفه ماده ۱۲ محاسبه خواهدشد.

ماده ۷۲ـ دستمزد کارشناسی در امور مهندسین مشاور وپیمانکاران در این گروه کارشناسان براساس تعرفه رسیدگی به موارد اختلاف بین کارفرمایان وپیمانکاران ومهندسین مشاور تعیین می‌شود.

ماده ۷۳ـ دستمزد تشخیص حدود ثبتی و رسیدگی به اختلافات آن املاک خارج از محدوده شهرها:

ـ دستمزد مطالعه پرونده ثبتی وپیاده نمودن پلاک موردنظر وتشخیص حدود آن در املاک مزروعی حداقل پانصدهزار ریال.

ـ در مواردی که مساحت ملک بیش از یک هکتار باشد به‌ازاء هر هکتار مازاد، ۱۰۰,۰۰۰ ریال.

ماده ۷۴ـ دستمزد آزمایشات مربوط به خاک‌شناسی و تهیه نمونه‌های مورد لزوم بر مبنای تعرفه موسسه تحقیقات خاک وآب (خاک‌شناسی وحاصلخیزی خاک) وضوابط مربوطه از طرف متقاضی پرداخت می‌شود.

قسمت سیزدهم ـ تعرفه دستمزد کارشناسان رسمی گروه ۱۰ـ مدیریت وخدمات شامل رشته‌های:
(آمار ـ آتش‌سوزی و آتش‌نشانی ـ امور اداری و استخدامی ـ امور گمرکی ـ بیمه ـ ثبت شرکتها وعلائم تجاری واختراعات ـ حوادث ناشی از کار ـ امور کار وکارگری ـ مدیریت بازرگانی)

ماده ۷۵ـ دستمزد کارشناسی در مورد کلیه رشته های فوق:

با توجه به کم وکیف کار با توافق تعیین می‌شود وحداقل دستمزد ۲۰۰,۰۰۰ ریال وحداکثر سه میلیون ریال می‌باشد.

قسمت چهاردهم ـ تعرفه دستمزد کارشناسان رسمی سایر رشته‌هائیکه بعد از تصویب این تعرفه به رشته‌های موجود کانون اضافه می‌شود.

ماده ۷۶ـ حق‌الزحمه رشته‌های جدیدی که به‌رشته‌های موجود کانون اضافه می‌شوند پس از تعیین گروه مربوط بر مبنای تعرفه همان گروه محاسبه خواهدشد.

ماده ۷۷ـ با توجه به محرومیت بعضی از مناطق مملکت ارقام تعرفه مورد عمل در مورد مناطق محروم ویا اشخاص حقیقی که استطاعت کافی ندارند به‌تشخیص قاضی پرونده یا کانون کارشناسان رسمی دادگستری تا ۳۰٪ (سی درصد) کاهش می‌یابد.

این مصوبه در اجرای ماده ۱۹ لایحه قانونی استقلال کانون کارشناسان رسمی مصوبه سال ۱۳۵۸ شورای انقلاب اسلامی در ۷۷ماده در تاریخ ۷۹/۷/۱۲ به‌تصویب رئیس قوه‌قضائیه رسید وپانزده روز پس از انتشار در روزنامه رسمی در سراسر کشور لازم‌الاجراست.

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نقل از شماره ۱۶۲۱۳ ـ ۱۳۷۹/۷/۳۰ روزنامه رسمی شماره ۳۱۳۴۸/ت ۲۳۵۴۱ هـ ـ ۱۳۷۹/۷/۱۹

اصلاحیه آیین‌نامه اجرایی قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی ـ مصوب ۱۳۷۸ ـ

وزارت دادگستری ـ وزارت امور خارجه

هیأت وزیران در جلسه مورخ ۱۳۷۹/۷/۱۰ با توجه به نظر رییس محترم مجلس شورای اسلامی (موضوع نامه شماره ۲۸۳۰هـ/ب مورخ ۱۳۷۹/۶/۳۰) تصویب نمود:

در تبصره ماده (۵) آیین‌نامه اجرایی قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی ـ مصوب ۱۳۷۸ ـ (موضوع تصویب‌نامه شماره ۷۵۳۰/ت۲۲۸۳۷ هـ مورخ ۱۳۷۹/۲/۲۱) عبارت «اصل عمل متقابل» به عبارت «مقررات مربوط» اصلاح می‌شود.

معاون اول رئیس‌جمهور ـ حسن حبیبی

The Executive Regulations of the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments

Collection of Laws from the Year 1392 [March 21, 2013 – March 20, 2014]

Pages: 1369-1370

Quoted from No. 20050 of *The Official Gazette* dated January 4, 2014 [Dey 14, 1392]

No. H49017 T/158357

Dated December 30, 2013 [Dey 9, 1392]

The Ministry of Justice - The Ministry of Foreign Affairs

The Ministry of Intelligence

By virtue of Article 138 of the Constitution of the Islamic Republic of Iran and Article 10 of "The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments," ratified in 1390 [March 21, 2011 – March 20, 2012], and based on the joint proposal of the ministries of Justice, Foreign Affairs, and Intelligence, the Council of Ministers, at the meeting held on December 25, 2013 [Dey 4, 1392], approved the executive regulations of the aforementioned law as set forth below:

> **The Executive Regulations of "The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments"**

Article 1:

In the course of executing the obligations set forth in "The Law of Jurisdiction of the Islamic Republic of Iran for Hearing Civil Claims against Foreign Governments," hereafter called “the Law,” The Ministry of Foreign Affairs must notify The Ministry of Justice of the following instances:

1. The list of governments that violate the judicial immunity of the government of the Islamic Republic of Iran or its officials and the governments that provide assistance in the course of enforcing the judgments that violate such immunity.

2. The list of the governments set forth in paragraph (b) of Article (1) of the Law.

Note: If, in the future, a government falls under the aforementioned instances, The Ministry of Foreign Affairs shall notify The Judicial Branch accordingly, and it shall be added to the aforementioned list.

Article 2:

The filing and hearing of the claims, and the issuance and execution of the judgment, shall be according to the Law, and the Act of Procedure of Public and Revolutionary Courts (in civil matters) ratified in 2000 [1379], and other pertinent laws and regulations.

Note: The said claims shall be heard without payment of court charges or the tax for the legal fees of the plaintiff's attorney. After the judgment is enforced and the judgment debt is collected, the court charges and attorney fee tax shall be collected by the Execution Department of the Civil Judgments of the Justice Department and shall be paid into the general treasury of the country.

Article 3:

The amount of the punitive damages shall be fixed according to the impact, repetition, and duration of the violation of domestic and international laws and regulations by the government named as defendant against the government or officials of the state of the Islamic Republic of Iran, the intensity and scope of physical and non-physical damages, and financial losses, and similar judgments issued by the foreign court.

The Ministry of Foreign Affairs and The Ministry of Intelligence are required to provide the competent judicial authorities with the evidence pertaining to the said instances.

Article 4:

If the Rial value of the judgment debt, relative to its equivalent in gold on the date when the judgment is issued, is less than what it was at the time when the final judgment was rendered, the basis for calculating the judgment debt shall be the Rial value of its equivalence in gold on the date on which the judgment was issued. The rate of exchange of Rials for gold shall be determined by the Central Bank of the Islamic Republic of Iran.

Article 5:

In the course of the execution of Article (4) of the amended Law for Establishing Public and Revolutionary Courts, ratified in 1381 [2002-2003], the claims set forth in the Law shall be heard by the branch or branches of the Justice Department of Tehran, whose judges have expertise and sufficient experience in the field of international law.

Article 6:

In order to create harmony in the execution of the Law and this regulation, a consulting group shall be formed consisting of the Minister of Justice or his fully-authorized representative (chairman) and representatives of the Judiciary Branch (if a representative is appointed by the head of the aforementioned branch), the Ministry of Foreign Affairs, the Ministry of Intelligence, the Office of Legal Assistance, Planning and Supervision of Performance of the President, and the Center for International Legal Affairs of the President.

First Assistant to the President - Eshaq Jahangiri

موضوع تصویب‌نامه شماره ۱۴۱۶۰۴/ت۴۷۸۱۰هـ مورخ ۱۳۹۱/۸/۲۱ و حداکثر تا پایان سال ۱۳۹۴ اعتبار دارند.

معاون اول رئیس‌جمهور ـ اسحاق جهانگیری

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نقل از شماره ۲۰۰۴۶ ـ ۱۳۹۲/۱۰/۷ روزنامه رسمی شماره ۹۰۰۰/۵۴۵۹۸/۱۰۰ ۱۳۹۲/۱۰/۳

اصلاحیه بند ج ماده ۹ دستورالعمل ضوابط و شرایط تأسیس، فعالیت و انحلال دفتر خدمات الکترونیک قضایی

جناب آقای سینجلی جاسبی

رئیس محترم هیأت مدیره و مدیرعامل روزنامه رسمی کشور

پیرو نامه شماره ۹۰۰۰/۹۹۸۳/۱۰۰ اصلاحیه بند ج ماده ۹ دستورالعمل ضوابط و شرایط تأسیس، فعالیت و انحلال دفتر خدمات الکترونیک قضایی که به تصویب رئیس محترم قوه قضاییه رسیده است به شرح ذیل جهت درج در روزنامه رسمی ایفاد می‌گردد.

(و تعیین میزان هزینه‌های مربوط به برگزاری فراخوان ثبت‌نام متقاضیان و بررسی و تأیید صلاحیت آنان) به بند ج ماده ۹ اضافه می‌گردد.

مدیرکل دبیرخانه قوه قضاییه ـ محسن محدث

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نقل از شماره ۲۰۰۵۰ ـ ۱۳۹۲/۱۰/۱۴ روزنامه رسمی شماره ۱۵۸۳۵۷/ت۴۹۰۱۷هـ ۱۳۹۲/۱۰/۹

وزارت دادگستری ـ وزارت امور خارجه

وزارت اطلاعات

هیأت وزیران در جلسه مورخ ۱۳۹۲/۱۰/۴ بنا به پیشنهاد مشترک وزارتخانه‌های دادگستری، امور خارجه و اطلاعات و به استناد اصل یکصد و سی و هشتم قانون اساسی جمهوری اسلامی ایران و ماده (۱۰) قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولت‌های خارجی ـ مصوب ۱۳۹۰ـ، آیین‌نامه اجرایی قانون یاد شده را به شرح زیر تصویب نمود:

آیین‌نامه اجرایی قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولت‌های خارجی

ماده۱ـ در اجرای تکالیف مقرر در قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولت‌های خارجی که در این آیین‌نامه

به اختصار «قانون» نامیده می‌شود، وزارت امور خارجه باید موارد زیر را به قوه قضاییه اعلام نماید:

الف ـ فهرست دولت‌های ناقض مصونیت قضایی دولت جمهوری اسلامی ایران یا مقامات رسمی آن و دولت‌های همکاری‌کننده در اجرای احکام ناقض این مصونیت‌ها.

ب ـ فهرست دولت‌های موضوع بند (ب) ماده (۱) قانون.

تبصره ـ در صورتی که دولتی در آینده مشمول موارد مذکور گردد، مراتب توسط وزارت امور خارجه به قوه قضاییه اعلام و به فهرست مذکور اضافه می‌شود.

ماده۲ـ اقامه دعوی، ترتیب رسیدگی، صدور حکم و اجرای آن مطابق قانون و قانون آیین دادرسی دادگاه‌های عمومی و انقلاب (در امور مدنی) ـ مصوب ۱۳۷۹ـ و سایر قوانین و مقررات مربوط خواهد بود.

تبصره ـ رسیدگی به دعاوی یادشده بدون پرداخت هزینه دادرسی و مالیات وکالت وکلای خواهان انجام و پس از اجرای حکم و اخذ محکوم‌به، هزینه دادرسی و مالیات وکالت توسط دایره اجرای‌احکام مدنی دادگستری کسر و به‌حساب خزانه‌داری کل کشور واریز می‌شود.

ماده۳ـ میزان خسارت تنبیهی با توجه به آثار و تکرار و تداوم نقض قوانین و مقررات داخلی و بین‌المللی توسط کشور خوانده علیه دولت یا مقامات کشور جمهوری اسلامی ایران، شدت و گستردگی صدمات و خسارات جانی، معنوی و مالی وارد شده و احکام مشابه دادگاه خارجی تعیین می‌گردد. وزارتخانه‌های امور خارجه و اطلاعات موظفند مستندات مربوط به موارد یادشده را به مرجع صالح قضایی ارائه کنند.

ماده۴ـ در صورتی که ارزش ریالی محکوم‌به نسبت به میزان طلای معادل آن در زمان اجرای حکم کمتر از زمان صدور حکم قطعی باشد، ملاک احتساب محکوم‌به، ارزش ریالی طلای معادل آن در زمان اجرای حکم خواهد بود. مرجع تعیین نرخ برابری ریال با طلا، بانک مرکزی جمهوری اسلامی ایران می‌باشد.

ماده۵ ـ در اجرای ماده (۴) اصلاحی قانون تشکیل دادگاه‌های عمومی و انقلاب ـ مصوب ۱۳۸۱ـ دعاوی موضوع قانون در شعبه یا شعبی از دادگاه‌های دادگستری تهران که قضات آن دارای تخصص و تجربه کافی در زمینه حقوق بین‌الملل باشند، رسیدگی می‌شود.

ماده۶ ـ به منظور ایجاد هماهنگی در اجرای قانون و این آیین‌نامه، کارگروهی مشورتی با حضور وزیر دادگستری یا نماینده تام‌الاختیار وی (رئیس) و نمایندگان قوه قضائیه (در صورت معرفی توسط رئیس قوه یادشده) و وزارتخانه‌های امور خارجه و اطلاعات و معاونت‌های حقوقی و برنامه‌ریزی و نظارت راهبردی رئیس‌جمهور و مرکز امور حقوقی بین‌المللی ریاست جمهوری تشکیل می‌شود.

معاون اول رئیس‌جمهور ـ اسحاق جهانگیری

نقل از شماره ۲۰۰۵۰ ـ ۱۳۹۲/۱۰/۱۴ روزنامه رسمی

شماره۱۵۷۷۳۵/ت۵۰۰۴۲هـ ۱۳۹۲/۱۰/۸

وزارت امور اقتصادی و دارایی

معاونت برنامه‌ریزی و نظارت راهبردی رئیس‌جمهور

بانک مرکزی جمهوری اسلامی ایران

هیأت وزیران در جلسه مورخ ۱۳۹۲/۱۰/۱ بنا به پیشنهاد وزارت امور اقتصادی و دارایی و معاونت برنامه‌ریزی و نظارت راهبردی رئیس‌جمهور و بانک مرکزی جمهوری اسلامی ایران و به استناد اصل یکصد و سی و هشتم قانون اساسی جمهوری اسلامی ایران، آیین‌نامه اجرایی تبصره (۴) الحاقی جزء (۲ـ۳) قانون بودجه سال ۱۳۹۲ کل کشور را به شرح زیر تصویب نمود:

آیین‌

آیین‌نامه اجرایی تبصره (۴) الحاقی جزء (۲ـ۳) قانون بودجه سال ۱۳۹۲ کل کشور

ماده۱ـ بانک مرکزی جمهوری اسلامی ایران مجاز است تا معادل مابه‌التفاوت بیست درصد تا بیست و شش درصد سهم صندوق توسعه ملی از محل وصولی‌های ناشی از فروش نفت را در حسابی جداگانه نگهداری و با رعایت این آیین‌نامه صرف تأمین پیش‌پرداخت طرحهای تأمین مالی شده از محل فاینانس خارجی نماید.

ماده۲ـ طرحهای موضوع این آیین‌نامه توسط کارگروهی متشکل از وزارت امور اقتصادی و دارایی (سازمان سرمایه‌گذاری و کمکهای اقتصادی و فنی ایران) و معاونت برنامه‌ریزی و نظارت راهبردی رئیس‌جمهور و بانک مرکزی جمهوری اسلامی ایران تعیین و به بانک یاد شده اعلام می‌شود.

ماده۳ـ تأمین پیش‌پرداخت طرحهای سرمایه‌ای شرکتهای دولتی منوط به تصویب کارگروه مذکور می‌باشد و محاسبه و تسویه آن نیز با هماهنگی معاونت برنامه‌ریزی و نظارت راهبردی رئیس‌جمهور و وزارت امور اقتصادی و دارایی (خزانه‌داری کل کشور) براساس مواد (۳۲) و (۳۳) قانون برنامه و بودجه کشور ـ مصوب ۱۳۵۱ـ انجام می‌شود.

ماده۴ـ بانک مرکزی جمهوری اسلامی ایران مکلف است پیش‌پرداخت طرحهای معرفی شده از سوی کارگروه یادشده را از محل وصول تدریجی منابع ارزی موضوع قانون اصلاح قانون بودجه سال ۱۳۹۲ کل کشور تأمین نماید.

ماده۵ـ مبنای محاسبه معادل ریالی تضامین این طرحها، بر پایه نرخ روز مورد تأیید بانک مرکزی جمهوری اسلامی ایران است.

معاون اول رئیس‌جمهور ـ اسحاق جهانگیری

***The Official Gazette*, The Majlis Debates**

Date: November 8, 1999 [Aban 17, 1378]

Public Session No. 323

Pages: 32-33

15: The Ratification of the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments, and also approval of its two-degree urgency[1]

Deputy Speaker: Please bring up the next issue on the agenda.

Secretary (Mavalizadeh): The report of the first consultation of the Joint Committee of Judicial and Legal Affairs and Foreign Policy concerning the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims [filed] Against Foreign Governments.

Deputy Speaker: Respected reporter for the Joint Committee, please proceed.

Musa Qorbani (the reporter for the Joint Committee of Judicial and Legal Affairs and Foreign Policy):

"In the name of God,

The report of the Joint Committee of Judicial and Legal Affairs and Foreign Policy to the Islamic Consultative Assembly:

The Bill of Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments, registered under No. 1585 which has been assigned to the Joint Committee of Judicial and Legal Affairs and Foreign Policy was reviewed in a meeting held on Tuesday, August 17, 1999 [Mordad 26, 1378] in the presence of the government's representatives, was approved by the majority after adding a note to it as Note 4 as explained below. Its report is hereby presented to the Majlis.

[1] The "two-degree urgency" of this bill was considered and ratified at the request of a number of respected representatives. That has been inserted on page 24.

The Chairman of the Joint Committee, Hasan Rouhani."

I need to provide a short explanation with this point that fortunately this bill has been brought before the Islamic Consultative Assembly around November 3 [Aban 13], which is the day of Death to America. In fact, this bill of law is a response to the "D'Amato Law" and similar laws in the United States. It constitutes a reciprocal action in order to defend the rights of Iranians that have been usurped by the countries that have violated human rights and ignore the rights of individuals. The issue is about seeking four types of damages from three kinds of countries:

The damages that may be sought based on this bill consist of damages that lead to death, damages leading to physical injuries and financial losses, and damages resulting from the loss of the physical and non-physical rights of the nationals of the Islamic Republic of Iran. These damages may be demanded with respect to three kinds of countries:

First, the country against which Iranian nationals may file a claim before judicial courts and file claim in our own country . . . [ellipsis is in the text]. The issue is also about creating jurisdiction for our local courts with respect to claims filed for seeking damages (that I mentioned) from the countries which I will talk about.

Iranian nationals may file a claim in local courts against three kinds of countries:

First, the countries that have violated, or will violate, the judicial immunity of the Iranian government, based on the laws they themselves have enacted in their own countries, such as the "D'Amato Law." This law has violated the judicial immunity of the Iranian government and authorizes the US government to take actions against the government and the people of Iran.

Second, the countries that enforce the judgments issued by the countries that have violated the judicial immunity of the Iranian government. If the U.S. government or any other country enters a judgment against the government or nation of Iran, and those countries enforce such judgments, those countries should execute that judgment at the appropriate time.

Third, if the damages result from terrorist actions of anti-revolutionary and terrorist groups that are supported by some countries, a claim may be filed against such countries.

Thus, the present bill authorizes the courts of the Islamic Republic of Iran to hear claims [filed] for personal injury resulting in death, physical injuries, and financial claims, as well as physical and non-physical rights against the countries that violate Iran's judicial immunity or execute rulings, even if not issued by their own country, or they support terrorist groups that inflict damages on the Iranian people, but those countries support such terrorist groups.

Therefore, the present bill has been presented in order to defend the rights of the Iranian nation and has been approved by the Joint Committee of Judicial and Legal Affairs and Foreign Policy. The expectation is that the [Majlis] deputies, who have always been the defenders of the rights of the Iranian people and have always confronted the aggression of other countries against Iran's interests, particularly at times close to the 13th of Aban [November 4], will, God willing, vote in the affirmative for this bill.

Deputy Speaker: Thank you. It is unlikely that there will be any objection. This is a very important bill. Now, in any case, whatever the view of the respected deputies may be, it will be abided by. Nevertheless, because of the claims that ... the Americans have now started something. Their nationals are filing claims against the Iranian government in courts inside the U.S. and, until now, in spite of all international regulations, they have convicted the Iranian government in various cases for more than one billion dollars. The only path is to counter this treacherous action, which the United States has started. And this bill, with God's blessing, can provide our courts with a very appropriate solution. So, would you like to speak or should we put the whole bill to a vote? We will put the whole bill to a vote. Now, in the second deliberation, we will deal with its details and do whatever the deputies decide. There are 188 deputies present. Those respected representatives, who are in favor of this bill should rise. (The majority rose.) It was approved almost unanimously.

Ra'isi-Dehkordi: Please take a vote on its two-degree urgency.

Deputy Speaker: Do you propose that this bill should be enacted with a two-degree urgency?

(Ra'isi-Dehkordi: Yes.)

Deputy Speaker: If we receive the proposal for a two-degree urgency signed by 15 deputies, we can vote on the two-degree urgency of this bill, which we have just voted on. Tomorrow at this same....

[Ra'isi-Dehkordi: We will give it to you right now.)

Deputy Speaker: Very well. For now, the general bill was ratified. If we receive the proposal for the two-degree urgency with 15 signatures by deputies, we will put the two-degree urgency to a vote. According to the rules, we must receive it.

***The Official Gazette*, The Majlis Debates**

Date: November 9, 1999 [Aban 18, 1378]

Public Session No. 324

Pages: 32-33

14. The Approval of the Two-degree Urgency of the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments

Deputy Speaker: The next issue concerns the two-degree urgency. Yesterday we voted on the general bill concerning the jurisdiction of the courts. Its two-degree urgency was ratified. This is the second session of deliberation. Because we voted on the general bill before the two-degree urgency, if there is a proposal, we can consider it. If there is not, you can read the text.

Movahedi-Saveji: We have a proposal.

Qorbani: We propose some changes to the draft.

Deputy Speaker: Mr. Qorbani proposes some changes. The changes will be first. Please proceed.

Mr. Qorbani:

In the name of God, the Merciful, the Beneficent.

Dear deputies,

As you are aware, in order to counter the action taken by the aggressive government of the United States, which, contrary to international law and the judicial immunity that all countries have, has enacted a law inside its country and issues judgments against the government of Iran and its officials and carries them out, the deputies are about to respond to that action, and they have prepared a bill whereby the courts of The Islamic Republic of Iran can also have that jurisdiction so that they can confront countries that violate our judicial immunity.

The draft that was prepared was approved during the first session of deliberation by the Joint Committee on Judicial and Foreign Policy. Yesterday, the general bill was ratified and it was approved to have a two-degree urgency. We intended to

correct a few deficiencies during the second session of debate, but, because it was agreed that this bill should be voted on with a two-degree urgency, we lost that opportunity. Therefore, the assistants of the Ministry of Foreign Affairs and of Justice, and relevant experts, have replaced the draft that I presented yesterday with a new one, and they have corrected the deficiencies. There are a few minor differences. From a legal point of view, when we want to ratify a law and enact it, we first need a ruling on the law and then we need to designate the authority that will enforce it. Therefore, this first draft provides a legal ruling for Iranian nationals, based on which Iranian nationals have the right to file claims against foreign governments. In the second stage, they have designated an authority who will hear such claims, which is the Justice Department of Tehran. In the bill, the Justice Department of Tehran has been named as the authority that has jurisdiction to hear those claims. The reason is that those claims need to be examined more exactly and they need more expertise. It is better that they be in the Justice Department of Tehran because there are high-ranking and experienced judges here. There are also some very minor changes that were proposed by the Ministry of Justice and the Ministry of Foreign Affairs. I therefore request that this draft be voted on by the deputies. The minor deficiencies that were in the first draft have been taken care of and removed in the present one, and, God willing, there will not be any problem.

[Mr. Abasi, a deputy at the parliament, suggested that all Iranian Courts should be entitled to hear these claims.]

[Asghar Raisi-Dehkordi, another deputy, disagreed.]

[Mr. Montazeri, the Deputy in the Justice Department, explained why the courts of the Justice Department of Tehran are better equipped to hear those claims.]

[The Deputy Speaker suggested that the word "*ravani*" ("psychological") should be changed to "*ma'navi*" ("emotional").]

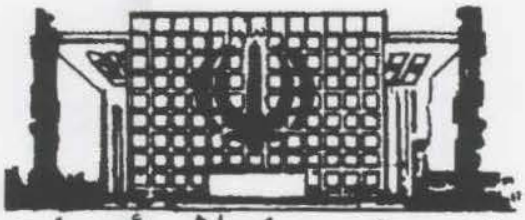
[The bill was voted on and enacted by the votes of the majority of the deputies present at the session.]

بسم الله الرحمن الرحیم

جلسهٔ سیصد و بیست و سوم
(۳۲۳)

۱۷ آبان ماه ۱۳۷۸ هجری شمسی
۲۹ رجب‌المرجب ۱۴۲۰ هجری قمری

مشروح مذاکرات مجلس شورای اسلامی



دوره پنجم ـ اجلاسیهٔ چهارم

۱۳۷۹-۱۳۷۸

صورت مشروح مذاکرات جلسهٔ علنی روز دوشنبه هفدهم آبان ماه ۱۳۷۸

فهرست مندرجات :

«جلسه ساعت نه و ده دقیقه به ریاست آقای علی‌اکبر ناطق‌نوری رسمیت یافت»

اداره تدوین مذاکرات مجلس شورای اسلامی

هزینه خانواده‌مندی است (نبوی ـ بله) آن وقت آن دچار اشکال می‌شود (نبوی ـ خیر، آن کمک هزینه خانواده‌مندی است، روشن است، موضوع این قانون کمک یا اعانه به افراد و مؤسسات است) آن وقت پرداخت کمک که می‌گوییم آن کمک هزینه را نمی‌گیرد؟

نبوی ـ خیر، چه ربطی به آن دارد. ببینید آقای دکترا موضوع این قانون پرداخت کمک یا اعانه به افراد و مؤسسات غیردولتی است. می‌خواهند بگویند از این محل به کارکنان پرداخت نشود. اگر این نباشد آن وقت راه باز می‌شود که از این مصوبه استفاده بشود به کارکنان هم پرداختهای دیگری انجام بشود. یعنی در هر حال حذف این ماده آن مشکل را حل نمی‌کند.

نایب رئیس ـ بسیار خوب، کمیسیون اگر نظری دارید بفرمایید.

محمد نبوتی (مخبر کمیسیون دیوان محاسبات و بودجه و امور مالی مجلس) ـ لطفاً عنایت بفرمایید علت حذف چیست. ببینید! قانونی را تصویب کرده‌اند (ماده ۷۱) که دستورالعمل اجرایی آن نبود، البته دستورالعمل اجرایی آن بصورت قانون الان ارائه و مصوب شده. منتها آنچه را که شورای محترم نگهبان اعلام کردند بعضی از مؤسسات و بعضی از وزارتخانه‌ها آمده‌اند یک مجوز خاص گرفته‌اند و از این مجوز خاص برای این اعانه و کمک استفاده می‌کنند که خیلی از دستگاههای اجرایی ندارند. خوب این یک تبعیضی است که یک سازمانی بتواند اعانه بدهد یک سازمانی نتواند اعانه بدهد. شورای نگهبان این تبعیض را برطرف کرده. گفته این قسمت حذف بشود تا تبعیضی نباشد. لذا ما هم آمدیم این قسمت که «به کارکنان جز در مواردی که مجوز قانونی خاص دارند ممنوع باشد» گفتیم خیر، برای همه ممنوع باشد چرا یک دستگاهی بتواند بدهد و یک دستگاهی نتواند بدهد. بنابراین، این تبعیض را ما با حذف این، بنا به توصیه شورای نگهبان برطرف کردیم. لذا خواهش می‌کنم به این اصلاحیه رأی بدهید که این تبعیض هم برطرف بشود، متشکر.

نایب رئیس ـ حضار ۱۸۷ نفر، فعلاً ما مورد اصلاحی که مورد نظر کمیسیون است می‌خواهیم به رأی بگذاریم. آن مصوبه کمیسیون را قرائت بفرمایید.

منشی (موالی‌زاده) ـ ماده (۶) بشرح زیر اصلاح می‌گردد:

پرداخت کمک و یا اعانه از محل اعتبارات و بودجه منظور در قانون بودجه کل کشور توسط دستگاههای مشمول این قانون به کارکنان دولت ممنوع است.

نایب رئیس ـ حضار ۱۸۷ نفر، نمایندگان محترمی که با این اصلاحیه موافق هستند قیام بفرمایند (عده کمی برخاستند) تصویب نشد. حالا یک نظر دیگری هست و آن حذف ماده (۶) بطور کلی است، آن را هم رأی می‌گیریم. پیشنهاد هم این است که ما ماده (۶) را کلاً برای تأمین نظر شورای محترم نگهبان حذف کنیم. حضار ۱۸۷ نفر، نمایندگان محترمی که با این پیشنهاد موافق هستند قیام بفرمایند (اکثر برخاستند) تصویب شد.

۱۵ ـ تصویب کلیات طرح صلاحیت محاکم دادگستری جمهوری اسلامی ایران برای رسیدگی به برخی دعاوی مدنی علیه دولتهای خارجی و همچنین تصویب دوفوریت آن[1]

نایب رئیس ـ دستور بعدی را مطرح بفرمایید.

منشی (موالی‌زاده) ـ گزارش شور اول کمیسیون مشترک امور قضایی و حقوقی و سیاست خارجی در مورد طرح صلاحیت محاکم دادگستری جمهوری اسلامی ایران برای رسیدگی به برخی دعاوی مدنی علیه دولتهای خارجی.

نایب رئیس ـ مخبر محترم کمیسیون مشترک بفرمایید.

موسی قربانی (مخبر کمیسیون مشترک امور قضایی و حقوقی و سیاست خارجی) ـ بسم‌الله الرحمن الرحیم

گزارش کمیسیون مشترک امور قضایی و حقوقی و سیاست خارجی به مجلس شورای اسلامی

طرح صلاحیت محاکم دادگستری جمهوری اسلامی ایران برای رسیدگی به برخی دعاوی مدنی علیه دولتهای خارجی به شماره ترتیب چاپ (۱۵۸۵) که به کمیسیونهای امور قضایی و حقوقی و سیاست خارجی بعنوان کمیسیون مشترک ارجاع شده بود در جلسه سه‌شنبه ۷۸/۵/۲۶ با حضور نمایندگان دولت مورد بررسی و تبادل نظر قرار گرفت و با الحاق یک تبصره بشرح ذیل بعنوان تبصره (۴) با اکثریت آراء بتصویب رسید. اینک گزارش آن تقدیم مجلس محترم شورای اسلامی می‌گردد.

رئیس کمیسیون مشترک ـ حسن روحانی

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۱ ـ دوفوریت این طرح با تقاضای عده‌ای از نمایندگان محترم مطرح و تصویب شد که در صفحه (۳۴) درج گردیده است.

من توضیح مختصری با ذکر این نکته خدمت نمایندگان محترم بدهم که خوشبختانه این طرح در ایام مقارن با ۱۳ آبان قرار گرفت که روز مرگ بر آمریکاست و این طرح هم در واقع یک پاسخی است به قانون «داماتو» و قوانین مشابهی که در آمریکا وجود دارد برای یک اقدام متقابل و در جهت دفاع از حقوق ایرانیانی که بوسیله کشورهای متجاوز به حقوق بشر و حقوق انسانها تضییع شده است. بحث بر سر مطالبه چهار نوع خسارت است از سه نوع کشور.

خساراتی که براساس این طرح قابل مطالبه است، خسارات جانی که منجر به فوت شده باشد، خساراتی که منجر به صدمات بدنی شده باشد، خسارات مالی و خسارات ناشی از تضییع حقوق مادی و معنوی اتباع دولت جمهوری اسلامی ایران و در مورد سه نوع از کشورها این خسارات قابل مطالبه است. اولین کشوری که اتباع ایران می‌توانند در دعاوی دادگستری و دعاوی داخل کشور خودمان طرح دعوی بکنند... بحث هم بحث ایجاد صلاحیت برای محاکم داخلی خودمان جهت اقامه دعوی برای مطالبه خسارات (که عرض کردم) است از کشورهایی که عرض می‌کنم.

علیه سه نوع کشور اتباع ایرانی می‌توانند در محاکم داخلی طرح دعوی بکنند. اول کشورهایی که مصونیت قضایی دولت ایران را نقض کردند یا نقض می‌کنند براساس قوانینی که خودشان در کشورهای خودشان بتصویب می‌رسانند مثل قانون «داماتو» که این قانون مصونیت قضایی دولت ایران را نقض می‌کند و به دولت آمریکا اختیار می‌دهد که اقداماتی علیه دولت و مردم ایران انجام بدهد.

دوم کشورهایی که آرای صادره از ناحیه کشورهایی که مصونیت قضایی دولت ایران را نقض می‌کنند را بمورد اجراء می‌گذارند. اگر دولت آمریکا یا هر کشور دیگری علیه دولت ایران و ملت ایران رأی صادر کرده باشد آن کشورها بیایند این رأی را بموقع اجراء بگذارند.

مورد سوم آن جایی است که خسارت، ناشی از اقدامات تروریستی گروههای ضدانقلاب و تروریست باشد اما مورد حمایت بعضی از کشورها باشند، علیه آن کشورها هم می‌شود این اقامه دعوی را داشت.

بنابراین براساس این طرح به محاکم جمهوری اسلامی اجازه داده می‌شود برای مطالبه خسارات جانی منجر به فوت، صدمات بدنی و برای خسارات مالی و مطالبه حقوق مادی و معنوی علیه کشورهایی که مصونیت قضایی ایران را نقض می‌کنند یا آرای صادره در این جهت را هر چند از ناحیه کشور خودشان نباشد اجراء می‌کنند یا حمایت از گروههای تروریستی می‌کنند که به مردم ایران خسارت وارد می‌کنند اما این کشورها از گروههای تروریستی حمایت می‌کنند.

بنابراین در جهت دفاع از حقوق ملت ایران این طرح تقدیم شده و بتصویب کمیسیون مشترک قضایی و سیاست خارجی رسیده و انتظار این است که نمایندگان محترم که همیشه مدافع حقوق مردم ایران بوده‌اند و همیشه جلو تجاوزگریهای سایر کشورها به منافع ایران را گرفته‌اند خصوصاً در ایامی که مقارن ۱۳ آبان است، انشاءالله نمایندگان محترم به این طرح رأی مثبت بدهند.

نایب رئیس ـ متشکر، بعید است این طرح مخالفی داشته باشد، این طرح بسیار مهمی است حالا بهرحال نظر نمایندگان محترم هر چه هست همان مطاع است، منتها بخاطر دعاوی که...الان آمریکاییها یک کاری را شروع کرده‌اند، اتباعشان دعاوی در محاکم داخلی آمریکا علیه دولت ایران مطرح می‌کنند و تاکنون هم علی‌رغم همه مقررات بین‌المللی بیش از یک میلیارد دلار دولت ایران را در دعاوی مختلف محکوم کرده‌اند و تنها راهش مقابله در برابر این کار خائنانه‌ای است که آمریکا شروع کرده و این طرح می‌تواند راه حل بسیار مناسبی را پیش روی محاکم ما انشاءالله بگذارد. خوب، می‌خواهید صحبت کنید یا کلیاتش را به رأی بگذاریم؟ کلیاتش را ما به رأی می‌گذاریم حالا در جزئیات، در شور دوم باز هر چه نظر نمایندگان محترم بود انجام می‌دهیم. حضار ۱۸۸ نفر، نمایندگان محترمی که با کلیات این طرح موافقند قیام بفرمایند (اکثر برخاستند) تقریباً به اتفاق آراء تصویب شد.

رئیس دهکردی ـ در فوریتش را رأی بگیرید.

نایب رئیس ـ پیشنهاد دوفوریت این طرح را دارید؟ (رئیس دهکردی ـ بله) پیشنهاد دو فوریت اگر (۱۵) امضاء به ما برسد ما می‌توانیم دو فوریت این طرح را که کلیاتش را هم رأی گرفتیم، به رأی بگذاریم، فردا در همین... (رئیس دهکردی ـ ما همین الان خدمتتان می‌دهیم) خیلی خوب، فعلاً کلیات این طرح تصویب شد، اگر درخواست دو فوریت هم با امضای (۱۵) نفر از نمایندگان بدست ما رسید، دو فوریتش را هم به رأی می‌گذاریم. طبق آیین‌نامه باید بدست ما برسد.

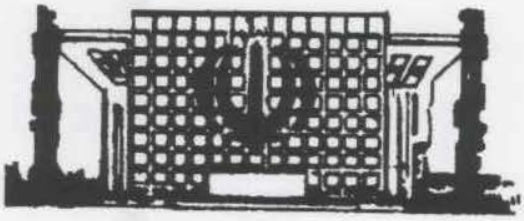
۱۶ ـ تصویب لایحه موافقتنامه تصفیه‌حساب بین دولت جمهوری اسلامی ایران و دولت جمهوری عربی سوریه

بسم الله الرحمن الرحیم

جلسهٔ سیصد و بیست و چهارم
(۳۲۴)

۱۸ آبان ماه ۱۳۷۸ هجری شمسی
۳۰ رجب المرجب ۱۴۲۰ هجری قمری

مشروح مذاکرات مجلس شورای اسلامی



دوره پنجم ـ اجلاسیهٔ چهارم
۱۳۷۸ـ۱۳۷۹

صورت مشروح مذاکرات جلسهٔ علنی روز سه‌شنبه هجدهم آبان ماه ۱۳۷۸

فهرست مندرجات :

«جلسه ساعت هشت و سی دقیقه به ریاست آقای علی‌اکبر ناطق‌نوری رسمیت یافت»

اداره تدوین مذاکرات مجلس شورای اسلامی

ماده واحده موافقند قیام بفرمایند (اکثر برخاستند) با اکثریت قاطع تصویب شد.

۱۴ ـ تصویب طرح دوفوریتی صلاحیت محاکم دادگستری جمهوری اسلامی ایران برای رسیدگی به برخی دعاوی مدنی علیه دولتهای خارجی

نایب رئیس ـ دستور بعد مربوط به همان دو فوریتی است که ما دیروز کلیات آن طرح را راجع به صلاحیت محاکم رأی گرفتیم، دو فوریتش تصویب شد، الان در واقع شور دوم این طرح است چون کلیاتش را ما قبل از دو فوریت رأی گرفته بودیم، اگر پیشنهادی هست ما می‌توانیم آن پیشنهاد را مطرح کنیم، اگر هم نیست می‌توانید متن را قرائت کنید.

موحدی‌ساوجی ـ پیشنهاد داریم.

قربانی ـ پیشنهاد جایگزینی دارم.

نایب رئیس ـ آقای قربانی پیشنهاد جایگزینی دارند. جایگزینی مقدم است، بفرمایید.

موسی قربانی ـ بسم‌الله الرحمن الرحیم

خدمت نمایندگان محترم عرض کنم، همانطوریکه استحضار دارید در ارتباط با مقابله بمثل با دولت تجاوزگر آمریکا که برخلاف حقوق بین‌الملل و مصونیت قضایی که همه کشورها دارند در داخل کشور خودش قانون وضع کرده و علیه دولت ایران و مقامات رسمی ایران در محاکم خودش حکم صادر می‌کند و بموقع اجراء می‌گذارد، نمایندگان محترم در صدد مقابله با این کار برآمدند و طرحی را تهیه کردند که محاکم جمهوری اسلامی ایران هم این صلاحیت را داشته باشند که با کشورهایی که مصونیت قضایی ما را نقض می‌کنند برخورد متقابل بکنند.

طرحی که تهیه شد در شور اول در کمیسیون مشترک قضایی و سیاست خارجی بتصویب رسید، دیروز بعد از اینکه کلیاتش تصویب شد نمایندگان محترم تقاضای دو فوریت کردند که فوریتش هم رأی آورد. این پیشنهادی که من عرض می‌کنم به این جهت است که ما چون تصمیم داشتیم در شور دوم نقایص طرح را برطرف بکنیم با توجه به تصویب دو فوریت این فرصت از دست رفت، روی همین جهت معاونین محترم وزارت خارجه و دادگستری و کارشناسان مربوطه این متن را که بنده بعنوان پیشنهاد دادم از دیروز متن جایگزینی تهیه کرده‌اند و ایرادات را برطرف کرده‌اند. فرقهای جزئی هم دارد. ببینید! ما از نظر حقوقی وقتی که می‌خواهیم یک قانونی را تصویب و بموقع اجراء بگذاریم اول باید حکم قانونی داشته باشد و بعد مرجع صالحش را مشخص کنیم. بنابراین در این طرح اول یک حکم قانونی برای شهروندان ایرانی وضع شده مبنی بر اینکه شهروندان ایرانی این حق و اختیار را دارند که علیه دولتهای خارجی اقامه دعوی بکنند، بعد در مرحلهٔ دوم آمده‌اند مرجع صالح برایش تعیین کردند که مرجع صالح هم دادگستری تهران است. در طرح محاکم قضایی ایران اجازه داده شده، در این پیشنهاد دادگستری استان تهران مرجع صالح تشخیص داده شده. برای اینکه اینگونه دعاوی قطعاً به رسیدگی دقیقتر و پشتوانه کارشناسی بیشتری نیاز دارد، بهتر است که در دادگستری تهران باشد که قضات عالی‌رتبه و دارای تجربه در اینجا هستند. بنابراین با تغییرات بسیار جزیی پیشنهاد، پیشنهادی است که وزارت خارجه و وزارت دادگستری با هم تهیه کرده‌اند و من خواهش می‌کنم که برادران و خواهران محترم نماینده، به این پیشنهاد رأی بدهند، نقایص جزیی که در طرح وجود داشته در این پیشنهاد برطرف شده و ان‌شاءالله که مشکلی پیش نخواهد آمد.

نایب رئیس ـ آقای عباسی مخالف هستند، بفرمایید.

عباس عباسی ـ بسم‌الله الرحمن الرحیم

موضوع محاکم قضایی است، محاکم قضایی جمهوری اسلامی ایران. ما بیاییم این عنوان بسیار زیبا را تبدیل به دادگستری تهران کنیم، یعنی یک عنوان بالا در یک متن کوچک. ضمن اینکه دادگستری تهران، دادگستری بسیار والایی هست اما هیچگاه از نظر حقوقی و یا بُعد و بخش سیاسی قضیه، جای محاکم قضایی جمهوری اسلامی ایران را نمی‌گیرد. من بنظرم همینطور که هست، یعنی محاکم قضایی جمهوری اسلامی ایران حق پذیرش دعاوی شهروندان خودشان را دارند و شهروندان می‌توانند اقامه دعوی بکنند. اما اینکه اختصاصاً دادگستری جمهوری اسلامی، دادگستری تهران باشد این هم یکمقدار حق شهروندان را کم می‌کند، هم آن بُعد عنوانیِ قضیه را کمرنگ می‌کند و هم اینکه این در اختیار دستگاه قضایی است. ممکن است دستگاه قضایی فردا به این نتیجه برسد که در مرکز هر استان یک شعبه اختصاصی به سرپرستی یک قاضی خاص یا زیر نظر رئیس دادگستری آن استان یک چنین محکمه‌ای تشکیل بشود. ما چرا هم دست قوه قضاییه را ببندیم و هم اینکه آن عنوان بسیار زیبا را در این متن بیاوریم؟ خود «محاکم قضایی» از نظر لفظ، متن، انشاء، جملات، اصلاً قابل مقایسه با دادگستری تهران نیست، ضمن اینکه عرض کردم دادگستری تهران خوب، دادگستری مرکز کشور است، حرفی نیست ولی آن متن یک چیز دیگری است و اجازه بدهید خود دستگاه قضایی، قوه قضاییه طی یک بخشنامه یا طی یک آیین‌نامه‌ای، حالا یک محکمه مشخص می‌کند همان دادگستری تهران، یا مثلاً در مراکز استانهای

بزرگ، یا در مرکز هر استان یک شعبه. بنظر من این بهتر است و من از این بابت مخالفم. والسلام

نایب رئیس ـ موافق را دعوت بفرمایید.

منشی (غفوری‌فرد) ـ آقای رئیسی موافق هستند، بفرمایید.

اصغر رئیسی‌دهکردی ـ بسم‌الله الرحمن الرحیم

من در جواب همکار محترم جناب آقای عباسی مطلبی را عرض می‌کنم که انشاءالله همکاران محترم بیشتر عنایت کنند.

اولاً اهمیت طرح برای همه همکاران محترم مشخص و ملحوظ است. من دیگر قابل ذکر نمی‌دانم و به همین نکته اکتفاء می‌کنم که بخاطر اهمیت موضوع بود که مجلس دیروز بعد از اینکه به‌خود طرح رأی داد، به‌دوفوریت هم رأی داد.

اما موضوع مورد بحث اینکه دادگاه ویژه‌ای در کل مملکت باشد که به این دعاوی رسیدگی بکند، این دادگاه بخاطر تخصصی بودن آن و بخاطر اینکه بهر صورت باید قضات عالی‌رتبه و باتجربهٔ کاری، مسلط به امور بین‌الملل و قضاء در تمامی این امور باشند تا بتوانند در آن محکمه این دعاوی مورد نظر را رسیدگی بکنند، در کلیه مراکز استانها یا در هر شهرستانی که یک مرکز قضایی وجود دارد چنین قضاتی احتمالاً وجود ندارند، جمع‌آوری آنها، یا مأموریت‌دادن آنها به مراکز استانها و شهرستانها برای قوه قضاییه ایجاد مشکل می‌کند. آقای عباسی می‌فرمایند که چرا دست قوه قضاییه را ما ببندیم؟ دست قوه قضاییه را اتفاقاً ما می‌خواهیم باز بگذاریم که آقا! با توجه به مشکلاتی که در امور قضاء دارد و قضات محترم در این زمینه احتمالاً در رابطه با مأموریت برای دستگاه قوه قضاییه ایجاد مشکل می‌کنند. لذا باید در تهران باشد.

از طرف دیگر در خود آمریکای جنایتکار اصلاً یک دادگاه، آنهم در واشنگتن وجود دارد که به این موضوع رسیدگی می‌کند. حالا در مملکت اسلامی ما هم چون تقریباً جریان امر و این طرح مقابله بمثل است، یک دادگاه ویژه آنهم در مرکز بخاطر حساسیت موضوع و ضمن اینکه این طرح بیشتر هم جنبه قضایی که دارد، یک وجهه سیاسی هم دارد که جنبه‌های تبلیغی و گرفتن خبرها از مرکز بهتر صورت می‌گیرد تا مراکز استانها و شهرها.

لذا بنده با پیشنهاد جایگزینی، به این دلیل موافق هستم که می‌تواند طرح را ساده‌تر و سلیس‌تر کند و دست قوه قضاییه را برای اجراء و بررسی کاملاً باز کند. از طرف دیگر در ارتباط با سیاست مقابله بمثل هم مشابه عمل شده. والسلام علیکم و رحمةالله

نایب رئیس ـ متشکر، آقای منتظری نماینده دولت اگر نسبت به این پیشنهاد جایگزینی نکته‌ای دارند، بفرمایند.

منتظری (معاون حقوقی و امور مجلس وزارت دادگستری) ـ بسم‌الله الرحمن الرحیم

همانطوریکه پیشنهاددهنده محترم فرمودند زمانیکه این طرح تقدیم مجلس شورای اسلامی شد با بررسیهای کارشناسی و حقوقی که روی آن انجام گرفت یک اشکالات مختصر و جزیی در آن لحاظ گردید. فلذا بنا بر این بود که در شور دوم این اصلاحات لازم روی طرح انجام بگیرد و در فرصت با همکاری وزارت امور خارجه اینکار انجام بشود. خوشبختانه چون دیروز عزیزان نماینده نسبت به دوفوریتی این طرح رأی دادند، در واقع فرصت هم برای ما برای اینکه این اصلاحات را انجام بدهیم کم بود فلذا با وزارت امور خارجه بنا گذاشتیم که این اصلاحات لازم انجام شود، البته چارچوب تغییر نکرده، یک اصلاحات جزیی در آن بعمل آمد.

اشکالی که جناب آقای عباسی فرمودند ایشان توجه دارند یکوقت یک دعاوی هست که سراسر کشور برای تسهیل در امور است خوب، بایستی که همه مردم بتوانند به‌محاکم حوزه سکونت خودشان مراجعه کنند. اولاً این دعاوی، دعاوی زیادی نیست و بندرت اتفاق می‌افتد و ثانیاً نیاز هست که هم از طرف قوه قضاییه و هم از طرف دولت و وزارت امور خارجه این کانالیزه بشود، یعنی اینکه یکسری مقررات خاصی را در طرح دعوی، نحوهٔ رسیدگی و سایر مسایل جنبی آن لحاظ بکنند. بخاطر همین جهت در دادگستری تهران قرار شده که این رسیدگی شود. ما مشابه اینهم در قوانین دیگر داریم که رسیدگی به یکسری از جرایم صرفاً در صلاحیت محاکم قضایی تهران است، اینهم بلحاظ مسایل خاصی که رسیدگی به این نوع دعاوی هست پیش‌بینی شده که این دعاوی صرفاً در دادگستری تهران قابل رسیدگی باشد. اگر فرد دیگری هم در نقطه‌ای از ایران می‌خواهد طرح دعوی کند، می‌تواند بیاید در تهران و با همان خصوصیاتی که عرض کردم رسیدگی بشود و لذا با این پیشنهاد ما موافق هستیم و پیشنهاد مخالفت جناب آقای عباسی را خیلی موجه نمی‌بینیم. والسلام

نایب رئیس ـ بسیار خوب، حضار ۱۹۵ نفر، پیشنهاد جایگزینی را قرائت بفرمایید.

منشی (رضایی) ـ طرح صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دول خارجی

ماده واحده ـ بموجب این قانون اتباع ایرانی می‌توانند در موارد ذیل از اقدامات دولتهای خارجی که مصونیت قضایی ناشی از مصونیت سیاسی دولت جمهوری اسلامی ایران و یا مقامات رسمی آنرا نقض نموده باشند در دادگستری تهران اقامه دعوی کنند، در اینصورت دادگاه مرجوع‌الیه مکلف است بعنوان عمل متقابل به دعوای

مذکور رسیدگی و طبق قانون حکم مقتضی صادر نماید.

فهرست دولتهای مشمول عمل متقابل توسط وزارت امور خارجه تهیه و به قوه قضاییه اعلام می‌شود.

۱ ـ خسارت ناشی از هرگونه اقدام و فعالیت دولتهای خارجی که مغایر با حقوق بین‌المللی باشد ازجمله دخالت در امور داخلی کشور که منجر به‌فوت، صدمات بدنی و روانی و یا ضرر و زیان مالی اشخاص گردد.

۲ ـ خسارات ناشی از اقدام و یا فعالیت اشخاص یا گروههای تروریستی که دولت خارجی از آنها حمایت نموده و یا اجازه اقامت یا تردد و یا فعالیت در قلمرو حاکمیت خود به آنان داده باشد و اقدامات مذکور منجر به‌فوت یا صدمات بدنی، یا روانی و یا ضرر و زیان مالی اتباع ایرانی گردد.

تبصره ۱ ـ دعاوی موضوع این قانون که منشأ آن قبل از تصویب این قانون بوده قابل طرح و رسیدگی می‌باشد.

تبصره ۲ ـ چنانچه دولتهای دیگری در اجراء احکام ناقض مصونیت جمهوری اسلامی ایران و یا مقامات رسمی آن مساعدت و همکاری نمایند، مشمول مقررات این قانون خواهند بود.

تبصره ۳ ـ آیین‌نامه اجرایی این قانون ظرف مدت (۳) ماه توسط وزارتین دادگستری و امور خارجه تهیه و بتصویب هیأت وزیران می‌رسد.

نایب رئیس ـ بسیار خوب، بجای کلمه «روانی»، «معنوی» بگذاریم. بهتر نیست «زیان معنوی»؟ حضار ۱۹۴ نفر، ما الان این پیشنهاد جایگزینی را به رأی می‌گذاریم. نمایندگان محترمی که با این پیشنهاد جایگزینی موافقند قیام بفرمایند (اکثر برخاستند) خوب، با اکثریت قاطع تصویب شد.

ما به نمایندگان محترم و همه آنهایی که زحمت کشیدند، وزارت امور خارجه، وزارت دادگستری، تبریک می‌گوییم. برای اینکه با این تصویب اگر ان‌شاءالله شورای نگهبان هم تأیید کند و بصورت قانون درآید، همه اتباع ایرانی که از دخالتهای ناروای دولت خائن آمریکا ضرر و زیان دیده‌اند می‌توانند به دادگستری مراجعه و شکایت کنند و البته ما همواره مصونیت سیاسی و قضایی دولتها را محترم می‌شماریم. اما اگر یک کشوری این کار را کرد و مصونیت سیاسی و قضایی دولت ایران را لغو کرد ما هم باید این اختیار را داشته باشیم که عمل متقابل را داشته باشیم «فمن اعتدی علیکم فاعتدوا علیه بمثل ما اعتدی علیکم» ان‌شاءالله مبارک است و امیدواریم با این مصوبه یک ضربه قاطعی به تجاوزگریهای آمریکا وارد بکنیم.

نمایندگان ـ احسنت، احسنت.

نایب رئیس ـ ما فکر می‌کردیم دستور طولانی شود و حتی فکر می‌کردیم به فردا کشیده شود، الحمدلله همه دستورهای ما امروز تمام شد و بنابراین فردا صبح برنامه پنجساله سوم در دستور کارمان خواهد بود ان‌شاءالله و می‌توانیم از فردا صبح رسیدگی بکنیم.

عده‌ای از نمایندگان ـ اعلام کرده بودند شنبه آغاز می‌شود.

نایب رئیس ـ نه، ما فردا صبح برنامه پنجساله سوم را داریم. ان‌شاءالله ساعت (۸) خدمت شما هستیم. ما طبق آیین‌نامه باید این کار را بکنیم. علت اینکه می‌خواستیم تأخیر بیندازیم برای اینکه فکر می‌کردیم دوفوریتی‌ها امروز تصویب نمی‌شود. (نورا ـ صبح اعلام کردند شنبه) خیر، اعلام بر این مبنا بوده. من الان خدمت شما اعلام می‌کنم، ما فردا صبح برنامه پنجساله سوم را داریم، علت اینکه ما گفتیم ممکن است تأخیر بیفتد، از اول هم قرار بود سه‌شنبه باشد، بخاطر دوفوریتی‌ها بود. امروز هم ما فکر می‌کردیم دوفوریتی‌ها تمام نشود، بحمدالله همه دستور ما تمام شد. بنابراین ما طبق آیین‌نامه فردا صبح باید برنامه پنجساله سوم را در دستور بگذاریم.

زادسر ـ تذکر دارم.

نایب رئیس ـ تذکر چه؟

زادسر ـ راجع به طرح اصلاح قانون مطبوعات که در دستور است می‌توانیم فردا مطرح بکنیم.

نایب رئیس ـ نه، آنها طبق آیین‌نامه، بعد مطرح می‌شود. برنامه سوم را ما می‌خواستیم امروز مطرح کنیم مانع ما دوفوریتی‌ها بود که الحمدلله همه دوفوریتی‌ها تمام شد. بنابراین طبق آیین‌نامه ما نمی‌توانیم کار دیگری انجام بدهیم. طبق آیین‌نامه فردا صبح باید برنامه پنجساله باشد که خواهد بود.

۱۵ ـ اعلام وصول یک فقره طرح و دو فقره سؤال

نایب رئیس ـ اگر طرح و لایحه‌ای هست اعلام وصول بفرمایید.

منشی (باهنر) ـ بسم‌الله الرحمن الرحیم

ـ طرح نحوه تأثیر سوابق منتقله بر سازمان تأمین اجتماعی برای استفاده از مزایای مقرر در قانون تأمین اجتماعی مصوب تیرماه ۵۴.

ـ سؤال جناب آقای سبحانی نماینده محترم دامغان از وزیر محترم کار در مورد عدم اجرای ماده (۱۹۱) قانون کار.

ـ سؤال جناب آقای محمدرضا علی‌حسینی‌عباسی نماینده محترم نهاوند از وزیر محترم بهداشت، درمان و آموزش پزشکی در مورد آزمون پره‌برد و سایر موارد که بدینوسیله اعلام وصول می‌شود.

۱۶ ـ اسامی غائبین و تأخیرکنندگان

غائبین جلسه امروز عبارتند از آقایان: سیدعلیرضا افقهی ـ عزت‌الله

Official Gazette, The Parliamentary [Majlis] Debates

Tuesday, October 31, 2000 [Aban 10, 1379]

Public Session No. 41

Pages: 24-25

15: Announcing the Arrival of the Bill Amending "The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments," with its two-degree urgency and the approval of its two-degree urgency

Deputy Speaker: Please submit the next issue.

Secretary (Jabbar-zadeh): We have a bill with a two-degree urgency and it is due to be brought up under the title of "The Bill Amending the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments." Our friends [the deputies] have requested that this bill be granted a two-degree urgency status. Would one of the drafters please proceed.

Deputy Speaker: Mr. Mirdamadi will talk as one of the drafters.

Mohsen Mirdamadi, :

In the name of God,

I request that my brothers and sisters give their complete attention because this is one of the important issues for our foreign policy. First, I will provide some explanation so that our friends become familiar with the issue.

In previous years, the US Congress has approved a law under which the relatives of those who have been injured in other countries may file a claim against foreign governments (including against the government of Iran). On that basis, certain claims have been filed in US courts against the Islamic Republic of Iran, and the US courts, contrary to international regulations, have rendered judgments against Iran and have authorized the US Government to confiscate assets of the Iranian government for the benefit of such plaintiffs and to expropriate those assets in order to satisfy those judgments.

Until the enactment of the recent amendment [law] that was enacted by the US Congress, the US Government had resisted that and, by virtue of its authority, refused to enforce the law. The US House and the Senate have recently enacted the law with a large majority, and the US Government is no longer able to bar enforcement of the law.

Based on that law, if it is enforced, three judgments have been entered against the Islamic Republic of Iran for the total amount of about one billion dollars (above 900 million dollars) to the present time. There are another three cases under review in the courts, and if those cases are decided, they may lead to judgments in the amount of about two billion dollars against Iran. The US Government may then try to expropriate the assets of the Iranian Government in the US and in other places (if it has access) and place them at the disposal of those individuals.

While we naturally support the policy of the government, which is aimed at reducing tensions in the world, and we appreciate the resulting important achievements, we must note that when there is an encroachment on our national interests, we must take reciprocal action and not let other countries to encroach on our national interests. The law that was enacted in the US is an outstanding example of a situation where our national interests have been encroached upon.

Deputy Speaker: Mr. Mirdamadi, speak about the urgency.

Mr. Mirdamadi: Certainly. It is clear that our national interest have been violated. The only way to confront that is to enact a similar law immediately. We have many individuals in our courts who have sustained damages because of US interference in Iran's internal affairs. They should be able to file their claim in [Iranian] courts and pursue them.

A law was enacted by the fifth Islamic Consultative Assembly for that purpose, but it has faced certain problems in practice. In that law, it was mentioned that individuals may file a claim in Iranian courts and that the courts are required to enter a judgment according to the law. Entering a judgment according to the law means [awarding] regular statutory compensation [*diyeh*], and that does not amount to reciprocal action. They [the US courts] have, in one case, entered a judgment against us for about, or perhaps more than, $300,000,000. We must authorize our courts to take the same reciprocal action. That is, to render judgments against that country to pay what the plaintiff is entitled to as well as punitive damages for an amount similar to what they [the US courts] have awarded. For that reason, this is in our nation's interest, and every day that it is delayed, we will see

additional judgments rendered in the United States. We must enact this law as soon as possible. This is a preventive action whereby they will note that this will not get [them] anywhere, and they will stop it and somehow solve the issue internally. For that reason, I believe that all of our friends are in agreement and that there is not any objection. I therefore seek a vote on two-degree urgency. If there is any question about the details, we can discuss those questions tomorrow when we review the bill. In connection with the national interest, however, this is urgent, and I request that all of my brothers and sisters [other deputies] vote in favor of two-degree urgency.

Deputy Speaker:

No one has disagreed with the two-degree urgency. Therefore, the two-degree urgency for "The Bill Amending the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments" is open for voting. Those who approve the two-degree urgency should stand.

(The majority rose.) It was approved.

Because there is a 24 hour period for proposals, I only request that if anybody has any proposal, that they should submit their proposal to the Leadership Board and The Office of Laws by tomorrow morning so that it can be printed. That would enable us to enact this bill tomorrow before the end of the day so there will not be any problem with the regulations. Thank you.

Official Gazette, The Majlis Debates

Wednesday, November 1, 2000 [Aban 11, 1379]

Public Session No. 42

Pages: 28-30

11. The ratification of the two-degree urgency of "The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments"

Deputy Speaker: We welcome the members of the Guardian Council. Please submit the bill which has two-degree urgency.

Secretary (Jabbar-zadeh): The two-degree urgency of "The Bill Amending the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments." I introduce Mr. Qashqavi, one of the drafters of the bill.

Mr. Qashqavi: In the name of God,

The present law, which is a reciprocal action in the courts for the protection of the rights of Iranian citizens, was enacted a few years ago.

However, it had been provided that the courts must take action according to the law. The law that we presently have, for instance, provides that, in our courts, the compensation for manslaughter is 6,400,000 Tumans, which, when converted to dollars, amounts to 6-7 thousand dollars. We, however, notice that in the law that was recently unanimously enacted by the US Congress pursuant to the previous law, this amount is much larger. In other words, when a woman named Flatow was killed in the occupied territories [Israel], in which the Islamic Republic of Iran did not have any role, the [US] court entered a judgment against the government of Iran for about $22.5 million dollars . . . I submit that the court enters a judgment against us for about 225 million dollars for punitive damages. At the present time, there are 12 claims filed against the Islamic Republic of Iran. Unfortunately, there are already judgments in the amount of $1 billion and two hundred million dollars rendered against Iran, and it is expected that judgments will be entered for another 1.5 billion dollars. In other words, the average amount for one judgment against the Islamic Republic of Iran is $270,000,000. On the other hand, our laws provide for payment of 6,500,000 Tumans [for each death]. According to US confessions, we have had many victims since the 1953 coup d’état, for instance, in the case of

the Airbus, and in other instances. That calls for the enactment of this law in order to protect the rights of Iranian citizens.

This bill has been approved by the Foreign Policy and National Security Committee, by an unanimous vote of our male and female colleagues, to provide the following:

1. Our courts, with respect to awarding physical and emotional damages, should consider the principle of reciprocal action.

2. We also consider punitive damages against the US, as they do.

3. The judgment debt should be an amount in Rials that is equivalent to dollars so that the fluctuation of the price of Rials will not have any effect.

4. With respect to the court charges and the [tax] stamp, that should be cancelled because the plaintiff is an Iranian national. We stated that the family of the Iranian victims should be able to pay the court charges after the judgment is enforced, so that the court charges would not bar them from filing their claims and that the attorneys who are willing to represent Iranian nationals [in these claims] will not be subject to taxation.

   This collection is an innovation that has been inserted in this draft to protect the right of Iranian nationals and to enable Iranian nationals who have sustained damages from the US government. It enables us to give our courts the authority, like them, and to protect the rights of our nationals. Yesterday, our sisters and brothers unanimously voted to grant this draft a two-degree urgency, and it is expected that today this bill will be ratified unanimously. (I did not hear of an opponent signing.)

Deputy Speaker: Thank you very much. No one has registered as being against the present draft. The two-degree urgency bill for "The Law Amending the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments" is open for voting. Those who are voting yes should rise. Two-hundred and four persons are present. (Most rose.) It was approved.

Deputies: "Death to America, Death to America, Death to America."

Deputy Speaker: Please discuss the proposed changes.

Secretary (Jabbar-zadeh): We have received a few proposals, which we reviewed. Among those proposals, the one that solves the more significant financial issues belongs to Mr. Golbaz, and we ask him to explain his proposal.

Deputy Speaker: Mr. Golbaz, please proceed.

Ja'far Golbaz:

In the name of God,

[Reads a verse from the Koran.]

There were some legal and drafting issues with this bill that I have tried to change in my proposed draft.

The phrases have been made more legal and comprehensive, particularly with respect to court charges and taxes on the legal fees of the attorneys who represent these claims in courts. We added the following phrase, as Paragraph (3), in the proposed draft: "With regard to the principle of reciprocal action, in evaluating the physical and emotional damages of the victims, as well as the punitive damages, if necessary, the standard shall be similar to [that of] the judgments rendered by foreign courts.

> Note 1: The judgment debt shall be determined in Rials and its equivalent in gold at the time when the judgment is entered and mentioned in the judgment.
>
> Note 2: Court charges and the tax of the plaintiff's attorneys for this type of claim shall, after the judgment is enforced, be deposited in the general treasury.

In the original draft, it has been mentioned that attorneys are exempted from taxes. There was no ground for that exemption, and I thought the Guardian Council would not approve it. Therefore, we changed it, and this draft has the full support of our parliament because the position of the United States is not consistent with

international law and violates international rules. No government is entitled to adopt a practice that would entitle its local courts to hear claims against the immunity of other governments and issue judgments against its citizens. For this reason, we took reciprocal action. We authorized our courts to grant compensation for physical and emotional injuries, as well as punitive damages, if necessary. We considered reciprocal damages in the evaluations of those who resort to these courts.

The Americans are being tempted these days, and I quote some of their statements for the audience. They say that some hardliners are doing this in the Iranian Parliament as lobbyists. This is the position of the Iranian nation, the Iranian government, and our leader. We, based on our humanitarian, Islamic, and Quranic standards, do not let a bloodsucking hand to encroach on the rights of the Iranian nation. We strongly stand by our positions. Of course, we are not seeking tension and do not want to disturb international order. Iran observes international laws more than many of these countries do that claim [to observe international rules]. What right do they have to go to their local courts and obtain a judgment for Ms. Flatow in the amount of $247.5 million against us and then to authorize themselves to seize our diplomatic properties and freeze them. We now present this bill.

Brothers and sisters, I make this final statement. In the U.S. Congress, even those who appear to be on Iran's side, voted unanimously for this act against Iran. We also vote unanimously. We shall strongly resist the evil actions of the governments that take action against Iran's rights.

A number of deputies: Great. Good for you.

Deputy Speaker: Thank you.

Secretary (Shakori-rad): There is no objection.

Deputy Speaker: Those who are in favor will not speak. There are many who are in favor, but since there is no objection, and they are not speaking, then those in favor will also not speak. The proposed draft is read so that deputies can vote on it.

Secretary (Jabbar-zadeh): The proposed draft:

> Single Article:
>
> In order to confront and prevent further violation of international laws and standards by the governments that ignore the judicial immunity of The Government of the Islamic Republic of Iran, the following paragraph is

hereby added as Paragraph (3) to "The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments, enacted on November 9, 1999 [Aban 18, 1378]:

Paragraph 3: With regard to the principle of reciprocal action, in evaluating physical and emotional damages of victims, as well as punitive damages, if necessary, the standard shall be similar to the judgments rendered in foreign courts.

Note 1: The judgment debt shall be fixed in Rials. Additionally, the judgment debt will be fixed at the price at the time of the issuance of the judgment, and it shall be mentioned in the judgment.

Note 2: Court charges and the tax for the plaintiff's attorneys for this type of claim, after the judgment is enforced, shall be deposited in the general treasury.

Deputy Speaker: The government is also in agreement. The text of the proposed bill, having been read, is open for voting. Two-hundred and four (204) deputies are present. (The majority rose.) The bill was enacted unanimously. I thank the members of the Guardian Council who are in attendance, and I hope this will be confirmed soon so that the unity among the people, the Parliament, and the government will be made manifest. Thank you very much.

بسم الله الرحمن الرحیم

جلسه چهل و یکم
(۴۱)

۱۰ آبان ماه ۱۳۷۹ هجری شمسی
سوم شعبان المعظم ۱۴۲۱ هجری قمری

مشروح مذاکرات مجلس شورای اسلامی

دوره ششم ـ احلاسیهٔ اول
۱۳۸۰ ـ ۱۳۷۹

صورت مشروح مذاکرات جلسهٔ علنی روز سه‌شنبه دهم آبان ماه ۱۳۷۹

فهرست مندرجات :

«جلسه ساعت هشت و بیست و پنج دقیقه به ریاست آقای مهدی کروبی رسمیت یافت»

اداره تدوین مذاکرات مجلس شورای اسلامی

اسلامی درخواست داریم به این لایحه هم رأی مثبت بدهند، ان‌شاءالله.

نایب رئیس ـ خیلی ممنون، اجازه بدهید چون تعداد حضار برای رأی‌گیری کافی است، آن لایحه اولی را قرائت بفرمایید، حضار ۲۰۸ نفر، متن ماده واحده برای رأی‌گیری قرائت می‌شود.

منشی (جبارزاده) ـ لایحه موافقتنامه تشویق و حمایت متقابل از سرمایه‌گذاری بین دولت جمهوری اسلامی ایران و دولت جمهوری آفریقای جنوبی

ماده واحده ـ موافقتنامه تشویق و حمایت متقابل از سرمایه‌گذاری بین دولت جمهوری اسلامی ایران و دولت جمهوری آفریقای جنوبی مشتمل بر یک مقدمه و (۱۵) ماده و یک پروتکل بشرح پیوست تصویب و اجازه مبادله اسناد آن داده می‌شود.

نایب رئیس ـ این لایحه موافقتنامه با تعداد حضار ۲۱۰ نفر به رأی گذاشته می‌شود. موافقین قیام بفرمایند (اکثر برخاستند) تصویب شد. متن ماده واحده قبلی را هم برای رأی‌گیری قرائت بفرمایید.

منشی (جبارزاده) ـ لایحه موافقتنامه تشویق و حمایت متقابل از سرمایه‌گذاری بین دولت جمهوری اسلامی ایران و دولت جمهوری آذربایجان

ماده واحده ـ موافقتنامه تشویق و حمایت متقابل از سرمایه‌گذاری بین دولت جمهوری اسلامی ایران و دولت جمهوری آذربایجان مشتمل بر یک مقدمه و (۱۲) ماده تصویب و اجازه مبادله اسناد آن داده می‌شود.

نایب رئیس ـ حضار ۲۱۲ نفر، لایحه موافقتنامه تشویق و حمایت متقابل از سرمایه‌گذاری بین دولت جمهوری اسلامی ایران و دولت جمهوری آذربایجان به رأی گذاشته می‌شود، موافقین قیام بفرمایند (اکثر برخاستند) تصویب شد.

۱۵ ـ اعلام وصول طرح اصلاح قانون صلاحیت دادگستری برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی با قید دوفوریت و تصویب دوفوریت آن

نایب رئیس ـ دستور بعدی را مطرح بفرمایید.

منشی (جبارزاده) ـ یک طرح دوفوریتی داریم که مهلت طرحش هم رسیده، تحت عنوان «طرح اصلاح قانون صلاحیت دادگستری برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی» که دوستان تقاضای دوفوریت کرده‌اند، یکی از طراحان بفرمایند.

نایب رئیس ـ آقای میردامادی بعنوان یکی از طراحان و پیشنهاددهندگان صحبت می‌کنند، بفرمایید.

محسن میردامادی ـ بسم‌الله الرحمن الرحیم

من از دوستان، خواهران و برادران نماینده تقاضا می‌کنم این مطلب را توجه داشته باشند، چون از مسایل مهم در بحث سیاست خارجی ماست. من ابتداء یک توضیحی بدهم سابقه قضیه را دوستان در جریان باشند.

در سالهای گذشته کنگره آمریکا قانونی را تصویب کرده که براساس آن قانون کسانی می‌توانند در دادگاههای آمریکا علیه دولتهای خارجی اقامه دعوی کنند (ازجمله علیه دولت ایران) که منسوبین آنها در کشورهای دیگر آسیب دیده‌اند. براین اساس شکایتهایی در دادگاههای آمریکا ارائه و اقامه دعوی علیه جمهوری اسلامی ایران شده و دادگاههای داخلی آمریکا برخلاف مقررات بین‌المللی احکامی را علیه ایران صادر کرده‌اند و به دولت آمریکا اجازه داده‌اند که اموال دولت ایران در آنجا بنفع آن مدعی‌ها و در جهت اجرای آن احکام، مصادره شود. دولت آمریکا تا قبل از اصلاحیه اخیری که در کنگره آمریکا صورت گرفت در مقابل آن مقاومت کرده بود و آن قانون را با اختیاراتی که داشت اجراء نمی‌کرد. اخیراً کنگره و سنای آمریکا مجدداً آن را با اکثریت بالا تصویب کردند و دیگر دولت آمریکا هم قادر نیست جلو اجرای آن را بگیرد. براساس این قانون اگر بخواهد اجراء شود که تابحال سه حکم علیه جمهوری اسلامی ایران صادر شده و مجموع این احکام حدود (۱) میلیارد دلار (۹۰۰ و خرده‌ای میلیون دلار) مبلغ آن است و سه دعوای دیگر هم در دادگاه تحت بررسی است که آنها را هم اگر بررسی کنند و حکم صادر کنند ممکن است حدود (۲) میلیارد دلار علیه ایران احکام صادر شده باشد و دولت آمریکا آنوقت تلاش می‌کند سرمایه‌های دولت ایران در آمریکا یا در جاهای دیگر (اگر دستش رسید) مصادره بکند و در اختیار آن افراد قرار بدهد.

ما ضمن اینکه طبعاً سیاست دولت محترم را که سیاست تنش‌زدایی در کل جهان در سیاست خارجی است حمایت می‌کنیم و دستاوردهای مهم آن را ارج می‌گذاریم که برای ما داشته، ولی باید این را توجه داشته باشیم که هرجا به منافع ملی ما تعرضی شد آن را پاسخ متقابل بدهیم و اجازه ندهیم کشورها متعرض منافع ملی ما باشند. قانونی که در آمریکا تصویب شده از موارد بارز و (نایب رئیس ـ آقای میردامادی! راجع به فوریت صحبت کنید) چشم... روشنی است که به منافع ملی ما تعرض شده و تنها راه مقابله با آن، تصویب قانون متقابلی

است که بلافاصله این را تصویب بکنیم، در دادگاهها ما در ایران افراد بسیاری را داریم که بدلیل دخالتهای آمریکا در امور داخلی ایران خسارت دیده‌اند و آن خسارتها را باید به دادگاه ارائه بدهند و اقامه دعوی بکنند.

در مجلس پنجم قانونی به این منظور تصویب شده، ولی در عمل دچار اشکالات شده. در آن قانون آمده که افراد در دادگاههای ایران می‌توانند اقامه دعوی کنند و دادگاه موظف است طبق قانون حکم صادر بکند. طبق قانون حکم صادر کردن یعنی دیه معمولی را در نظر گرفتن و این مقابله بمثل نیست، آنها در یک پرونده‌ای ما را در حدود (۳۰۰) یا بیش از (۳۰۰) میلیون دلار محکوم کرده‌اند. ما هم باید این اجازه را به دادگاه بدهیم که آنها هم بتوانند اقدام متقابل بکنند. آن کشور را... یعنی علاوه بر حقی که به آن شاکی می‌دهند آن کشور را هم جریمه تنبیهی معادل مواردی که آنها تعیین کرده‌اند بکنند. به این دلیل این در جهت منافع ملی ماست و هرروز که تأخیر بیفتد ما شاهد احکام دیگری خواهیم بود که در آمریکا صادر خواهد شد. هرچه زودتر ما بتوانیم این را تصویب بکنیم عملاً این بازدارنده است که آنها ببینند این مسیر بجایی نخواهد رسید، آن را متوقف بکنند و بنحوی مسأله را خودشان در داخل خودشان حل بکنند. به این دلیل من فکر می‌کنم همه دوستان موافق باشند، سر این مخالفی نباشد. خواهش می‌کنم به دوفوریت این رأی بدهیم. در جزئیات هم اگر بحثی بود طبعاً فردا که وارد بحث جزئیات خواهیم شد می‌توانیم آن را بحث داشته باشیم، ولی در رابطه با منافع کشور فوریتی است. من از همه خواهران و برادران خواهش می‌کنم به دوفوریت این رأی بدهند، متشکرم.

نایب رئیس ـ مخالفی برای دوفوریت ثبت‌نام نکرده. دوفوریت طرح اصلاح قانون صلاحیت دادگستری برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی به رأی گذاشته می‌شود. موافقین دوفوریت قیام بفرمایند (اکثر برخاستند) تصویب شد. من فقط خواهش می‌کنم اگر کسی پیشنهادی دارد چون (۲۴) ساعت مهلت تقدیم پیشنهادات است تا اول صبح فردا این پیشنهاداتشان را به هیأت رئیسه و اداره کل قوانین بدهند تا چاپ شود و ما آخر وقت فردا بتوانیم این را طرح بکنیم که از نظر آیین‌نامه هم اشکالی پیش نیاید، خیلی ممنون.

۱۶ ـ تصویب لایحه موافقتنامه تشویق و حمایت از سرمایه‌گذاری بین دولت جمهوری اسلامی ایران و دولت جمهوری کره

نایب رئیس ـ دستور بعدی را مطرح بفرمایید.

منشی (جبارزاده) ـ دستور بعدی گزارش کمیسیون اقتصاد در مورد لایحه موافقتنامه تشویق و حمایت از سرمایه‌گذاری بین دولت جمهوری اسلامی ایران و دولت جمهوری کره. مخبر محترم کمیسیون اقتصادی آقای محبی‌نیا بفرمایید.

جهانبخش محبی‌نیا (مخبرکمیسیون اقتصادی) ـ بسم‌الله الرحمن الرحیم

گزارش کمیسیون اقتصادی به مجلس شورای اسلامی

لایحه موافقتنامه تشویق و حمایت از سرمایه‌گذاری بین دولت جمهوری اسلامی ایران و دولت جمهوری کره به شماره ترتیب چاپ (۱۲۲) که به این کمیسیون بعنوان کمیسیون اصلی ارجاع شده بود با حضور مسؤولین دستگاههای دولتی ذیربط مورد بحث و تبادل‌نظر قرار گرفت و در جلسه مورخ ۷۹/۶/۱۵ به تصویب رسید. اینک گزارش آن را به مجلس محترم شورای اسلامی تقدیم می‌دارد.

رئیس کمیسیون اقتصادی ـ رضا عبداللهی

این لایحه هم مثل آن لوایحی بود که مجلس رأی داد. فقط این نکته را عرض کنم که کره، الان در دو دهه گذشته در سایهٔ سرمایه‌گذاریهای خارجی، دانش فنی و فناوری و این بحثها توانسته است اقتصاد کشورش را از یک اقتصاد سرمایه‌پذیر به اقتصاد سرمایه‌فرست تبدیل بکند و در ارتباطات اقتصادی خودش هم با کشور ما شرکتهایی که سرمایه‌گذاری کرده‌اند، توانسته‌اند صلاحیتهای فنی خودشان را به اثبات برسانند. در قبال این حضور، شرکتهای کره‌ای چند مدتی است که مصّرند یکسری از قوانین اقتصادی را در این مراودات شفاف بکنند و طبیعتاً باتوجه به منافع اقتصادی که ما هم دنبال آنها هستیم و آن تضمین سرمایه و مباحثی است که قبلاً در رابطه با آن به اندازه کافی بحث شده، امنیت سرمایه‌گذاران دو کشور در سرمایه‌گذاریها تضمین شود. قاعدتاً کمیسیون از مجلس معزز و مکرم مجلس شورای اسلامی خواستار این است که به این لایحه هم رأی مثبت بدهند.

نایب رئیس ـ خیلی ممنون و متشکر. مخالفی برای این لایحه ثبت‌نام نکرده، متن ماده واحده برای رأی‌گیری قرائت شود.

منشی (جبارزاده) ـ لایحه موافقتنامه تشویق و حمایت از سرمایه‌گذاری بین دولت جمهوری اسلامی ایران و دولت جمهوری کره.

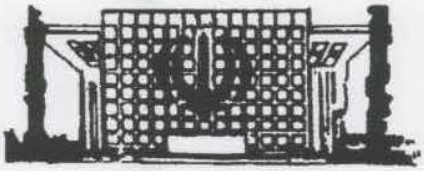
ماده واحده ـ موافقتنامه تشویق و حمایت از سرمایه‌گذاری بین دولت جمهوری اسلامی ایران و دولت جمهوری کره مشتمل بر یک مقدمه و (۱۴) ماده، بشرح پیوست تصویب و اجازه مبادله اسناد آن داده

بسم الله الرحمن الرحیم

جلسه چهل و دوم
(۴۲)

۱۱ آبان ماه ۱۳۷۹ هجری شمسی
۴ شعبان المعظم ۱۴۲۱ هجری قمری

مشروح مذاکرات مجلس شورای اسلامی



دوره ششم ـ اجلاسیهٔ اول
۱۳۸۰ ـ ۱۳۷۹

صورت مشروح مذاکرات جلسهٔ علنی روز چهارشنبه یازدهم آبان ماه ۱۳۷۹

فهرست مندرجات :

«جلسه ساعت هشت و بیست و پنج دقیقه به ریاست آقای مهدی کروبی رسمیت یافت»

اداره تدوین مذاکرات مجلس شورای اسلامی

حداکثر هر پنجسال یکبار جریمه‌های قانونی متناسب با شاخصهای مذکور با پیشنهاد وزارتخانهٔ ذیربط و تصویب هیأت وزیران تعدیل خواهد شد.

تبصره ۲ ـ برای گرد شدن ارقام جریمه‌ها تا (۲۰) درصد افزایش یا کاهش نسبت به ارقام تعدیل شده مجاز می‌باشد.

این پیشنهاد جایگزینی است.

نایب رئیس ـ حضار ۱۹۹ نفر، پیشنهاد جایگزینی که قرائت شد به رأی گذاشته می‌شود. موافقین قیام بفرمایند (عده کمی برخاستند) تصویب نشد. اصل ماده واحده برای رأی‌گیری قرائت شود.

منشی (جبارزاده) ـ لایحه اصلاح قانون امور گمرکی مصوب ۱۳۵۰ و آیین‌نامه اجرایی قانون امور گمرکی مصوب ۱۳۵۱ و اصلاحات بعدی آنها.

ماده واحده ـ قانون امور گمرکی مصوب ۱۳۵۰ و آیین‌نامه اجرایی آن مصوب ۱۳۵۱ و اصلاحات بعدی آنها بشرح زیر اصلاح می‌شود:

۱ ـ در تبصره (۲) ماده (۲۶) قانون امور گمرکی عبارت (۱۰۰۰) ریال تمام (۵۰۰۰) ریال و در ماده (۲۶۲) آیین‌نامه اجرایی قانون یادشده عبارت (۱۰۰۰) تا (۵۰۰۰) ریال به عبارت (۱۰۰) هزار ریال تا (۱) میلیون ریال اصلاح می‌شود.

۲ ـ در ماده (۲۸) قانون امور گمرکی عبارت «در مورد اضافه برای هر عدل یا بسته (۱۰) ریال که حداکثر از (۵۰۰۰) ریال تجاوز نکند و نسبت به کسری برای هر عدل یا بسته (۵۰) ریال که حداکثر از (۲۰) هزار ریال تجاوز نکند» به عبارت «برای هر عدل یا بسته اعم از کسر یا اضافه (۵۰۰۰) ریال مشروط بر اینکه در هرصورت کلاً از (۵۰۰) هزار ریال تجاوز نکند» اصلاح می‌گردد.

۳ ـ متن زیر بعنوان تبصره به ماده (۱۰۲) آیین‌نامه اجرایی قانون گمرکی اضافه می‌شود.

تبصره ـ در گمرکاتی که تشریفات ترخیص کالا بصورت رایانه‌ای انجام می‌گیرد پس از اختصاص شماره ثبت و اظهارنامه توسط رایانه و امضاء آن بوسیله صاحب کالا یا نماینده قانونی وی کالای اظهارشده تلقی می‌شود.

۴ ـ در ماده (۲۶۵) آیین‌نامه اجرایی قانون امور گمرکی عبارت (۱۰۰۰) تا (۵۰۰۰) ریال به عبارت (۱۰۰) هزار تا (۱) میلیون ریال اصلاح می‌گردد.

۵ ـ در ماده (۲۶۷) آیین‌نامه اجرایی قانون امور گمرکی عبارت (۱۰۰) تا (۱۰۰۰) ریال به عبارت (۱۰) هزار تا (۵۰) هزار ریال اصلاح می‌شود.

۶ ـ در تبصره (۲) ماده (۲۶۹) آیین‌نامه اجرایی قانون امور گمرکی عبارت حداقل آن (۱۰۰۰) و حداکثر آن (۱۰) هزار ریال نخواهد بود به عبارت حداکثر آن (۱۰۰) هزار و حداکثر آن بیش از (۱) میلیون ریال نخواهد بود اصلاح می‌شود.

۷ ـ در ماده (۲۷۰) آیین‌نامه اجرایی قانون امور گمرکی عبارت (۵۰۰) ریال به عبارت حداقل (۱۰) هزار ریال و حداکثر (۵۰) هزار ریال اصلاح می‌شود.

تبصره ۱ ـ تعیین میزان جرایم موضوع بندهای (۱،۴،۵،۶،۷) با رعایت حداقل و حداکثرهای مقرر در بندهای یادشده و باتوجه به شرایط و مقتضیات براساس آیین‌نامه‌ای که به پیشنهاد وزارت امور اقتصادی و دارایی از تصویب هیأت وزیران خواهد گذشت خواهد بود.

تبصره ۲ ـ این قانون از سال ۱۳۸۰ لازم‌الاجراء می‌باشد و به دولت اجازه داده می‌شود هر سه سال یکبار متناسب با تغییر شاخص قیمت عمده‌فروشی کالاها که توسط بانک مرکزی جمهوری اسلامی ایران اعلام می‌شود مبالغ تعیین شده در این قانون را بنا به پیشنهاد وزارت امور اقتصادی و دارایی مشخص نماید.

نایب رئیس ـ حضار ۲۰۱ نفر، لایحه اصلاح قانون امور گمرکی مصوب ۱۳۵۰ و آیین‌نامه اجرایی قانون امور گمرکی مصوب ۱۳۵۱ و اصلاحات بعدی آنها به رأی گذاشته می‌شود. موافقین قیام بفرمایند (اکثر برخاستند) تصویب شد.

۱۱ ـ تصویب طرح دوفوریتی اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی

نایب رئیس ـ با عرض خیرمقدم به اعضای محترم شورای نگهبان، طرح دوفوریتی را مطرح بفرمایید.

منشی (جبارزاده) ـ طرح دوفوریتی اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی. یکنفر از طراحان محترم آقای تشقاوی بفرمایید.

حسن تشقاوی ـ بسم‌الله الرحمن الرحیم

عرض کنم که این قانون معامله متقابل در دادگاهها برای حفظ حقوق شهروندان ایرانی در چند سال گذشته تصویب شده.

النهایه در آن قانون درواقع پیش‌بینی شده که دادگاهها بر حسب قانون عمل کنند. قانونی که الان ما مثلاً برای قتل نفس داریم در دادگاههای ما (۶) میلیون و (۴۰۰) هزار تومان برای قتل نفس هر شهروند است. اگر این را تقویم دلاری کنید (۶،۷) هزار دلار می‌شود. در حالیکه در قانونی که اخیراً بدنبال قانون تبلی در کنگره آمریکا باتفاق آراء اعضای کنگره آمریکا تصویب شده ما ملاحظه می‌کنیم که

این معادل، بسیار فراتر از این است. یعنی یک خانمی بنام خانم «فلانو» در سرزمینهای اشغالی کشته می‌شود که هیچ نقشی در آن جمهوری اسلامی ایران ندارد، اما دادگاه (۲۲/۵) میلیون دلار علیه جمهوری اسلامی ایران... عرض کنم بحضور شما که حدود (۲۲۵) میلیون دلار بعنوان اقدام تنبیهی علیه دولت ایران، دادگاه، ما را محکوم می‌کند. یعنی الان از (۱۲) شکایتی که در دادگاههای آمریکا علیه جمهوری اسلامی ایران وجود دارد متأسفانه تا همین الان (۱) میلیارد و (۲۰۰) میلیون دلار ایران را محکوم کرده‌اند و (۱/۵) میلیارد دلار دیگر هم بناست محکوم بکنند. یعنی متوسط برای هر شکایت علیه دولت جمهوری اسلامی ایران (۲۷۰) میلیون دلار در مقابل (۶) میلیون و (۵۰۰) هزار تومانی که الان در قانون دادگاههای ماست، در حالیکه در جرایمی که بهرحال با اعتراف خود دولت آمریکا ما قربانیان زیادی داریم، از کودتای (۲۸) مرداد به اینطرف و ماجرای هواپیمای ایرباس و موارد دیگر، بنابراین حفظ حقوق شهروندی اقتضاء می‌کند که این طرح تقدیم شود.

این طرح باتفاق آراء برادران و خواهران در کمیسیون امنیت ملی و سیاست خارجی تصویب شده که:

۱ ـ اصل عمل متقابل را دادگاه ما در خسارات مادی و معنوی زیاندیدگان در نظر بگیرند.

۲ ـ ما هم خسارت تنبیهی علیه آمریکا مثل آنها درنظر بگیریم.

۳ ـ موارد محکومٌ‌به، به ریالی که معادل دلار است که نوسانات قیمت ریال تأثیری نداشته باشد.

۴ ـ هزینه دادرسی و مواردی که می‌خواهند تمبر ابطال بکنند، چون شهروند ایرانی است، گفتیم این هزینه دادرسی را پس از اجرای حکم بتوانند خانواده شهروندانی که قربانی شده‌اند بدهند و هزینه دادرسی مانع دادرسی و درخواست دادرسی نشود و بعد هم اینکه وکلایی که حاضرند از حقوق شهروندان ایرانی دفاع کنند مشمول مالیات نشوند.

این مجموعهٔ ابتکاری است که در این طرح وضع شده تا در راستای حمایت از حقوق شهروندان قربانی شده به دست دولت آمریکا بتوانند همانگونه که آنها آنگونه عمل کردند ما هم بتوانیم دست دادگاهها را باز بگذاریم و در واقع از حقوق شهروندان دفاع کنیم. انتظار می‌رود همانطور که دیروز باتفاق آراء برادران و خواهران به فوریت این طرح رأی دادند، امروز هم ان‌شاءالله (ظاهراً شنیدم که مخالفی هم ثبت‌نام نکرده) باتفاق آراء به این موضوع رأی بدهیم.

نایب رئیس ـ خیلی متشکر، مخالفی ثبت‌نام نکرده، «طرح دوفوریتی اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی مطرح است، حضار ۲۰۴ نفر، موافقین با این طرح قیام بفرمایند (اکثر برخاستند) تصویب شد.

نمایندگان ـ مرگ بر آمریکا، مرگ بر آمریکا، مرگ بر آمریکا.

نایب رئیس ـ پیشنهادات جایگزین را مطرح بفرمایید.

منشی (جبارزاده) ـ پیشنهادات متعددی رسیده، بررسی کردیم از بین پیشنهادهای جایگزین رسیده آن پیشنهادی که مشکل بار مالی‌تری را حل کرده پیشنهاد آقای گلباز است، تقاضا می‌کنیم پیشنهادشان را مطرح بفرمایند.

نایب رئیس ـ آقای گلباز بفرمایید.

جعفر گلباز ـ اعوذبالله من‌الشیطان‌الرجیم. بسم‌الله الرحمن الرحیم

«قد کان لکم آیة فی فئتین التقطا فئة تقاتل فی‌سبیل‌الله و اخری کافرة یرونهم مثلیهم رأی‌العین والله یؤید بنصره من‌یشاء ان فی‌ذلک لعبرة لاولی‌الابصار».

خدمت همکاران عزیز و ارجمند عرض کنم که در اصل طرح یک مشکلات حقوقی و عبارتی وجود داشت که من سعی کردم در پیشنهاد جایگزین آنها را برطرف بکنم.

یکمقدار عبارات حقوقی‌تر، جامعتر تنظیم شده، مخصوصاً درخصوص هزینه دادرسی و مالیات وکلای محترم خواهان که در این محاکم حضور پیدا می‌کنند بر خلاف خود طرح اظهار نظر شده، ما در این پیشنهاد بعنوان بند (۳) الحاقی این عبارات را آوردیم، با توجه به اصل عمل متقابل میزان، در تقویم خسارت مادی و معنوی زیاندیدگان و در صورت لزوم، خسارات، تنبیهی، احکام مشابه صادره از دادگاه خارجی خواهد بود.

تبصره ۱ ـ محکومٌ‌به، به ریال تعیین و به علاوه میزان طلای معادل محکومٌ‌به نیز به قیمت تاریخ صدور حکم در رأی قید می‌شود.

تبصره ۲ ـ هزینه دادرسی و مالیات وکلای خواهان این نوع دعاوی پس از اجرای حکم به حساب خزانه داری کل واریز خواهد شد.

در حالیکه در خود اصل طرح برای معافیت مالیات وکلای خواهان آنجا آمده بود که آنها معاف هستند، وجهی برای معافیت نبود و من فکر می‌کردم که شورای محترم نگهبان با این مسأله موافقت نداشته باشد، برای همین ما آن را تغییر دادیم و این طرح در مجلس ما صد در صد طرفدار دارد بلحاظ اینکه موضع آمریکا یک موضع غیر حقوق بین‌المللی و بر خلاف قواعد بین‌المللی است، هیچ دولتی حق ندارد در محاکم خودش علیه مصونیت دولتها، محاکمه علیه اتباع آنها را رویه و پیشینه خودش قرار بدهد، برای همین ما یک اقدام متقابل انجام دادیم، به محاکم مان اجازه می‌دهیم خسارات مادی و معنوی را مورد حکم

قرار بدهند، در صورت لزوم خسارات تنبیهی را هم به آن اضافه بکنند، در تقویم خواسته کسانیکه به این محاکم مراجعه می‌کنند ما خسارات متقابل را در نظر می‌گیریم.

آمریکاییها امروزه وسوسه می‌شوند و (بعضی از اظهارات اینها را من برای شنوندگان عزیز، برای همکاران محترم خودم عرض کنم) می‌گویند که بعضی از افراد محافظه کار بعنوان لابی در مجلس ایران دارنداین کار را انجام می‌دهند، این موضع ملت و دولت و رهبری ایران است، ما هرگز براساس موازین انسانی و اسلامی و قرآنی خودمان اجازه نمی‌دهیم یک دست خون‌آشامی از دوردست به حقوق ملت ایران تعدی بکند، ما محکم در این مواضع خودمان ایستاده‌ایم، البته دنبال تشنج نیستیم، دنبال برهم زدن قواعد بین‌المللی نیستیم، ایران بیش از همه کشورها و جدی‌تر از بسیاری از این کشورهایی که مدعی هستند، قواعد بین‌المللی را رعایت می‌کند، برای همین آنها چه حقی دارند علیه ما به محاکم خودشان مراجعه بکنند، برای یک خانم فلاتو (۲۴۷/۵) میلیون دلار علیه ما حکم بگیرند، بعد بخودشان اجازه بدهند اموال دیپلماتیک ما را، اموال بلوکه شده ما را توقیف و تعدی بکنند، ما این طرح را الان اینجا مطرح می‌کنیم.

برادران و خواهران عزیز! من این جمله پایانی را عرض کنم که در کنگره آمریکا حتی لابی‌های بظاهر طرفدار ایران، آنها به این طرح علیه ایران یکپارچه رأی دادند و ما هم یکپارچه رأی می‌دهیم، در مقابل ددمنشی‌های دولتهایی که بخواهند علیه حقوق ایران اقدام کنند محکم و استوار تا آخر هم ایستاده‌ایم. والسلام علیکم و رحمةالله

(عده‌ای از نمایندگان ـ احسنت)

نایب رئیس ـ خیلی متشکر.

منشی (شکوری‌راد) ـ مخالفی ثبت‌نام نکرده است.

نایب رئیس ـ موافق هم صحبت نمی‌کند، موافقین خیلی زیاد ثبت‌نام کرده‌اند ولی دیگر چون مخالفی نیست و صحبت نمی‌کند آنها هم صحبت نمی‌کنند، پیشنهاد جایگزین قرائت می‌شود تا به رأی گذاشته بشود.

منشی (جبارزاده) ـ پیشنهاد جایگزین:

ماده واحده ـ برای مقابله و جلوگیری از نقض بیشتر مقررات و موازین حقوق بین‌الملل توسط دولتهایی که مصونیت قضایی دولت جمهوری اسلامی را نادیده گرفته و می‌گیرند بند ذیل بعنوان بند (۳) به ماده واحده قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی مصوب ۱۳۷۸/۸/۱۸ اضافه می‌شود.

بند (۳) ـ با توجه به اصل عمل متقابل، میزان در تقویم خسارات مادی و معنوی زیاندیدگان و در صورت لزوم، خسارات تنبیهی احکام مشابه صادره از دادگاههای خارجی خواهد بود.

تبصره ۱ ـ محکومٌ‌به، به ریال تعیین و بعلاوه میزان طلای معادل محکومٌ‌به نیز به قیمت تاریخ صدور حکم در رأی قید می‌شود.

تبصره ۲ ـ هزینه دادرسی و مالیات وکلای خواهان این نوع دعاوی پس از اجرای حکم به حساب خزانه داری کل واریز خواهد شد.

نایب رئیس ـ دولت هم موافق است، متن پیشنهاد جایگزین که قرائت شد، به رأی گذاشته می‌شود. حضار ۲۰۴ نفر، موافقین قیام بفرمایند (اکثر برخاستند) به اتفاق آراء تصویب شد. تشکر می‌کنیم از اعضای محترم شورای نگهبان که تشریف آوردند، انشاءالله هر چه زودتر نتیجه این هم مشخص بشود که یکپارچگی همه مردم، مجلس و دولت مشخص شود، خیلی ممنونم.

حذف آن تبصره‌ای که رأی گرفتیم، تبصره (۴) قانون اصلاح تقسیمات کشوری تعداد حضار ۱۹۸ بود، آراء سفید (۹۵) رأی، آراء کبود (۶۷)، آراء باطل (۵) رأی. بنابراین حذف آن تبصره رأی نیاورد و تصویب نشد.

عده‌ای از نمایندگان ـ رأی آورد.

نایب رئیس ـ خیر، تصویب نشد. حضار ۱۹۸ نفر بود.

۱۲ ـ اعلام وصول (۷) فقره لایحه

نایب رئیس ـ طرح و لایحه‌ای اگر هست اعلام وصول بفرمایید.

منشی (خالقی) ـ لوایحی از دولت محترم رسیده که اعلام وصول می‌شود:

ـ لایحه اصلاح بند (۲) قانون اصلاح بندهای «ز» و «ح» ماده (۸۴) و بند «ج» ماده (۸۶) قانون محاسبات عمومی کشور.

ـ لایحه موافقتنامه تشویق و حمایت متقابل از سرمایه‌گذاری بین جمهوری اسلامی ایران و کنفدراسیون سوئیس.

ـ لایحه تصویب پروتکل کنترل انتقالات برون‌مرزی مواد زاید خطرناک و دیگر ضایعات در دریا.

ـ لایحه اصلاح قانون سرباز قهرمان.

ـ لایحه اصلاحیه پروتکل مونترآل مصوبه نهمین اجلاس اعضای مونترآل ۱۵ تا ۱۷ سپتامبر ۱۹۹۷ میلادی برابر با ۲۴ تا ۲۶ شهریور ۱۳۷۶ هجری شمسی.

ـ لایحه موافقتنامه همکاریهای علمی و فناوری بین دولت جمهوری اسلامی ایران و دولت فدراسیون روسیه.

ـ لایحه تصویب پروتکل جلوگیری از اعمال غیرقانونی خشونت‌آمیز در فرودگاههایی که در خدمت هواپیمایی کشوری

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مجلس شورای اسلامی دوره ۸ جلسه ۱۹۳

رئیس جلسه: علی اردشیرلاریجانی تاریخ: ۱۳۸۹/۳/۱
شماره روزنامه رسمی: ۱۸۹۸۱ زمان: ۸:۴۸ تا ۱۲:۳

فهرست متن جلسه اسکن صفحات

۱ ۲ ۳ ۴ ۵ ۶ ۷ ۸ ۱۰ ۱۳ ۱۴ ۱۵ ۱۶ ۱۷ ۱۸ ۱۹
۲۰ ۲۱ ۲۲ ۲۳ ۲۴ ۲۵ ۲۶ ۲۷

فهرست مندرجات:

۱ ـ اعلام رسمیت و دستور جلسه.

۲ ـ تلاوت آیاتی از کلام‌الله مجید.

۳ ـ ادامه رسیدگی به طرح افزایش بهره‌وری بخش کشاورزی و منابع طبیعی و تصویب موادی از آن.

۴ ـ اعلام وصول طرح اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی مصوب ۱۳۷۸ و اصلاحیه آن با قید یک فوریت و تصویب فوریت آن.

۵ ـ ناطقین جلسه عبارتند از آقایان: علی کائیدی، علیرضا سلیمی، نصرالله کمالیان و خانم لاله افتخاری.

۶ ـ طرح سؤال آقای مصطفی کواکبیان نماینده محترم سمنان از آقای متکی وزیر محترم امورخارجه.

۷ ـ تذکرات کتبی نمایندگان محترم مجلس شورای اسلامی به مسؤولان اجرایی کشور.

۸ ـ قرائت بیانیه نمایندگان محترم مجلس به محضر مقام معظم رهبری در خصوص قدردانی از پیام ایشان به کنفرانس بین‌المللی خلع سلاح تهران.

۹ ـ اسامی تأخیرکنندگان.

۱۰ ـ اعلام ختم جلسه و تاریخ تشکیل جلسه آینده.

«جلسه ساعت هشت و چهل و هشت دقیقه به ریاست آقای علی اردشیرلاریجانی رسمیت یافت»

اداره تدوین مذاکرات مجلس شورای اسلامی

۱ ۲ ۳ ۴ ۵ ۶ ۷ ۸ ۱۰ ۱۳ ۱۴ ۱۵ ۱۶ ۱۷ ۱۸ ۱۹
۲۰ ۲۱ ۲۲ ۲۳ ۲۴ ۲۵ ۲۶ ۲۷

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مجلس شورای اسلامی دوره ۸ جلسه ۱۹۳

رئیس جلسه: علی اردشیرلاریجانی تاریخ: ۱۳۸۹/۲/۱
شماره روزنامه رسمی: ۱۸۹۸۱ زمان: ۸:۴۸ تا ۱۲:۲

فهرست متن جلسه اسکن صفحات

۱ ۲ ۳ ۴ ۵ ۶ ۷ ۸ ۱۰ ۱۳ ۱۴ ۱۵ ۱۶ ۱۷ ۱۸ ۱۹
۳۰ ۳۱ ۳۲ ۳۳ ۳۴ ۳۵ ۳۶ ۳۷

جمهوری اسلامی ایران تعدیل و تعیین می‌گردد. وجه حق بهره‌برداری و یا حق انتفاع سالانه مذکور باید توسط مجریان طرح حداکثر تا پایان هر سال مالی به حساب مربوط در خزانه واریز گردد.

تبصره (۲) ـ هر گونه واگذاری جزئی و یا کلی و یا تغییر کاربری غیرمجاز و یا تغییر طرح مصوب، کلی و یا جزئی و یا عدم پرداخت بموقع وجه، حق بهره‌برداری و یا حق انتفاع سالانه از سوی مجری طرح موجب فسخ یکطرفه قرارداد بهره‌برداری طرح از سوی وزارت جهادکشاورزی می‌شود.

تبصره (۳) ـ مدت زمان اجراء اینگونه طرحها (۱۵) سال تعیین می‌گردد و مفاد آن در پایان سال پانزدهم قابل تجدید نظر می‌باشد. همچنین در صورتی که مجری طرح مطابق مفاد این ماده و سایر قوانین مرتبط نسبت به اجراء تعهدات خود اقدام نموده باشد وزارت جهادکشاورزی مجاز است عرصه طرح مذکور را با شرایط تجدید نظر شده همچنان در اختیار مجری مذکور قرار دهد.

تبصره (۴) ـ حجم فعالیت و میزان کل مساحت اراضی مورد اجراء درخصوص فعالیتهای موضوع این ماده در سطح کشور برای هر سال در بودجه‌های سنواتی تعیین می‌گردد.

تبصره (۵) ـ لایحه قانونی اصلاح لایحه قانونی واگذاری و احیای اراضی در حکومت جمهوری اسلامی ایران مصوب ۲۶ /۱ /۱۳۵۹ و آیین‌نامه اجرایی آن مصوب ۳۱ /۳ /۱۳۵۹ و مواد (۳) و (۳۱) قانون حفاظت و بهره‌برداری از جنگلها و مراتع کشور مصوب سال ۱۳۴۶ و اصلاحات بعدی آن و ماده (۷۵) قانون وصول برخی از درآمدهای دولت و مصرف آن در موارد معین مصوب ۲۸ /۳ /۱۳۸۳ از حکم این ماده مستثنی بوده و همچنین قانون اصلاح ماده (۳۳) اصلاحی قانون حفاظت و بهره‌برداری از جنگلها و مراتع کشور مصوب ۹ /۴ /۱۳۸۶ مجمع تشخیص مصلحت نظام درخصوص اراضی و طرحهای موضوع این ماده نیز مجری و نافذ می‌باشد. همچنین در صورت ضرورت، طرحهای موضوع ماده (۳) قانون حفاظت و بهره‌برداری از جنگلها و مراتع کشور مصوب سال ۱۳۴۶ و اصلاحات بعدی آن که تا قبل از تصویب این قانون واگذار شده و به مرحلهٔ بهره‌برداری رسیده و مشمول مصادیق مذکور در این ماده می‌باشد، قابل انطباق با مفاد این ماده خواهد بود.

تبصره (۶) ـ آیین‌نامه اجرایی این ماده به پیشنهاد وزارت جهاد کشاورزی به تصویب هیأت وزیران می‌رسد.

رئیس ـ حضار ۱۹۵ نفر، همکاران محترم درخصوص اصل ماده (۸) و تبصره‌های آن اعلام رأی بفرمایید. پایان رأی‌گیری را اعلام می‌کنیم، تصویب‌شد.

۴ ـ اعلام وصول طرح اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به ی علیه دولتهای خارجی مصوب ۱۳۷۸ و اصلاحیه آن با قید یک فوریت و تصویب فوریت آن

بازگشت به بالا

رئیس ـ درخواست طرح یک فوریتی نمایندگان را مطرح بفرمایید.

دبیر (دهقانی‌نقندر) ـ درخواست یک فوریت توسط جمعی از همکاران محترم برای طرح اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی مصوب ۱۳۷۸ و اصلاحیه آن آمده است. آقای فلاحت‌پیشه یکی از طراحان محترم بفرمایید.

حشمت‌الله فلاحت‌پیشه ـ بسم‌الله الرحمن الرحیم

همکاران عزیز! این طرحی که یک فوریت آن پیشنهاد شده از جمله مهمترین طرحهایی است که ما ان‌شاءالله امسال می‌توانیم به نتیجه برسانیم. طرح اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی.

ما یک چنین قانونی را در مجلس ششم داشتیم ولی چون کشورها مصونیت قضایی دارند، همین دست قضات ما را بسته است برای این که حقوق دولت ایران را پیگیری کنیم و عمل مقابله به مثل انجام دهیم. سه هدف در فوریت این طرح و بعنوان اساس این فوریت مطرح است که من عرض می‌کنم:

هدف اول، در قالب عمل مقابله به مثل است. در سال ۲۰۰۸ میلادی در قالب قانون بودجه دفاع ملی ایالات متحده یک قانونی را اینها تصویب کردند که مصونیت قضایی برخی از دولتها را استثناء کردند و از آن زمان یکسری دادگاهها در آمریکا احکامی را علیه جمهوری اسلامی ایران کاملاً براساس یکسری اطلاعات کذب صادر می‌کنند. مثلاً در یک مورد از آن یکی از افراد می‌گوید که همسر من مثلاً در یک جایی پنجسال گروگان بوده، بعنوان جریمه از ایران شکایت می‌کند، (۱۳۵۰) میلیارد تومان ایران را محکوم می‌کنند و اموال ایران در قالب همان قانون بلوکه می‌شود ولی همان آمریکاییها (دولت آمریکا) در ایران الان از مصونیت قضایی کماکان برخوردار هستند، متأسفانه ما شاهد هستیم که برخی از اروپاییان بخاطر رابطه خاصی که با آمریکا دارند اموال ایران را بلوکه می‌کنند. ما طبق منشور ملل متحد و کنوانسیونهای بین‌المللی می‌توانیم عمل مقابله به مثل انجام بدهیم و وزارت امور خارجه در قالب این قانون موظف است اسامی آن دسته از کشورهایی که مشمول عمل مقابله به مثل می‌شوند را اعلام کنند که در دادگاههای خودمان پیگیری کنیم و علیه آنها حکم بدهیم.

هدف دوم بحث گروههای تروریستی است، خود شما می‌دانید آخرین مورد آن بحث ریگی است که رسماً اعتراف او نشان می‌دهد که در ارتباط مستقیم و مستمر با برخی کشورهای خارجی بوده ولی همان مصونیت اجازه این پیگیری را در محاکم داخلی به ما نمی‌دهد. شما با این کار دست قاضی ایرانی را باز می‌گذارید که در قالب مقررات بین‌المللی حکم بدهد، حکمی که نقض حقوق هم ملت ایران است، دهها شهید داریم و هم دولت ایران. این کار را هم بعنوان هدف دوم

Annex 168

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مجلس شورای اسلامی دوره ۸ جلسه ۱۹۳

رئیس جلسه: علی اردشیرلاریجانی تاریخ: ۱۳۸۹/۳/۱
شماره روزنامه رسمی: ۱۸۹۸۱ زمان: ۸:۳۸ تا ۱۳:۲

فهرست متن جلسه اسکن صفحات

۱ ۲ ۳ ۴ ۵ ۶ ۷ ۸ ۱۰ ۱۳ ۱۴ ۱۵ ۱۶ ۱۷ ۱۸ ۱۹
۳۰ ۳۱ ۳۲ ۳۳ ۳۴ ۳۵ ۳۶ ۳۷

شما انجام می‌دهید.

سومین هدفی که از این فوریت دنبال می‌شود، یکسری قوانین معطل‌مانده‌ای است که شما بهرحال با یک همگرایی در این مجلس و مجلس گذشته تصویب شده، مثلاً قانون الزام دولت به پیگیری حقوق (۸۰) هزار جانباز شیمیایی در جنگ که (۱۱۴) شرکت عمدتاً غربی طبق قوانین بین‌المللی و طبق قوانین داخلی خود آن کشورها و بویژه طبق قوانین ایران مقصر هستند برای دفاع از حقوق این عزیزان، جانباز شیمیایی شما می‌خواهد علیه کشوری شکایت کند، چون مصونیت دارد دست قاضی بسته است، قانون دومی که یک فوریت آن را همین جا تصویب کردید، پیگیری حقوق ایرانیانی است که در مناطق اشغال‌شده، حقوقشان توسط اشغالگران ضایع شده، شما دست قاضی را در این باره باز می‌گذارید، اموال و جانشان، اینها شکنجه شدند، بروید در مرز خیلی از اینها را می‌بینید که الان نمی‌توانند به حقوقشان برسند.

نتیجه این فوریت که بنده به همراه دوستان یک فوریت را پیشنهاد دادیم چون برای این که به کمیسیونها برود، کمیسیون قضایی و امنیت و دیگر دوستان کار را کاملاً حلاجی کنند، هر چند که این حاصل یک سلسله کارهای کارشناسی است که در پیگیری قوانینی که قبلاً عرض کردم ما انجام دادیم، احساس کردیم این نقصها وجود دارد. نتیجه‌ای که شکل می‌گیرد این است:

۱ ـ دادگاه ایرانی دادگاه صالحه می‌شود در پیگیری حقوق ایرانی نسبت به دولت خاطی خارجی، دولتی که مصونیت ما را نقض کرده است را می‌توانیم در قالب همین قانون حقوق خودمان و حقوق ایرانیان را پیگیری کنیم.

۲ ـ نتیجه بسیار مهم دیگر این است که شما اولین کشوری که مصونیت قضایی آن را لغو می‌کنید کشور آمریکاست. کشوری که مصونیت قضایی ما را لغو کرده و احکام ناعادلانه هم صادر کرده، ما احکام عادلانه علیه آن صادر می‌کنیم.

لذا خواهش من این است با رأی بالا دوستان عزیز رأی بدهند، این یک کار حقوقی است، (اسناد معتبر ما مثلاً ۸۰ هزار جانباز شیمیایی ما) هیچ کشوری در دنیای امروز هیچ سندی به اندازه این سند مذموم در اختیار ندارد، می‌توانید پیگیر شوید. خواهش من این است که حتماً رأی کامل بدهید.

رئیس ـ تشکر می‌کنیم. مخالف ندارد پس موافق هم صحبت نمی‌کند. حضار ۱۹۵ نفر، همکاران محترم پیشنهاد یک فوریت این طرح مهم را به رأی می‌گذاریم. پایان رأی‌گیری را اعلام می‌کنیم، با رأی بسیار بالایی که پیام خیلی خوبی خواهد داشت تصویب‌شد. میهمانان جلسه را معرفی بفرمایید.

(افراد) ـ بسم‌الله الرحمن الرحیم

بازگشت به بالا

Annex 168

The Parliamentary [Majlis] Debates

Eighth Period, Fourth Session

Session No. 403

Date: Tuesday, March 6, 2012 [Esfand 16, 1390]

Pages: 15-18

11. The Ratification of the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments, which has one-degree urgency.

Deputy Speaker: Please read the next item.

Secretary (Mohebbi-nia): The next issue on the agenda is the report of the Judicial and Legal Committee with respect to "The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments" ratified in 1999 and amended in 2000. This bill has one-degree urgency.

We are at the disposal of Mr. Rahimi, the speaker of the Judicial Committee, to present the report.

Amin-Hossein Rahimi (Speaker of the Judicial and Legal Committee):

In the name of God,

The Report of the Judicial and Legal Committee to the Islamic Consultative Assembly

The draft of the Bill Amending the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments, enacted in 1999 and amended in 2000, bearing the printed number 1076, which had been referred to this Committee as the primary Committee, has been reviewed and discussed in the presence of the experts of executive departments, has eventually been approved in the form that follows. Its report is hereby submitted to the Assembly.

Chairman of the Judicial and Legal Committee, Ali Shahrokhi

I advise my dear colleagues that we previously had two laws for hearing civil claims against foreign governments which had been enacted in the years 1999 and

2000. Due to the actions taken by certain foreign governments contrary to international regulations which violated the judicial immunity of the Islamic Republic of Iran, the said laws had certain deficiencies which made those laws insufficient for taking reciprocal action. Therefore, the draft of a new law which was signed by some of our friends was received by the Committee. Experts attended and eventually, instead of amending the old laws, we prepared a new draft of the law wherein the said deficiencies were taken care of and the new law will supersede the previous laws. This law enables the Judiciary of the Islamic Republic of Iran in Tehran to hear claims of legal entities and actual persons against any government that violates the judicial immunity of the Islamic Republic of Iran and to issue judgment for the payment of damages. The draft, which has been approved by the Committee, includes damages resulting from any action and activity of foreign governments from both inside and outside Iran that are against international law and lead to death, physical or psychological injuries, or financial loss. It also includes the action and activities of terrorist individuals and groups inside and outside of Iran that are encouraged or supported by a foreign government.

In any event, its articles will be read and, when we review the law in detail, we shall hear our friends' comments. This draft remedies the deficiencies that existed in the previous laws. With God's blessing, it shall be a good law, in order to confront the governments and countries that violate the judicial immunity of the Islamic Republic of Iran. Because of the judgments issued by their courts, international laws are violated and the assets of the Islamic Republic of Iran are seized. We shall have [a] reciprocal action particularly due to the actions taken by those governments in Iran and the support they previously granted to terrorist groups in Iran. This law shall be retroactively effective. Hence, those who have suffered from these governments may file legal action in the Tehran Judiciary and seek damages. Dear colleagues, please vote.

Deputy Speaker:

The Bill Amending the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments is under consideration. I invite those opposed.

Secretary (Farhangi) – Mr. Haydari, please proceed.

Nurollah Haydari-Dastnayi:

In the name of God,

Greetings. I have a few brief points.

The first point is that the main issue is naturally defendable. That is, we definitely must take an appropriate, definite, and lawful approach against the problems, difficulties and damages created by chauvinistic governments and any government that acts against our holy Islamic republic and our esteemed nation. Nevertheless, I am not in favor of this draft for two main reasons. The first reason is that if the dear members of the Judicial and Legal Committee review the records and the background of this issue, as well as the previous and existing laws, there is no efficiency in what our Consultative Assembly has enacted during eight periods of its existence. The existing laws meet the requirements.

The second and last reason, which is more important, is that the dear members of the Committee and colleagues should note that any decision that we adopt in the Assembly or in any other part of the country which is somehow related to international relations, must be reviewed very carefully. We may have a good intention but God forbids it to have undesirable impacts in the field of international relations. To support my point, I request that you read a few pages of the report by the Research Center of the Assembly. The dear experts of this Center have, as they always do, researched the present draft and have studied its positive and negative points. This report, on balance, indicates that we do not need such a draft because, first, our laws are sufficient, and second, we have not applied or utilized the provisions of international laws to their full capacity. If my dear colleagues and members of the government and the Committee apply the laws we presently have to the same extent that currently exists in the international system, we shall be able to fully defend our country's interest in all respects using the existing international laws, without facing any risks or challenges that these amendments may entail.

On this basis, I believe that dear colleagues should be careful. By rejecting this draft, we shall not have any deficiency in the defense of our beloved country's interest. Therefore, please cast your votes against this draft. Thank you.

Deputy Speaker: Thank you very much. Now, a deputy in favor is invited.

Secretary (Farhangi): Dr. Jalali, please proceed.

Kazem Jalali:

In the name of God,

The draft that is under consideration – on April 21, 2010 [Ordibehesht 1, 1389] it was decided that this law is urgent – is one of the necessary laws, and we have deficiencies in our law. Part of what was said by our colleague Mr. Haydari is valid, but we have a lot of deficiencies in the present law. One of the deficiencies concerns legal entities [individuals] in the Islamic Republic of Iran. In practice, the government files legal actions with respect to legal entities. Some of these deficiencies concern legal entities. This means that if these legal entities somehow sustain damages due to the violation of international rules and standards, now against these persons, both legal and real, the government of the Islamic Republic of Iran may file legal action or take reciprocal action. Presently, this is not explicitly addressed in the law we presently have.

Another problem that exists concerns damages resulting from the action and or activities of terrorist persons or groups inside or outside of Iran. Our judicial system may also take action in this respect.

I submit to my dear and esteemed colleagues that presently, due to the deficiency that exists in our law and the lack of action on the part of the organizations that are responsible [for enforcing the law], we have not filed any action in courts, even though the Islamic Republic of Iran has sustained damages in many instances. For instance, one of the countries that has sustained the highest degree of damages in connection with terrorism is the Islamic Republic of Iran. Unfortunately, with respect to actual persons or legal entities, we have the fewest cases and have pursued [those claims] the least. In fact, the fact that those claims have been pursued the least has given rise to an organization like the Mojahedin [MEK] who claim that they have carried out 48 thousand terror attacks inside the country, has found a place for itself in the European Parliament and by carrying a few pictures and photographs tries to impress the deputies in the European Parliament. Thus, it is necessary that we have a law and various organizations be responsible.

Presently, in this draft it has been specified that the list of terrorist individuals and groups shall be prepared by The Ministry of Intelligence and shall be sent to The Ministry of Justice and that The Ministry of Intelligence and Ministry of Justice must pursue this matter. These issues must be pursued in courts. Of course, in addition to writing the laws, we must ensure that our organizations enforce these laws. We are one of the countries that has sustained the most damages due to the use of chemical weapons. Unfortunately, we have not pursued these issues legally and before judicial authorities. We must pursue the issue before [the] judicial

system and take reciprocal action through the judiciary. If we do not act and do not take serious action with respect to filing claims in connection with issues such as terrorism, the use of chemical weapons, etc., it will be too late tomorrow.

These days, at many gatherings, when we arrive, people are surprised when we tell them that chemical weapon has been used against us and our freedom fighters have sustained injuries, even though one can say that some people pretend to be deaf. Nevertheless, we must know that we have not made enough efforts and the result is not good. Part of it is due to deficiencies in our laws that will be remedied by the draft we present. When we correct this part, the other part concerns the enforcement of the laws that must be carried out.

We believe that the present draft is very necessary. For instance, in many cases when Iranian nationals would like to file a claim, retaining an attorney and filing the legal action would be costly and therefore they change their mind. We should create an environment for Iranian nationals to claim their rights before courts. It is not right to leave an Iranian national who has sustained damages due to terror and terrorism or due to an action which was against international law alone and tell him to file his own claim before international court if he likes. He would not be able to pay the litigation costs. In this respect, we definitely must create certain possibilities to enable him to pay for the litigation cost.

Therefore, I believe the draft which has been prepared is very necessary and hope that my esteemed colleagues will approve it with a high majority. Thank you.

Deputy Speaker: Thank you. Invite the next person opposed.

Secretary (Farhangi): Mr. Yousef-nejad, please proceed.

Ali-Asghar Yousef-nejad:

In the name of God,

The laws that were enacted in the years 1999 [1378] and 2000 [1379] contain more forceful and effective provisions than what has been provided in the present draft. I hoped that the representative of the Committee and the deputy who spoke in favor of the draft would address the advantages and the reasons why the present draft is better that the laws of 1999 and 2000 and to inform the Assembly why this draft is being presented and why the laws of 1999 and 2000 must be superseded.

This is what we are looking for, and Mr. Jalali is aware of it. I am surprised by his statements. What has been provided for in the present draft is acceptable in general

and has been provided in the previous laws. Preventing the violation of international law, with respect to actual persons or legal entities is a general issue and is acceptable. It is obvious and does not need any explanation. What I expected to hear was the reasons why the present draft is better than what we presently have. Therefore, my question from the next person who speaks in favor of the present draft and from the representative of the Committee is whether we have sufficient laws or not. We have sufficient laws, but we have not applied the law to its legal capacity. Under the conditions which exist for us, we do not need to increase the jurisdiction of the courts. If the jurisdiction of the courts needs to be increased (which it does not) to pursue claims against foreign nationals, the existing laws enable us to achieve our goals. Our problem is execution. We are unable to execute. What the representative of the Committee should explain is as follows: The Islamic Republic of Iran has adhered to and joined the 2004 Convention of the United Nation with respect to judicial immunity. With respect to government assets, in connection with judicial immunity, we have agreed to apply international capacity, not to enact a law that may give rise to the possibility that other countries will also take reciprocal action in their own country.

I seek an explanation. specifically with respect to Article (12) of the UN Convention of the year 2004. Iran has adhered to and joined this convention. Are the obligations of the Islamic Republic of Iran consistent or inconsistent with this convention? The representative of the Committee should please explain.

Therefore, I did not see what I was looking for in this draft. There is nothing new. We have an enforcement problem. It may even create many problems for us in the future. I urge my colleagues to be careful and not to vote in favor of the present draft, but to let us apply the legal capacities on the international level as well as the laws of 1999 and 2000 that are specific and effective. The new draft does not offer us anything. Please be careful so hopefully there won't be any problem.

Deputy Speaker: Thank you. Invite the next person in favor.

Secretary (Farhangi): The last person who is in favor is Mr. Qorbani. Please proceed.

Musa Qorbani: In the name of God,

Dear friends, in today's environment we cannot remain idle and not pursue our claims. When something happens here and there, we have been inactive and have only watched. Our friends state that there are problems in the process of

enforcement [of the laws]. No problem. You should address such problems and solve the issue.

In any event, the Ministry of Foreign Affairs and the President's office must also take action. Legal actions should have already been filed under the previous law. That is a separate issue, and we have to find a solution for it as well. Those friends who are involved in this issue, however, testify that the existing laws are not sufficient and must be amended.

All the aspects have been considered in the present draft. We cannot stay idle against the countries that inflict damage on Iranian nationals or the terrorist groups that are supported by certain countries, or even if they are not supported. They inflict damage on the Iranian people, the government, and the system. We cannot be idle while they strike here and there. Those who are in charge must know their legal duties and have the authority to pursue. Our courts must be authorized to examine [the claims]. From the view point of enforcement, such claims must be filed and pursued. These are all provided for here. I urge my colleagues to vote in favor of these general issues.

Now, if they have suggestions and would like to suggest that something be deleted or amended, that is fine. The Legal Committee, with the cooperation of pertinent organizations, has reviewed and discussed [the present draft]. The issue is that we would like to take reciprocal action against those who inflict damage on and harm, the Islamic Republic of Iran and our nationals. This is a natural right. It accords with international custom , and there is not any problem.

Deputy Speaker: Thank you. The government and the Committee are in favor. The draft of "The Law of Jurisdiction of Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments" is under consideration. The report of the Committee was read. Those who were in favor of and opposed to the draft spoke. The government is also in favor of the draft.

Present are 199 deputies. We cast votes on the draft in general. Please participate in casting a vote. I declare the end of voting. It was ratified.

Parliamentary Debates

Eighth Period, Fourth Session

Session No. 404

Date: Wednesday, March 7, 2012 [Esfand 17, 1390]

Page 2:

3. The Ratification of "The Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Governments," which has one-degree urgency.

Deputy Speaker: Please read the agenda.

Secretary (Mohebbi-Nia): The agenda consists of the continuation of the examination of the report of the Judicial and Legal Committee with respect to the one-degree urgency of the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims Against Foreign Government. Mr. Engineer, in [our] meeting yesterday we, with our colleagues' permission, agreed on the bill in general. Now we start the final consultation. Article (1). There is not a proposal.

Deputy Speaker: Please read [the article] for the vote.

Secretary (Mohebbi-Nia):

Article 1:

Under the present law, in order to confront and prevent a violation of the rules and standards of international law, actual persons and legal entities may file a lawsuit at the Tehran Justice Department against the actions of foreign governments that breach the judicial immunity of the government of the Islamic Republic of Iran or its officials. In such a case, the court with which the claim is filed is required, as a reciprocal action, to hear such claims and to enter an appropriate judgment according to the law.

The list of governments that fall under reciprocal action shall be prepared by the Ministry of Foreign Affairs and shall be communicated to the Judicial Branch.

The instances covered by the present article are as follows:

a) Damages resulting from any type of action or activity of foreign governments, inside or outside of Iran, that is against international law and that leads to death, physical or psychological injuries, or the financial loss of individuals.

b) Damages resulting from the action or activity of terrorist persons or groups, inside or outside Iran, that is encouraged or supported by a foreign government or when a foreign government authorizes [such persons or groups] to reside in, travel through, or have activities inside its own sovereign territory and such actions lead to death, physical or psychological injuries, or financial loss.

The list of terrorist persons or groups shall be prepared by The Ministry of Intelligence and shall be communicated to the Judicial Branch.

Deputy Speaker: Present are 199 deputies. Article (1) is under consideration. Deputies, please cast your votes. I declare the voting process closed. It was ratified. Please read the next article.

Secretary (Mohebbi-Nia):

Article 2:

If the cause of action of the claims that constitutes the subject matter of the present law occurs before the enactment of the present law, such claims may be filed and heard [under this law].

Deputy Speaker: Present are 198 deputies. Article (2) is under consideration. Deputies, please cast your votes. I declare the voting process closed. It was ratified. Please read the next article.

Secretary (Mohebbi-Nia):

Article 3:

If other governments provide assistance and cooperate in the course of execution of the judgments that violate the immunity of the Islamic Republic of Iran or its officials, they shall be subject to the provisions of this law.

Deputy Speaker: Present are 197 deputies. Article (3) is under consideration. Deputies, please cast your votes. I declare the voting process closed. It was ratified. Please read the next article.

Secretary (Mohebbi-Nia):

Article 4:

With regard to the principle of reciprocal action, in evaluating physical and emotional damages, as well as the punitive damages of the victims, the standard shall be similar to [that of] the judgments issued by foreign courts.

Note: The judgment debt shall be determined in Rials and its equivalent in gold at the price when the judgment is issued and shall be calculated and mentioned in the judgment.

Deputy Speaker: Present are 198 deputies. Article (4) is under consideration. Deputies please cast your votes. I declare the voting process closed. It was ratified. Please read the next article.

Secretary (Mohebbi-Nia):

Article 5:

Court charges and the tax [fee] of the attorneys of plaintiffs for this type of claim shall, after the judgment is executed, be deposited in the general treasury.

Deputy Speaker: Present are 200 deputies. Article Five is under consideration. Deputies, please cast your votes. I declare the voting process closed. It was ratified. Please read the next article.

Secretary (Mohebbi-Nia):

Article 6:

The courts of Iran (the Justice Department of Tehran) shall have jurisdiction in hearing claims against foreign governments in the following instances:

1. At the time the incident occurs or at the time the claim is filed, the victim or those who survive them are of Iranian nationality.

2. At the time the damage is inflicted, the victim is employed by the government of the Islamic Republic of Iran.

Deputy Speaker: Present are 201 deputies. Article (6), including the two parts that were read, is under consideration. Deputies, please cast your votes. I declare the voting process closed. It was ratified. Please read the next article.

Secretary (Mohebbi-Nia):

Article 7:

Claims against the agents or authorities of, or entities affiliated with or under the control of, foreign government, shall, with regard to the principle of reciprocal action, be heard when damages have resulted from actions that constitute the subject matter of the present law.

Deputy Speaker: Present are 201 deputies. Article (7) is under consideration. Deputies please cast your votes. I declare the voting process closed. It was ratified. Please read the next article.

Secretary (Mohebbi-Nia):

Article 8:

The properties owned by the government, its officials, its representatives, or entities affiliated with or under the control of the foreign government shall, with regard to the principle of reciprocal action, not be immune from the execution [of the judgments entered under the present law].

Deputy Speaker: Present are 200 deputies. Article (8) is under consideration. Deputies, please cast your votes. I declare the voting process closed. It was ratified. Please read the next article.

Secretary (Mohebbi-Nia):

Article 9:

Except in the following instances, the provisions specified in international treaties that are enforceable relative to the government of the Islamic Republic of Iran shall not be subject to the ruling set forth in Article (8) of this law:

a. Income earned from the leasing, mortgage, or sale of the properties of the foreign government.

b. Properties of the foreign government that are transferred to others with the intention of evading the application of this law.

c. Properties that have immunity based on international regulations and that are subject to the process of execution in the foreign country that falls

under the provisions of this law, shall be subject to the process of execution.

Deputy Speaker: Present are 198 deputies. Article (9) is under consideration. Deputies, please cast your votes. I declare the voting process closed. It was ratified. Please read the next article.

Secretary (Mohebbi-Nia):

Article 10:

The executive regulations of the present law shall be prepared during the next three months by the ministries of Justice, Foreign Affairs, and Intelligence and shall be ratified by the Council of Ministers.

Deputy Speaker: Present are 198 deputies. Article Ten is under consideration. Deputies, please cast your votes. I declare the voting process closed. It was ratified. Please read the next article.

Secretary (Mohebbi-Nia):

Article 11:

As of the date on which this law becomes enforceable, the Law of Jurisdiction of the Justice Department of the Islamic Republic of Iran for Hearing Civil Claims against Foreign Governments, ratified on November 9, 1999 [Aban 18, 1378] and its subsequent amendments, ratified on November 1, 2000 [Aban 11, 1379], are superseded.

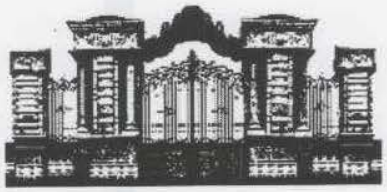
Deputy Speaker: Present are 200 deputies. Article (11) is under consideration. Deputies, please cast their votes. I declare the voting process closed. It was ratified.

بِسْمِ اللَّهِ الرَّحْمنِ الرَّحِيمِ

جلسه چهارصد و سوم
(403)

16 اسفند ماه 1390 هجری‌شمسی
13 ربیع‌الثانی 1433 هجری‌قمری

مشروح مذاکرات مجلس شورای اسلامی



دوره هشتم ـ اجلاسیه چهارم

1391 ـ 1390

صورت مشروح مذاکرات جلسه علنی روز سه‌شنبه شانزدهم اسفند ماه 1390

فهرست مندرجات:

«جلسه ساعت هشت و سی دقیقه به ریاست آقای محمدرضا باهنر «نایب‌رئیس» رسمیت یافت»

مدیریت و برنامه‌ریزی کشور موظف شده بود همه‌ساله میزان گزارش پیشرفت کشور را در مقایسه با سایر کشورها بر اساس شاخص‌های بین‌المللی مورد سنجش قرار بدهد و ارزیابی موقعیت کشور را در زمینه‌های مختلف اقتصادی، اجتماعی، فرهنگی و سیاسی به مقام معظم رهبری، مجلس و دولت تقدیم کند. متأسفانه در طول سال‌های برنامه این گزارش به هیچ وجه تهیه یا ارائه نشد و در واقع نگرانی ما بیشتر می‌شود از این جهت دولتی که اعلام می‌کند خدمات فراوان و شایسته‌ای داشته ثمربخشی و نتیجه کارهایش باید قاعدتاً در چنین گزارشی نمود پیدا بکند، نتیجه همه زحمت‌ها حالا چه مجلس و چه دولت در تصویب برنامه، در تصویب بودجه و قوانینی که هست به نتیجه و سرانجام برسیم. واقعاً جای گله دارد که دولت این گزارش را تهیه نکرد و مجلس هم عرض کردم حالا از عمر این مجلس گذشت ولی ان‌شاءالله مجلس آینده روی این مطلب حساسیت داشته باشند و واقعاً پایش کنند که ما به چه سمتی داریم پیش می‌رویم و گزارش لازم را به مردم بدهند در واقع خود مسؤولین نظام آمدند به مردم اعلام کردند که در همه زمینه‌ها ما شما را ظرف بیست سال به جایگاه اول منطقه خواهیم رساند. طبعاً جمهوری اسلامی صرف‌نظر از رقابت‌هایی که در عرصه بین‌المللی هست و تلاشی که با پدید آمدن فناوری‌های جدید در عرصه اجتماعی ـ اقتصادی کشورها دارد اتفاق می‌افتد باید تلاش کند که در رتبه برتر قرار بگیرند و طبعاً از کشور عزیز ما با پتانسیل انقلابی که دارد و با بهره‌گیری از آرمان‌های اسلامی انتظار می‌رود شایستگی و برتری خودش را در این زمینه نشان بدهد.

حالا قطعاً ما باید این حساسیت را داشته باشیم که ببینیم به این سمت حرکت کردیم یا نکردیم؟ در واقع هفت سال از عمر بیست‌ساله سند چشم‌انداز گذشته و یک‌سوم از عمر سند سپری شده. ما در بحث مهندسی مطلبی به اسم مهندسی ارزش داریم یعنی در واقع در طول کار همواره پایش می‌کنیم آن طرحی که داریم تهیه می‌کنیم آیا متناسب با نیازها هست؟ مخصوصاً وقتی شرایط عوض می‌شود نیازها عوض می‌شود و مرتب پایش می‌شود، این را مهندسی ارزش می‌گویند. قطعاً ما با گذشتن یک‌سوم از عمر سند چشم‌انداز لازم است بدانیم که تا چه اندازه و در چه زمینه‌هایی به سمت هدف سند چشم‌انداز پیش رفتیم و در چه حوزه‌هایی عقب‌تر رفتیم.

نگرانی در مورد این موضوع وقتی بیشتر می‌شود که آقای رئیس‌جمهور دو مطلب متناقض را در رابطه با سند چشم‌انداز مطرح کردند؛ یک‌بار اشاره کردند که ما لازم نیست که (20) سال صبر کنیم تا سند چشم‌انداز محقق بشود. ما ظرف (10) سال مملکت را به جایگاه اول منطقه خواهیم رساند و بعد از مدتی هم متأسفانه حرف دیگری زدند و آن این بود که تحقق سند چشم‌انداز منوط به تغییر مناسبات جهانی است و طبعاً بعنوان رئیس اجرایی دولت این مطلب قابل قبول نیست که در ارتباط با مهمترین سند بالادستی، مدیریتی و برنامه‌ریزی کشور چنین حرفی را بزند و در واقع ایشان باید پاسخگوی حداقل دوره عملکرد خودشان باشند و در ارتباط با عملکرد برنامه چهارمی که ایشان عمدتاً مسؤولیت اجرایی آن را داشتند.

به هر حال این نگرانی‌ها وجود دارد گزارش‌هایی که می‌آید نشان می‌دهد که در بعضی از زمینه‌ها کشور توفیقاتی داشته و در بعضی از زمینه‌ها نه، مشخصاً ما در زمینه پس‌انداز ملی و درصد GDP گزارش‌هایی که ما در اختیار داریم، از رتبه هفتم از (22) کشور به رتبه بیست و دوم تنزل کردیم و در زمینه تورم از رتبه هجدهم به رتبه بیستم رسیدیم. خوب این قطعاً شایسته کشور انقلابی و نظام انقلابی ما نیست و انتظاراتی که مردم دارند همانطورکه عرض کردم در بعضی از حوزه‌ها هم موفق بودیم مثلاً در بحث رشد علمی و از نظر کمی حداقل ما موفقیت‌های خوبی داشتیم ولی در بحث کیفی آن یک مقدار حرف و حدیث است.

(در این هنگام آقای سیدشهاب‌الدین صدر ریاست جلسه را به عهده گرفتند)

به نظر می‌رسد این موضوع، موضوع بسیار مهمی است و خواهش من این است که دوستان در هر حال توجه کنند. رسانه‌ها این مطلب را با حساسیت دنبال کنند. به هر حال وقتی ما داریم اعلام می‌کنیم که کشور را ظرف (20) سال به جایگاه اول منطقه می‌رسانیم، واقعاً باید این صداقت را داشته باشیم و حداقل در مقاطعی این گزارش را به مردم بدهیم که در این سمت حرکت کردیم یا نه؟ به هر حال مردم با شرکت‌شان در انتخابات در واقع دارند بلیط این سند چشم‌انداز را از ما می‌خرند و انتظار دارند که ما به این مقصد برسیم. درست نیست که مردم با این انتظار به ما اعتماد کنند و خدای ناکرده آن موفقیت‌هایی که به مردم اعلام کردیم نداشته باشیم. ان‌شاءالله با این ارزیابی این مسأله روشن می‌شود و تأثیرگذاری داشته باشد در برنامه‌های آتی که مجلس تدوین می‌کند.

جناب آقای دکتر صدر من ضمن خیرمقدم خدمت جناب‌عالی هم فکر می‌کنم با توجه به فرصت زمانی که مجلس دارد امکان تحقیق و تفحص نیست مخصوصاً بحث بررسی بودجه، من فقط خواستم که طرح موضوعی شده باشد اگر که جناب‌عالی هم صلاح بدانید دیگر رأی‌گیری نشود و ما به همین مقدار اکتفا کنیم.

نایب‌رئیس ـ خیلی ممنون و متشکر از توضیحات جناب‌عالی. از جناب آقای اولیاء هم تشکر می‌کنیم. گزارش کمیسیون برنامه و بودجه هم رد تقاضای تحقیق و تفحص بود با توجه به توضیحاتی هم که دادند این که وقت اقتضاء نمی‌کند که این کار انجام بگیرد.

11 ـ تصویب کلیات طرح یک‌فوریتی صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولت‌های خارجی

نایب‌رئیس ـ دستور بعدی را اعلام بفرمایید.

دبیر (محبی‌نیا) ـ دستور بعدی گزارش کمیسیون قضایی و حقوقی در مورد طرح یک‌فوریتی اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولت‌های خارجی مصوب 1378 و اصلاحیه 1379 می‌باشد.

در خدمت جناب آقای رحیمی سخنگوی محترم کمیسیون قضایی برای ارائه گزارش هستیم.

امین‌حسین رحیمی (سخنگوی کمیسیون قضایی و حقوقی) ـ بسم‌الله الرحمن الرحیم

گزارش کمیسیون قضایی و حقوقی به مجلس شورای اسلامی

طرح اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی مصوب 1378 و اصلاحیه 1379 به شماره چاپ (1076) که جهت رسیدگی به این کمیسیون به عنوان کمیسیون اصلی ارجاع شده بود در جلسات متعدد با حضور کارشناسان دستگاههای اجرایی مورد بحث و تبادل نظر قرار گرفت و نهایتاً با اصلاحاتی در عنوان و متن به شرح زیر تصویب شد. اینک گزارش آن تقدیم مجلس محترم شورای اسلامی می‌گردد.

رئیس کمیسیون قضایی و حقوقی ـ علی شاهرخی

خدمت همکاران عزیز عرض می‌شود که ما قبلاً برای رسیدگی به دعاوی مدنی علیه دولت‌های خارجی دو قانون داشتیم که در سال 78 و 79 تصویب شده بود اما با اقداماتی که در نقض مقررات بین‌المللی توسط بعضی از دولت‌های خارجی انجام می‌شود و مصونیت قضایی دولت جمهوری اسلامی را نقض می‌کنند آن قوانین سابق ایراداتی داشت که برای برخورد عمل متقابل کفایت نمی‌کرد. لذا طرحی تهیه شده بود که دوستان امضاء کرده بودند به کمیسیون آمد، کارشناسان حضور پیدا کردند و نهایتاً به جای این که آن قوانین قبلی را اصلاح کنیم یک قانون جدید با رفع آن نواقص نوشته شد و آن دو قانون قبلی لغو شد و نقض گردید. این قانون این اختیار را می‌دهد که هر دولتی مصونیت قضایی دولت جمهوری اسلامی ایران را نقض کند، محاکم دادگستری جمهوری اسلامی ایران در تهران صلاحیت دارند که به شکایات اشخاص حقیقی و حقوقی علیه آن دولت رسیدگی کنند و حکم پرداخت خسارت صادر کنند و مواردی که در این مصوبه کمیسیون آمده خسارت ناشی از هرگونه اقدام و فعالیت دولت‌های خارجی در داخل یا خارج ایران که مغایر با حقوق بین‌الملل و منجر به فوت یا صدمات بدنی یا روانی یا ضرر و زیان مالی اشخاص شود و همچنین خسارات ناشی از اقدام یا فعالیت اشخاص یا گروه‌های تروریستی در داخل یا خارج ایران که دولت خارجی آنها را تشویق یا از آنان حمایت کند.

به هر صورت مواد آن را در زمان بررسی جزئیات قرائت می‌کنند و نظرات دوستان را هم می‌شنویم. این طرح که عرض کردم نواقص آن قوانین قبل را مرتفع کرده، قانون خوبی ان‌شاءالله خواهد شد برای برخورد با دولت‌ها و کشورهایی که مصونیت قضایی دولت جمهوری اسلامی را نقض می‌کنند و با احکامی که در دادگاه‌هایشان صادر می‌کنند موجب می‌شوند هم مقررات بین‌الملل نقض بشود و هم اموال دولت جمهوری اسلامی ایران در آنجا ضبط بشود ما هم عمل متقابل داشته باشیم مخصوصاً با اقداماتی که آن دولت‌ها در ایران و حمایت از گروههای تروریستی در ایران از قبل داشتند. این قانون گفتیم شامل موارد قبل از این هم خواهد شد. لذا کسانی که صدماتی از این دولت‌ها دیده‌اند می‌توانند در دادگستری تهران اقامه دعوی کنند و خساراتشان را بگیرند. تشکر می‌کنم، همکاران عزیز رأی بدهند.

نایب‌رئیس ـ طرح صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولت‌های خارجی مطرح است. مخالف را دعوت بفرمایید.

دبیر (فرهنگی) ـ آقای حیدری بفرمایید.

نورالله حیدری‌دستنایی ـ بسم‌الله الرحمن الرحیم

با عرض سلام و خسته نباشید خدمت همکاران گرامی. بنده خیلی کوتاه چند نکته را تقدیم می‌کنم.

نکته اول این که اصل این موضوع قاعدتاً قابل دفاع است یعنی ما حتماً باید با همه وجود در برابر اشکالات، ایرادات و خسارت‌هایی که دولت‌های استکبار و یا هر دولت دیگری علیه نظام مقدس جمهوری اسلامی ما و ملت بزرگوار ایران اعمال می‌کند، برخوردی مناسب قاطعانه و قانونمند داشته باشیم. منتها بنده به دو دلیل عمده با ارائه این طرح مخالفم. دلیل اول این است اگر عزیزان کمیسیون محترم قضایی و حقوقی به پیشینه این کار، قوانین گذشته و قوانین موجود نگاه کنند، آنچه را که مجالس ما در طی هشت دوره عمر خودش تصویب کرده ما خلائی را در این موضوع نمی‌بینیم. آنچه که تاکنون مورد نیاز بوده قوانین مصوب پاسخگو است.

مهمتر از آن و دلیل دوم و آخر، اگر عزیزان کمیسیون و همکاران گرامی دقت کنند هر تصمیمی که ما در مجلس یا هر بخش دیگری از کشور می‌گیریم و به نوعی با مناسبات بین‌المللی ارتباط پیدا می‌کند، باید با ظرافت خاص و دقت بیشتر... ممکن است ما یک اراده نیکی داریم اما خدای ناخواسته اثرات نه‌چندان خوشایندی را در گستره روابط بین‌المللی ما به جا می‌گذارد. بنده در تأیید این عرضم استدعا می‌کنم که گزارش چند صفحه‌ای مرکز پژوهش‌های مجلس را شما مطالعه کنید. عزیزان کارشناس این مرکز همچون همیشه نشسته‌اند در رابطه با این طرح واکاوی کردند، نقاط قوت و ضعفش را بررسی کردند، برآیند این گزارش نشان می‌دهد که ما نیازی به چنین طرحی نداریم به این دلیل که اولاً قوانین خودمان در این مسأله وافی و کافی است و دوم این که الان ما از ظرفیت‌های موجود قوانین بین‌المللی کمال استفاده را نبرده‌ایم. اگر عزیزان دولت و کمیسیون محترم این قوانینی را که الان در نظام بین‌المللی ساری و جاری است را ملاک عمل قرار بدهند ما با همین ظرفیت موجودی که در قوانین بین‌المللی وجود دارد، بدون این که کمترین چالش و آسیبی از قبل این گونه اصلاحیه‌ها به کشور برسد دقیقاً می‌توانیم در یک سطح برتر آن تفوق و برتری خودمان را در دفاع از منافع همه‌جانبه کشور داشته باشیم.

بر این اساس معتقد هستم که عزیزان دقت کنند ما با رد این اصلاحیه هیچ خلائی، هیچ قصور و کاستی‌ای در دفاع از منافع کشور عزیزمان نخواهیم داشت. بنابراین با رأی منفی خودتان این را ان‌شاءالله رد کنید، متشکرم.

نایب‌رئیس ـ خیلی ممنون، موافق را دعوت بفرمایید.

دبیر (فرهنگی) ـ آقای دکتر جلالی بفرمایید.

کاظم جلالی ـ بسم‌الله الرحمن الرحیم

طرحی که الان در مورد آن بحث می‌کنیم و قبلاً هم فوریت آن به تصویب رسید در تاریخ 1389/2/1 یکی از طرح‌های بسیار ضروری است و ما در قانون خلأ داریم. مطالبی که برادر عزیزمان جناب آقای حیدری فرمودند بخشی از آن مطالب، مطالب فاقد وجهی نیست اما ما در قانون فعلی خلأهای بسیار زیادی را داریم. بخشی از این خلأها به موضوع اشخاص حقوقی در نظام جمهوری اسلامی ایران بر می‌گردد که عملاً خود دولت در مورد اشخاص حقوقی اقامه دعوا می‌کند. به این معنا که چنانچه این اشخاص حقوقی بر اثر نقض مقررات و موازین حقوق بین‌الملل به نوعی خسارت ببینند حالا این اشخاص اعم از حقیقی و حقوقی، دولت جمهوری اسلامی ایران می‌تواند اقامه دعوا کند و یا عمل متقابل را انجام بدهد، در حالی که در قانون فعلی که ما داریم چنین مسأله‌ای با این صراحت ذکر نشده است.

مسأله دیگری که وجود دارد بحث خسارات ناشی از اقدام و یا فعالیت اشخاص یا گروه‌های تروریستی در داخل یا خارج از ایران است که در این خصوص هم باز دستگاه قضایی ما می‌تواند اقدام کند.

من خدمت همکاران عزیز و محترم عرض بکنم که اتفاقاً الان بر اثر همین خلأ قانونی و یا عدم اقدام لازم توسط دستگاههای مسؤول، علی‌رغم این که جمهوری اسلامی ایران در بسیاری از موارد خسارت دیده ما در دادگاه‌ها در مورد اینها پرونده‌ای را تشکیل ندادیم. مثلاً یکی از کشورهایی که بیشترین خسارت را در مسأله ترور و تروریسم دیده است جمهوری اسلامی ایران است. اما متأسفانه در مورد اشخاص حقیقی و یا حقوقی ما کمترین پرونده را داریم و کمترین پیگیری را کردیم. اتفاقاً همین کمترین پیگیری موجب شده که امروز ما می‌بینیم یک سازمانی مثل سازمان منافقین که خود سازمان منافقین مدعی است حدود (48) هزار ترور در داخل جمهوری اسلامی ایران انجام داده، بر اثر عدم پیگیری مسائل قضایی و حقوقی، ما می‌بینیم این‌ها در پارلمان اروپا جایگاهی باز کردند با در دست گرفتن چند تصویر و عکس در پارلمان اروپا تلاش می‌کنند نمایندگان اروپا را تحت تأثیر قرار بدهند. پس اتفاقاً لازم است که ما یک قانون داشته باشیم و دستگاههای مختلف را مکلف کنیم.

الان در این طرح کاملاً مکلف شدند که فهرست اشخاص یا گروه‌های تروریستی توسط وزارت اطلاعات تهیه و به قوه قضائیه اعلام می‌شود و وزارت اطلاعات و قوه قضائیه باید این موضوع را پیگیری کنند. در دادگاه‌ها باید این مسائل پیگیری بشود. البته ما باید تلاش کنیم که علاوه بر نوشتن قانون دستگاهها هم این قوانین را اجراء کنند. ما الان یکی از کشورهایی هستیم که بیشترین خسارت را از سلاح‌های شیمیایی دیدیم، اما متأسفانه پیگیری قضایی و حقوقی ما به عنوان این که پرونده‌ها موجود باشد و این را ما در دستگاههای قضایی پیگیری بکنیم و عمل متقابل به مثل را در بحث قضایی انجام بدهیم این‌ها نیست و متأسفانه اگر امروز ما نجنبیم و کار جدی درخصوص پرونده‌سازی برای موضوعاتی مثل تروریسم، مثل استفاده از سلاح‌های شیمیایی و غیره انجام ندهیم، فردا طبعاً دیر است.

همین امروز در خیلی از مجامعی که وارد می‌شویم برایشان خیلی عجیب است که وقتی ما می‌گوییم علیه ما سلاح شیمیایی استفاده شده و ما کلی جانباز شیمیایی داریم. اگرچه شاید بتوان گفت برخی‌ها خودشان را به کر بودن می‌زنند ولی در عین حال باید بدانیم که میزان عملکرد ما هم عملکرد درستی نبود. حالا بخشی از این عملکرد بر می‌گردد به ضعف قوانین که ما باید از طریق همین طرح‌هایی که داریم ارائه می‌دهیم، بخش ضعف قوانین را جبران کنیم یک بخشی هم بر می‌گردد به اجراء که باید اجراء انجام بشود.

ما فکر می‌کنیم این طرحی که الان نوشته شده طرح بسیار ضروری است، مثلاً شما نگاه کنید! خیلی از جاها اتباع ایرانی وقتی می‌خواهند اقدام کنند برایشان گرفتن وکیل و اقدام در دادگاه‌ها آنقدر هزینه دارد که منصرف می‌شوند. چرا ما نباید برای اتباع ایرانی یک فضایی را ایجاد کنیم که بتوانند در دادگاهها برای گرفتن حقوق خودشان شکایت کنند؟ این که ما یک ایرانی خسارت‌دیده ناشی از ترور و تروریسم یا خسارت‌دیده ناشی از یک اقدام خلاف موازین حقوق بین‌الملل را تنها بگذاریم، بگوییم حالا شما اگر خواستی برو در دادگاه‌های بین‌المللی شکایت کن. او اصلاً نمی‌تواند هزینه‌های دادرسی را بپردازد، در این خصوص حتماً ما باید برای او امکاناتی را ببینیم که این فرد بتواند هزینه‌های ناشی از دادرسی را بپردازد.

لذا من فکر می‌کنم این طرح که نوشته شده از طرح‌های بسیار ضروری است و ان‌شاءالله همکاران محترم حتماً با رأی بالایی این طرح را تصویب کنند، متشکرم.

نایب‌رئیس ـ خیلی ممنون، مخالف بعدی را دعوت بفرمایید.

دبیر (فرهنگی) ـ آقای یوسف‌نژاد بفرمایید.

علی‌اصغر یوسف‌نژاد ـ بسم‌الله الرحمن الرحیم

آن چیزی که در این طرح وجود دارد تقریباً قوی‌تر و مؤثرتر از آن در قوانین سال‌های 78 و 79 وجود دارد. من منتظر بودم که مخبر محترم کمیسیون یا موافق محترم در مورد برجستگی‌ها و امتیازات این طرح نسبت به قوانین سال‌های 78 و 79 مسائلی را عنوان کنند که مجلس در جریان قرار بگیرد چرا این طرح با از بین بردن قوانین مصوب سال 78 و 79 باید در مجلس مطرح شود؟

آن چیزی که ما به دنبالش هستیم قطعاً جناب آقای جلالی در جریان هستند و من از این اظهارنظر ایشان تعجب کردم. آن چیزی که در اینجا وجود دارد کلیات قابل قبول است در همان قوانین قبلی هم وجود داشته، جلوگیری از نقض مقررات و موازین حقوق بین‌الملل چه در مورد اشخاص حقیقی و حقوقی، این برای اقداماتی که مصونیت قضایی ما را نقض می‌کند این‌ها کلیات است و قابل قبول است، از دلایل بین است، توضیح واضحات است. من انتظار داشتم که این برجستگی‌ها و امتیاز را در این طرح ببینم که عنوان نشد. منتها سؤال من از موافق بعدی یا از مخبر محترم کمیسیون این است که آیا ما قانون به اندازه کافی داریم یا نداریم؟ قانون به اندازه کافی داریم، منتها از ظرفیت‌های قانونی استفاده نکردیم. از

شرایطی که برای ما وجود دارد در مورد دادگاه‌ها نیاز به افزایش صلاحیت دادگاه اصلاً نداریم. اگر پیگیری حقوقی اتباع خارجی نیاز به افزایش صلاحیت دادگاه‌ها داشت (که ندارد) همین قوانین موجود می‌تواند ما را به آن چیزی که ما می‌خواهیم در هدف و در مقدمه برساند. مشکل ما مشکل اجراء است. ما نمی‌توانیم اجراء بکنیم. اگر آن چیزی که جمهوری اسلامی ایران و حتماً مخبر محترم باید توضیح بدهند در کنوانسیون سال 2004 سازمان ملل متحد ایران متعهد شده و به آن پیوسته در مورد مصونیت قضایی، در مورد اموال دولتی در مورد مصونیت قضایی دولتی ما متعهد شدیم در آنجا وجود دارد از آن ظرفیت بین‌المللی استفاده کنیم. نه این که بیاییم قانونی را مشخص کنیم که ممکن است دیگر دول هم در کشور خودشان بیایند عمل متقابل انجام بدهند، طرح با هدف عمل متقابل طراحی شده ولی در عمل دارد آن را نقض می‌کند و چیز جدیدی را به وجود نمی‌آورد.

من خواهش می‌کنم توضیح بدهند، مخصوصاً در مورد ماده (12) کنوانسیون سال 2004 سازمان ملل متحد که ایران به آن پیوسته و ایران متعهد شده، آیا مغایر تعهدات جمهوری اسلامی ایران به این کنوانسیون نیست یا هست؟ مخبر محترم این را توضیح بدهند.

بنابراین آن چیزی که من به دنبالش بودم را در این طرح ندیدم، چیز جدیدی نیست، ما در اجراء مشکل داریم. حتی ممکن است بسیاری از مشکلات را در آینده برای ما به وجود بیاورد. خواهش می‌کنم همکاران دقت کنند و بهرحال به عنوان مخالف به آن رأی ندهند و اجازه بدهند از ظرفیت‌های قانونی در سطح بین‌المللی وهم قانون سالهای 78 و 79 که به صورت مشخص و مؤثر نوشته شده استفاده کنیم. این طرح چیز جدیدی را به ما نمی‌دهد. خواهش می‌کنم در این مورد دقت کنند که ان‌شاءالله مشکلی به وجود نیاید.

نایب‌رئیس ـ خیلی ممنون، موافق بعدی را دعوت بفرمایید.

دبیر (فرهنگی) ـ آخرین موافق جناب آقای قربانی هستند، بفرمایید.

موسی قربانی ـ بسم‌الله الرحمن الرحیم

دوستان عنایت بفرمایید، در فضایی که در دنیای امروز وجود دارد، ما نمی‌توانیم دست روی دست بگذاریم و حقوق خودمان را پیگیر نشویم. هر جا اتفاقی می‌افتد، ما نشسته‌ایم و نظاره می‌کنیم. دوستان می‌فرمایند که در اجراء مشکلاتی وجود دارد، خوب عیبی ندارد آنها را هم از مجرای خودش به سراغش بروید و بحث مسأله اجرایی را هم حل کنید.

به هر حال وزارت خارجه و ریاست جمهوری هم باید بجنبند، باید تا به حال براساس قانون قبلی پرونده تشکیل می‌شد و نباید سکوت می‌شد آنها هم سرجای خودش. برای آن هم باید راه‌حلی پیدا کنند. اما همه دوستانی که دست‌اندرکار این موضوع هستند، گواهی می‌دهند که وضعیت قانون فعلی کافی نیست و باید اصلاحاتی صورت بگیرد.

این قانون آمده همه جوانب را دیده، ما چه در برابر کشورهایی که به اتباع ایران خسارت وارد می‌کنند و چه در برابر گروههای تروریستی که مورد حمایت برخی از کشورها هستند یا حتی اگر مورد حمایت هم نیستند، نمی‌توانیم در برابر اینها سکوت کنیم. به مردم ایران، به دولت و نظام دارند خسارت وارد می‌کنند، این طرف و آن طرف ضربه می‌زنند و ما همین‌طور بنشینیم و تماشا کنیم. بالاخره مسؤولین مربوطه باید هم از جهت قانونی تکلیفشان روشن باشد و اجازه داشته باشند که پیگیری کنند. دادگاههای ما هم اجازه رسیدگی داشته باشند و هم از جهت اجرایی باید بروند این موارد را پیگیر شوند، پرونده را تشکیل بدهند. همه این موارد اینجا دیده شده و خواهش می‌کنیم دوستان محترم به کلیات این مطلب رأی بدهند.

حالا اگر در جزئیاتش پیشنهادی داشتند، جایی را می‌گویند حذف یا اصلاح شود، آنها سرجای خودش باقی است. کمیسیون قضایی با همراهی دستگاههای ذیربط مفصل نشسته‌اند بحث کرده‌اند. بحث این است که ما می‌خواهیم اقدام مقابله به مثل داشته باشیم با کسانی که موجب اذیت و آزار و خسارت به نظام جمهوری اسلامی و شهروندان ما می‌شوند و این یک حق طبیعی است. بنابر عرف بین‌الملل هم هست و هیچ مشکلی ندارد.

نایب‌رئیس ـ خیلی ممنون، دولت وکمیسیون موافق هستند، طرح صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولت‌های خارجی مطرح است. گزارش کمیسیون را شنیدیم. مخالف و موافق هم صحبت کردند و دولت هم موافق است.

حضار 199 نفر، کلیاتش را به رأی می‌گذاریم. همکاران در رأی‌گیری مشارکت بفرمایند. پایان رأی‌گیری را اعلام می‌کنیم، **تصویب شد.**

12ـ ناطقین جلسه عبارتند از آقایان: حسن کامران‌دستجردی، مصطفی کواکبیان، علی مطهری (تهران)، قدرت‌الله علیخانی و سیدعلی ادیانی‌راد

نایب‌رئیس ـ ناطقین میان دستور را دعوت بفرمایید.

دبیر (سبحانی‌نیا) ـ بسم‌الله الرحمن الرحیم

ناطقان جلسه امروز عبارتند از آقایان:

ـ جناب آقای حسن کامران‌دستجردی نماینده محترم اصفهان.

ـ جناب آقای مصطفی کواکبیان نماینده محترم سمنان.

ـ جناب آقای علی مطهری نماینده محترم تهران، شمیرانات، اسلامشهر و ری.

(که هر کدام هفت دقیقه وقت دارند)

ـ جناب آقای اسدالله عباسی نماینده محترم رودسر و املش.

ـ جناب آقای سیدعلی ادیانی‌راد نماینده محترم قائمشهر، سوادکوه و جویبار.

(که هر کدام پنج دقیقه وقت دارند)

جناب آقای دکتر کامران برای ارائه نطقشان تشریف بیاورند.

حسن کامران‌دستجردی ـ بسم‌الله الرحمن الرحیم

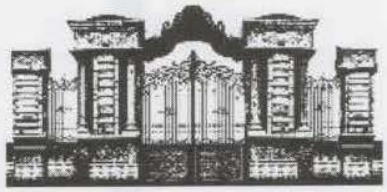
مقام معظم رهبری فرمودند کار را برای خدا بکنید نه اینکه چون مردم دوست دارند. اگر هدف این شد که دل مردم را به دست بیاوریم ناکام خواهیم ماند. در بهمن‌ماه بنده اینجا نطق داشتم که

بِسْمِ اللَّهِ الرَّحْمنِ الرَّحِيمِ

جلسه چهارصد و چهارم
(404)

17 اسفند ماه 1390 هجری شمسی
14 ربیع‌الثانی 1433 هجری قمری

مشروح مذاکرات مجلس شورای اسلامی



دوره هشتم ـ اجلاسیه چهارم

1390 ـ 1391

صورت مشروح مذاکرات جلسه علنی روز چهارشنبه هفدهم اسفند ماه 1390

فهرست مندرجات:

«جلسه ساعت هشت و سی و سه دقیقه به ریاست آقای محمدرضا باهنر «نایب‌رئیس» رسمیت یافت»

Annex 169

1 ـ اعلام رسمیت و دستور جلسه

نایب‌رئیس ـ بسم‌الله الرحمن الرحیم

جلسه با حضور 196 نفر از نمایندگان رسمی است. دستور جلسه را قرائت بفرمایید.

دبیر (محبی‌نیا) ـ بسم‌الله الرحمن الرحیم

دستور جلسه چهارصد و چهارم روز چهارشنبه هفدهم اسفندماه 1390 هجری‌شمسی مطابق با چهاردهم ربیع‌الثانی 1433 هجری‌قمری:

1 ـ ادامه رسیدگی به گزارش کمیسیون قضایی و حقوقی درمورد طرح یک‌فوریتی اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولت‌های خارجی مصوب 1378 و اصلاحیه 1379.

2 ـ گزارش کمیسیون انرژی درمورد طرح یک‌فوریتی قانون وزارت نفت.

3 ـ گزارش کمیسیون قضایی و حقوقی درمورد لایحه موافقتنامه استرداد مجرمین بین دولت جمهوری اسلامی ایران و جمهوری تاجیکستان.

4 ـ گزارش کمیسیون قضایی و حقوقی درمورد لایحه موافقتنامه استرداد مجرمین بین جمهوری اسلامی ایران و جمهوری بلاروس.

5 ـ گزارش کمیسیون اقتصادی درمورد لایحه موافقتنامه کمک و همکاری متقابل درمورد موضوعات گمرکی بین دولت جمهوری اسلامی ایران و دولت جمهوری خلق چین.

6 ـ گزارش کمیسیون اقتصادی درمورد لایحه موافقتنامه تشویق و حمایت متقابل از سرمایه‌گذاری بین دولت جمهوری اسلامی ایران و دولت جمهوری گینه بیسائو.

7 ـ گزارش کمیسیون کشاورزی، آب و منابع طبیعی درمورد لایحه یک‌فوریتی جامع منابع طبیعی و آبخیزداری کشور.

2 ـ تلاوت آیاتی از کلام الله مجید

نایب‌رئیس ـ تلاوت آیاتی از کلام الله مجید را آغاز بفرمایید.

(آیات 127 ـ 125 از سوره مبارکه «انعام» توسط قاری محترم آقای شاه‌بوداغی تلاوت گردید)

اعوذبالله من الشیطان الرجیم ـ بسم‌الله الرحمن الرحیم

فَمَنْ یُرِدِ اللَّهُ أَنْ یَهْدِیَهُ یَشْرَحْ صَدْرَهُ لِلْإِسْلامِ وَ مَنْ یُرِدْ أَنْ یُضِلَّهُ یَجْعَلْ صَدْرَهُ ضَیِّقاً حَرَجاً کَأَنَّما یَصَّعَّدُ فِی السَّماءِ کَذلِکَ یَجْعَلُ اللَّهُ الرِّجْسَ عَلَی الَّذِینَ لا یُؤْمِنُونَ * وَ هذا صِراطُ رَبِّکَ مُسْتَقِیماً قَدْ فَصَّلْنَا الْآیاتِ لِقَوْمٍ یَذَّکَّرُونَ * لَهُمْ دارُ السَّلامِ عِنْدَ رَبِّهِمْ وَ هُوَ وَلِیُّهُمْ بِما کانُوا یَعْمَلُونَ *

(صدق الله العلی العظیم ـ حضار صلوات فرستادند)

نایب‌رئیس ـ طیبه‌الله، از جناب آقای شاه‌بوداغی قاری محترم امروز و فرزند شهید بزرگوار شاه‌بوداغی و نفر اول مسابقات بین‌المللی عراق تشکر می‌کنیم. ترجمه آیات را قرائت بفرمایید.

(ترجمه آیات توسط آقای سیدجاسم ساعدی قرائت گردید)

به نام خداوند بخشنده مهربان

«خدا هر که را بخواهد هدایت کند، دلش را به روی اسلام می‌گشاید و هر که را بخواهد گمراه سازد دلش را تنگ می‌دارد چنان که گویی می‌خواهد به آسمان بالا رود و خدا کسانی را که ایمان نمی‌آورند اینچنین به پلیدی و نکبت دچار می‌سازد. اینک این راه راست پروردگار توست. ما بی‌گمان آیات را به روشنی برای مردمی که پند می‌پذیرند بیان کرده‌ایم. آنان را نزد پروردگارشان سرایی است امن و آسوده و او به پاداش آنچه می‌کرده‌اند، یار و یاور آنهاست». بر محمد و آل محمد صلوات (حضار صلوات فرستادند).

نایب‌رئیس ـ متشکریم.

3 ـ تصویب طرح یک‌فوریتی صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولت‌های خارجی

نایب‌رئیس ـ دستور جلسه را قرائت کنید.

دبیر (محبی‌نیا) ـ دستور عبارت است از ادامه رسیدگی به گزارش کمیسیون قضایی و حقوقی درمورد طرح یک‌فوریتی اصلاح قانون صلاحیت دادگستری جمهوری اسلامی ایران. آقای مهندس! در نشست دیروز ما کلیاتش را با اجازه همکاران تصویب کردیم، الان شور نهایی را شروع می‌کنیم. ماده (1) پیشنهادی نیست.

نایب‌رئیس ـ برای رأی‌گیری قرائت بفرمایید.

دبیر (محبی‌نیا) ـ ماده (1) ـ به موجب این قانون برای مقابله و جلوگیری از نقض مقررات و موازین حقوق بین‌الملل، اشخاص حقیقی و حقوقی می‌توانند از اقدامات دولتهای خارجی که مصونیت قضایی دولت جمهوری اسلامی ایران و یا مقامات رسمی آن را نقض نمایند، در دادگستری تهران اقامه دعوی کنند. در این‌صورت دادگاه مرجوع‌الیه مکلف است به عنوان عمل متقابل به دعاوی مذکور رسیدگی و طبق قانون، حکم مقتضی صادر نماید. فهرست دولتهای مشمول عمل متقابل توسط وزارت امور خارجه تهیه و به قوه قضائیه اعلام می‌شود.

موارد موضوع این ماده عبارت است از:

الف ـ خسارات ناشی از هرگونه اقدام و فعالیت دولت‌های خارجی در داخل یا خارج ایران که مغایر با حقوق بین‌الملل است و منجر به فوت یا صدمات بدنی یا روانی یا ضرر و زیان مالی اشخاص می‌گردد.

ب ـ خسارات ناشی از اقدام و یا فعالیت اشخاص یا گروه‌های تروریستی در داخل یا خارج ایران که دولت خارجی آنها را تشویق یا از آنها حمایت می‌نماید و یا اجازه اقامت یا تردد و یا فعالیت در قلمرو حاکمیت خود را به آنها می‌دهد و اقدامات مذکور منجر به فوت یا صدمات بدنی یا روانی یا ضرر و زیان مالی می‌شود.

فهرست اشخاص یا گروههای تروریستی توسط وزارت اطلاعات تهیه و به قوه قضائیه اعلام می‌شود.

نایب‌رئیس ـ حضار 199 نفر، اصل ماده (1) مطرح است، نمایندگان محترم نظرشان را اعلام بفرمایند. پایان رأی‌گیری را اعلام می‌کنیم، **تصویب شد**. ماده بعد را قرائت بفرمایید.

دبیر (محبی‌نیا) ـ ماده (2) ـ دعاوی موضوع این قانون با منشأ قبل از تصویب آن قابل طرح و رسیدگی است.

نایب‌رئیس ـ حضار 198 نفر، ماده (2) مطرح است، نمایندگان محترم نظرشان را اعلام بفرمایند. پایان رأی‌گیری را اعلام می‌کنیم، **تصویب شد**. ماده بعد را قرائت کنید.

دبیر (محبی‌نیا) ـ ماده (3) ـ چنانچه دولت‌های دیگری در اجرای احکام ناقض مصونیت جمهوری اسلامی ایران و یا مقامات رسمی آن مساعدت و همکاری نمایند، مشمول مقررات این قانون می‌باشند.

نایب‌رئیس ـ حضار 197 نفر، ماده (3) مطرح است، نمایندگان محترم نظرشان را اعلام بفرمایند. پایان رأی‌گیری را اعلام می‌کنیم، **تصویب شد**. ماده (4) را قرائت بفرمایید.

دبیر (محبی‌نیا) ـ ماده (4) ـ با توجه به اصل عمل متقابل میزان، در تقویم خسارات مادی، معنوی و تنبیهی زیان‌دیدگان، مشابه احکام صادره از دادگاه خارجی است.

تبصره ـ محکومٌ‌به به ریال تعیین و میزان طلای معادل آن به قیمت تاریخ صدور حکم محاسبه و در آن قید می‌شود.

نایب‌رئیس ـ حضار 198 نفر، ماده (4) و تبصره آن مطرح است، نمایندگان محترم نظرشان را اعلام بفرمایند. پایان رأی‌گیری را اعلام می‌کنیم، **تصویب شد**. ماده بعد را قرائت بفرمایید.

دبیر (محبی‌نیا) ـ ماده (5) ـ هزینه دادرسی و مالیات وکلاء خواهان این نوع دعاوی پس از اجرای حکم به حساب خزانه‌داری کل واریز می‌شود.

نایب‌رئیس ـ حضار 200 نفر، اصل ماده (5) مطرح است، نمایندگان محترم نظرشان را اعلام بفرمایند. پایان رأی‌گیری را اعلام می‌کنیم، **تصویب شد**. ماده بعد را قرائت بفرمایید.

دبیر (محبی‌نیا) ـ ماده (6) ـ دادگاه‌های ایران (دادگستری تهران) در موارد زیر صلاحیت رسیدگی به شکایت علیه دولت‌های خارجی را دارند:

1 ـ زیان‌دیده یا بازماندگان وی در زمان وقوع حادثه یا زمان طرح دعوی تبعه ایران باشند.

2 ـ زیان‌دیده در زمان ورود خسارت در استخدام دولت جمهوری اسلامی ایران باشد.

نایب‌رئیس ـ حضار 201 نفر، ماده (6) با دو جزئی که اعلام شد مطرح است. نمایندگان محترم نظرشان را اعلام بفرمایند. پایان رأی‌گیری را اعلام می‌کنیم، **تصویب شد**. ماده بعد را قرائت بفرمایید.

دبیر (محبی‌نیا) ـ ماده (7) ـ دعاوی علیه نمایندگان یا مقامات یا نهادهای وابسته یا تحت کنترل دولت خارجی با رعایت اصل عمل متقابل، در صورتی قابل رسیدگی است که خسارات، ناشی از اقدامات موضوع این قانون باشد.

نایب‌رئیس ـ حضار 201 نفر، اصل ماده (7) مطرح است. نمایندگان محترم نظرشان را اعلام بفرمایند. پایان رأی‌گیری را اعلام می‌کنیم، **تصویب شد**. ماده بعد را قرائت بفرمایید.

دبیر (محبی‌نیا) ـ ماده (8) ـ اموال متعلق به دولت یا مقامات یا نمایندگان آن یا نهادهای وابسته یا درکنترل دولت خارجی مشمول این قانون با رعایت اصل عمل متقابل، مصون از اقدامات اجرایی نیست.

نایب‌رئیس ـ حضار 200 نفر، ماده (8) به رأی گذاشته شده است، نمایندگان محترم نظرشان را اعلام بفرمایند. پایان رأی‌گیری را اعلام می‌کنیم، **تصویب شد**. ماده بعد را قرائت بفرمایید.

دبیر (محبی‌نیا) ـ ماده (9) ـ موارد مصرحه در معاهدات بین‌المللی لازم‌الاجراء نسبت به دولت جمهوری اسلامی ایران مشمول حکم ماده (8) این قانون نمی‌شود مگر در موارد زیر:

الف ـ عوایدی که از اجاره، رهن یا فروش اموال دولت خارجی حاصل می‌شود.

ب ـ اموال دولت خارجی که به قصد فرار از اعمال این قانون به غیرمنتقل می‌شود.

پ ـ اموال مصونیت‌یافته براساس مقررات بین‌المللی که در دولت خارجی مشمول این قانون، موضوع اقدامات اجرایی باشد.

نایب‌رئیس ـ حضار 198 نفر، ماده (9) مطرح است. نمایندگان محترم نظرشان را اعلام بفرمایند. پایان رأی‌گیری را اعلام می‌کنیم، **تصویب شد**. ماده بعد را قرائت بفرمایید.

دبیر (محبی‌نیا) ـ ماده (10) ـ آیین‌نامه اجرایی این قانون ظرف سه ماه توسط وزارتخانه‌های دادگستری، امور خارجه و اطلاعات تهیه می‌شود و به تصویب هیأت وزیران می‌رسد.

نایب‌رئیس ـ حضار 198 نفر، ماده (10) مطرح است، نمایندگان محترم نظرشان را اعلام بفرمایند. پایان رأی‌گیری را اعلام می‌کنیم، **تصویب شد**. ماده بعد را قرائت بفرمایید.

دبیر (محبی‌نیا) ـ ماده (11) ـ از تاریخ لازم‌الاجراء شدن این قانون، قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی به دعاوی مدنی علیه دولت‌های خارجی مصوب 1378/8/18 و اصلاحیه بعدی آن مصوب 1379/8/11 لغو می‌گردد.

نایب‌رئیس ـ حضار 200 نفر، ماده (11) مطرح است، نمایندگان محترم نظرشان را اعلام بفرمایند. پایان رأی‌گیری را اعلام می‌کنیم، **تصویب شد**.

4 ـ تصویب کلیات طرح یک‌فوریتی قانون وظایف و اختیارات وزارت نفت و بحث و بررسی درخصوص مواد آن

نایب‌رئیس ـ دستور بعدی را قرائت بفرمایید.

دبیر (محبی‌نیا) ـ دستور عبارت است از گزارش کمیسیون انرژی درمورد طرح یک‌فوریتی قانون وزارت نفت. از سخنگوی محترم کمیسیون انرژی جناب آقای سیدحسینی درخواست می‌کنیم گزارش خودشان را ارائه کنند باتوجه به این مراجعات بسیار زیادی که برای در دستور قرار گرفتن بود.

ISLAMIC REPUBLIC OF IRAN
DR YAHYA ARDALAN
OFFICIAL TRANSLATOR TO THE JUDICIARY
32 BAHAR ST TEHRAN 15719 , IRAN
TEL & FAX 8830527

دکتر یحیی اردلان مترجم رسمی دادگستری
تهران - خیابان بهار جنوبی - پلاک ۳۲
کدپستی ۱۵۷۱۹ تلفن و فاکس ۸۸۳۰۵۲۷

سماره ۲۰۱۸۲۳ سری/ح
سماره دفتر مترجم
جمهوری اسلامی ایران
قوه قضائیه - اداره کل فنی

OFFICIAL TRANSLATION

THE JUDICIARY OF THE ISLAMIC REPUBLIC OF IRAN
JUDGMENT

IN THE NAME OF GOD

Date March 31, 2003
Case no 987/3/80
Judgment no 8
Computer 417532
Forum Division 3 of Tehran Public Court
Presided over by Dr Mansour Pournouri

THE PLAINTIFFS:

1-Mr Ali, 2- Ms Batoul, 3- Ms Zahra, 4- Ms Sharbanou all of the surname SHAFIEI and Ms Golnesa Izadpanah and Ms Fatemeh (Ghandi) Ranjbar, all represented by Ms Nasrin Niktash, with the address at 25 west Sixth Andisheh, Andisheh, Shahid Beheshti Ave , Tehran

THE DEFENDANT:

The Government of the United States of America, with the address at no 59 West Farzan St , Afriqa Ave , Foreign Interests Section, Swiss Embassy, Tehran

THE OBJECT OF CLAIM:

Demand of material and spiritual damage

THE COURSE OF EVENTS:

The plaintiffs have lodged a petition with the above object of claim vs the above defendant which after being referred to this Branch and registered under the above number and gone through the formalities, the court is held at the extraordinary time, presided over by the undersigned, and considering the contents of the file, declares the hearing closed and issues the following judgment

ARDALAN
OFFICIAL TRANSLATOR

Annex 170

ISLAMIC REPUBLIC OF IRAN
DR. YAHYA ARDALAN
OFFICIAL TRANSLATOR TO THE JUDICIARY
32 BAHAR ST TEHRAN 15719 , IRAN
TEL & FAX 8830527

دکتر یحیی اردلان مترجم رسمی دادگستری
تهران - خیابان بهار جنوبی - پلاک ۳۲
کدپستی ۱۵۷۱۹ تلفن و فاکس ۸۸۳۰۵۲۷

شماره ۲۰۱۸۲۲ مری/ح

جمهوری اسلامی ایران
قوه قضائیه - اداره کل فنی

شماره دفتر مترجم

JUDGMENT OF THE COURT

In connection with the petition of Ms Nasrin Niktash representing Ali, Batoul, Zahra and Shahrbanou SHAFIEI, Golnesa IZADPANAH and Fatemeh (GHANDI) RANJBAR vs the Government of the United States of America, claiming and demanding material and spiritual damage resulting from martyrdom of the Martyr Nasrollah SHAFIEI by the armed forces of the Government of the United States of America in Persian Gulf, the plaintiffs' attorney as described in the petition and statements submitted has explained that the Martyr Nasrollah SHAFIEI was the 1st deputy commander of the Battalion of Marine Force of the Guard Corps of the Islamic Republic of Iran who was attacked by the American Forces during the mission assigned to him for confronting the Iraqi force during the imposed war of Iraq against Iran, on Sept 7, 1987 at 7 30 am around Farsi Island of Iran and, after being wounded by American Forces was martyred but his corpse was missing

The plaintiffs who are his wife, parents and children are claiming payment of damage by the Defendant because of material and spiritual damages Despite notification of the petition and its annexes by the note no 150/4094 dated Nov 2, 2002 of the Protocol Department of the Iranian Ministry of Foreign Affairs to the Swiss Embassy, the Defendant has failed to reply to the petition of the plantiffs' attorney

The court ascertaining its jurisdiction by virtue of the single article of the jurisdiction of the Judiciary for dealing with civil claims against foreign governments approved on 09 11 1999 and the amendment thereto dated Nov 1, 2000 and its executive by-law, and also the statement of the Iranian Ministry of Foreign Affairs concerning the applicability of the reciprocity to the Government of the Unites States of America due to breach of the judicial immunity of the Government of the Islamic Republic of Iran and official Iranian authorities by

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تهران - خیابان بهار جنوبی - پلاک ۳۲
کدپستی ۱۵۷۱۹ تلفن و فاکس ۸۸۳۰۵۲۷

issuance of numerous judgments condemning the Government of Iran and the official authorities of the Islamic Republic of Iran and, considering the report of events by the Marine Force of the Islamic Republic Guard Corps registered under no 5272 dated 18 03 2003 indicating the official and legal commission of the Martyr Nasrollah SHAFIEI for patrolling around the Iranian Farsi Island located at 67 miles south-west of Boushehr City, which begun on Sept 7, 1987 at 7 30 am with a boat, Tareq gunboat and a float and at 21 30 p m of the same day, American Forces prevented their patrolling and, according to the report of the message center of Farsi Island, the American warship was seen on the radar which approaching to the patrolling floats under the command of the Martyr Nasrollah SHAFIEI and creating clashes for 15 to 20 minutes, the Martyr Nasrollah SHAFIEI together with other officials were wounded, martyred and missing Moreover the waters around Farsi Island of Iran, the place where American Forces attacked the float under the command of Shahid SHAFIEI, is a part of Iranian territorial sea and according to articles 2 and 3 and the paragraph 2 of article 121 of the Convention of 1982 on the Law of the Sea and article 2 of the Law on Iranian Marine Areas in Persian Gulf and Oman Sea is part of marine territory of Iran and under sovereignty of Iran, violation of the Iranian sovereignty in Iranian marine territory and martyrdom of Nasrollah SHAFIEI by American Armed Forces are certain, and the claim and its documents have remained undefended by the U S A Government Considering spiritual sorrows suffered from the martyrdom of martyr Nasrollah SHAFIEI by his parents, and his father and mother who suffer heart disease and eye trouble due to sorrows and his wife suffers nervous troubles and finally depression as a result of this accident and the death of martyr Nasrollah SHAFIEI, and the children of the said martyr who were in childhood at the time of martyrdom and were deprived from paternal effection and suffered mental troubles and other mental and spiritual

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دکتر یحیی اردلان مترجم رسمی دادگستری
تهران ـ خیابان بهار جنوبی ـ پلاک ۳۲
کدپستی ۱۵۷۱۹ تلفن و فاکس ۸۸۳۰۵۲۷

damages inflicted on them have been confirmed by experts, and the fact that from the moment of becoming wounded until the martyrdom during some time they suffered physically and mentally, the claim of the plaintiffs' attorney is proved, and the court, by virtue of the single article of the Law on Jurisdiction of the Judiciary of the Islamic Republic of Iran to deal with civil claims against Foreign States approved on Nov 9, 1999 and the amendment thereto dated 01 11 2000 and its executive by-law, issues the judgment condemning the Government of the United States of America to payment of Rls 100,000,000,000/- for the damage resulting from injuries and murder, and payment of Rls 40,000,000,000/- to the parents for spiritual damage derived from the death of their son, payment of Rls 20,000,000,000/- to the wife for spiritual damage derived from the death of the husband, payment of Rls 60,000,000,000/- to the children of the martyr for the damage derived from the death of the father, payment of Rls 2000,000,000,000/- as punitive damage equivalent to 329 kg of gold, payment of Rls 44,399,950,000/- as procedure cost to the treasury, and payment of Rls 221,000,000,000/- as attorney's fee

This judgment is issued by default and may be protested in this court within two months from the date of service

- Presiding Judge of the Division 3 of Tehran Public Court
  Mansour Pournouri Signed and sealed
- True copy certified Imam Khomeini Judicial Complex Signed and sealed

09 JUL 2003

****

Certified to be a true translation from the Persian text
05/07/2003

Y. ARDALAN

Annex 170

دادگستری جمهوری اسلامی ایران

دادنامه

دادگاه

تاریخ

شماره

پیوست

بتاریخ ۸۲/۱/۱۱ پرونده کلاسه ۹۸۷/۳/۸۰ شماره دادنامه ۸ رایانه ۴۱۷۵۳۲

مرجع رسیدگی شعبه سوم دادگاه عمومی تهران به ریاست آقای دکتر منصور پور نوری

خواهان ها -۱- آقای علی خانم ها ۲- بتول ۳- زهرا ۴- شهربانو شهرت همگی شفیعی وخانم گل نساء ایزد پناه وخانم فاطمه (قندی) رنجبر همگی باوکالت خانم نسرین نیکتاش بنشانی تهران خ شهید بهشتی اندیشه اندیشه شش غربی پ ۲۵

خوانده - دولت ایالات متحده امریکا بنشانی تهران سفارت سوئیس بخش حافظ منافع خارجی- خ آفریقا خ فرزان غربی پ ۵۹

خواسته - مطالبه خسارت مادی ومعنوی

گردشکار - خواهان دادخواستی بخواسته فوق بطرفیت خوانده بالا تقدیم داشته که پس از ارجاع به این شعبه وثبت به کلاسه فوق وجری تشریفات قانونی دروقت فوق العاده دادگاه بتصدی امضاء کننده زیر تشکیل است وباتوجه به محتویات پرونده ختم رسیدگی رااعلام وبشرح زیر مبادرت بصدوررای مینماید.

((رای دادگـــــــاه))

در خصوص دعوی خانم نسرین نیکتاش به وکالت از علی بتول زهرا وشهربانو شفیعی وگل نساء ایزد پناه وفاطمه (قندی) رنجبر بطرفیت دولت ایالات متحده امریکا بخواسته ومطالبه خسارت مادی ومعنوی ناشی ار به شهادت رساندن شهید نصراله شفیعی توسط نیروهای مسلح دولت امریکا درخلیج فارس به این خلاصه که وکیل خواهان بشرح دادخواست ولوایح تقدیمی توضیح دادندکه شهید نصراله شفیعی معاون اول گردان نیروی دریائی سپاه پاسداران انقلاب اسلامی بودند که درحین انجام ماموریت محوله ومقابله با نیروی عراقی دررمان جنگ تحمیلی عراق بر ایران درساعت هفت وسی دقیقه صبح مورخ ۶۶/۶/۱۶ دراطراف جزیره فارسی ایران مورد حمله نیروهای امریکائی قرارگرفته وپس ار مجروح شدن توسط نیروهای امریکائی به شهادت رسیدند ولیکن پیکر مطهر ایشان مفقود شد وخواهانها که همسر شهید ووالدین وفرزندان او میباشند به جهت ورود خسارت مادی ومعنوی ار خوانده مطالبه خسارت می کنند خوانده علیرغم ابلاغ دادخواست وضمائم آن که طی یادداشت شماره ۱۵۰/۴۰۹۴ مورخ ۸۱/۸/۱۱ اداره تشریفات ورارت امور خارجه به سفارت سوئیس تسلیم شده به دعوی وکیل خواهانها پاسخی ندادند ودادگاه بااحراز صلاحیت خود به استناد ماده واحده صلاحیت دادگستری برای رسیدگی به دعاوی مدنی علیه دولتهای خارجی مصوب ۷۸/۸/۱۸ واصلاحیه مورخ ۷۹/۸/۱۱ وآیین نامه اجرائی آن ونیز اعلام وزارت امو رخارجه ایران مبنی برشمول عمل متقابل به دولت ایالات متحده امریکا بعلت نقض مصونیت قضائی دولت جمهوری اسلامی ایران ومقامات رسمی کشو رباصدورآراء متعدد محکومیت دولت ایران ومقامات رسمی جمهوری اسلامی وباتوجه به گزارش ماوقع از طرف نیروی دریائی سپاه پاسداران انقلاب اسلامی مثبوت به شماره ۵۲۷۲ مورخ ۸۱/۱۲/۲۷ که حکایت از ماموریت رسمی وقانونی شهید نصراله شفیعی برای گشت زنی دراطراف جزیره ایرانی فارسی واقع در ۶۷ مایلی جنوب غرب شهرستان بوشهر دارد که از ساعت هفت وسی دقیقه صبح روز ۶۶/۶/۱۶ مایک فروند قایق ، یک فروند ناوچه طارق ویک فروند شناور شروع ودرساعت بیست ویک وسی دقیقه عصر همان رور نیروهای امریکائی مانع گشت زنی آنها شده وبسابه گزارش مرکز پیام جزیره فارسی ناوجنگی امریکا درراادار رویت گردیده وباردیک شدن به شناورهای گشتی تحت فرماندهی شهید نصراله شفیعی وایجاد درگیری به مدت ۱۵ تا ۲۰ دقیقه شهید نصراله شفیعی به همراه سایر ماموریں مجروح وشهید ومفقودشدند وایکه اطراف جزیره فارسی ایران محل تعرض نیروهای امریکایی به

دادگستری جمهوری اسلامی ایران

دادنامه

دادگاه

تاریخ

شماره

پیوست

فَلَا تَتَّبِعُوا الْهَوَىٰ أَن تَعْدِلُوا

شناور تحت فرماندهی شهید شفیعی حزء دریای سرزمیں ایراں بوده ومطابق مـواد ۲ و ۳ وبنـد ۲ مـاده ۱۲۱ کنواسـیون ۱۹۸۲ حقوق دریاها ومادهٔ قانون مناطق دریایی ایران درخلیج فارس ودریای عمان جزو قلمرودریـائی وتحـت حـاکمیت ایـران محسـوب میشود نقض حاکمیت ایران درقلمرو دریائی ایران به شهادت رساندن شهید نصراله شفیعی توسط نیروهای مسلح امریکائی محـرز میباشد ودعوی ومستندات آں مصون از دفاع دولت ایالات متحده امریکاباقی مانده باتوجه به تالمات روحـی وارده دراثـر شـهادت شهید نصراله شفیعی به والدین وی از جمله پدرومادر ایشان که دراثر تالمات فراوان دچار ناراحتی قلبی وبینـائی شـدند وهمسـر ایشان نتیجه این حادثه وفقدان شهید نصراله شفیعی مبتلا به اختلالات عصبی ونهایتا" دپـرس شـدند وفرزنـدان آن شـهید کـه درزمان شهادت درسن طفولیت بوده واز محبت پدر محروم گردیدند وبه ناراحتی های روحـی وروانـی ابتـلا پیـدا کردنـد وسـایر خسارات روحی ومعنوی که به آنان وارد شده مورد تایید کارشناسا ن مربوطه قرار گرفته است وایکـه ار لحظـه مجـروح شـدن تاشهادت مدتی ار تالمات جسمی وروحی رنج میبردند دعوی وکیل خواهانها ثابت بسطر میرسد ودادگـاه مسـتندا" بمـاده واحـده قانون صلاحیت دادگستری جمهوری اسلامی ایران برای رسیدگی بـه دعـاوی مدنـی علیـه دولتهای خـارجی مصـوب ۷۸/۸/۱۸ واصلاحیه مورخ ۱۳۷۹/۸/۱۱ وآیین نامه احرائی آں حکم به محکومیت دولت ایالات متحده امریکا به پرداخت صد میلیـارد ریـال بابت خسارت ناشی از جراحات وارده وقتل وپرداخت ۴۰ میلیارد ریال بابت خسارت معنوی ناشی از فقـدان فرزنـد بـرای والدیـن وپرداخت ۲۰ میلیارد ریال بابت خسارت معنوی ناشی از فقدان همسر برای همسر شهید وپرداخت ۶۰ میلیارد ریال بابت خسارت ناشی ار فقدان پدر برای فرزندان شهید وپرداخت ۴۰۰۰میلیارد ریال بابت خسارت تنبیهی معادل ۳۲۹ کیلوگـرم طـلا وپرداخـت ۴۴۳۹۹۹۵۰۰۰۰ ریال خسارت دادرسی بصندوق دولت وپرداخت ۲۲۱ میلیارد ریال حق الوکاله وکیل صـادرواعلام مینمـاید ایـن رای غیابی وظرف دوماه ار ابلاغ قابل واخواهی دراین دادگاه است ۰

رئیس شعبه سـوم دادگـــاه عمومی تهـــران

مـنصور پـورنـوری

Annex 170

In reciprocal act, Iran sanctions 15 American companies

Tehran, March 26, IRNA – The Islamic Republic of Iran, in response to Washington's imposition of new sanctions against Tehran, has put 15 American companies under sanctions.

Code:82474449 | Date:14:32 - 26/03/2017

The Foreign Ministry announced in a statement on Sunday that the Islamic Republic of Iran has imposed sanctions on 15 American companies involved in propping up the Zionist regime, terrorists and suppressing civilians in the region.

"The Islamic Republic of Iran condemns the recent measure taken by the United States administration to impose one-sided extraterritorial sanctions against Iranian and non-Iranian individuals and institutions," the Foreign Ministry said in its statement.

"Imposition of new sanctions by the US is based on fabricated and illegitimate pretexts and amount to an action against the international regulations as well as the word and spirit of the Joint Comprehensive Plan of Action," it said.

"Hereby, the Islamic Republic repeats and insists that strengthening and enhancement of the country's defense capabilities, including boosting Iran's missile defense power remains to be certain and inevitable in a bid to safeguard the country's right to defend itself against any foreign aggression and build up its deterrence power against threats."

"The Islamic Republic of Iran accepts no restrictions imposed against its efforts to protect its dignity, territorial integrity and security of the people."

The statement by Iran's Foreign Ministry suggests that the 15 American companies have gone under sanction for their blatant violation of human rights and international humanitarian rights.

"They have been included in the list of the individuals and legal entities which are under sanction by the Islamic Republic."

According to the statement, the sanctioned companies have, directly and/or indirectly, been involved in the brutal atrocities committed by the Zionist regime in the occupied Palestinian territories, or they have supported the regime's terrorist activities and Israel's development of Zionist settlements on the Palestinian soil against the Resolution 2334 adopted by the United Nations Security Council urging Tel Aviv to stop construction of new settlements.

The following are the names of the American companies now under Iranian sanction:

BENI Tal
United Technologies Produces
RAYTHEON
ITT Corporation

Annex 171

Re/Max Real Estate
Oshkosh Corporation
Magnum Research Inc.
Kahr Arms
M7 Aerospace
Military Armament Corporation
Lewis Machine and Tool Company
Daniel Defense
Bushmaster Firearms International
O.F. Mossberg & Sons
H-S Precision Inc.

Most of the companies listed above are involved in security and military activities and generously help the Zionist regime to continue its brutal treatment of Palestinians.

2044**1771

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

IN THE PROCEEDING BETWEEN

MOBIL CORPORATION, VENEZUELA HOLDINGS, B.V.,
MOBIL CERRO NEGRO HOLDING, LTD.,
MOBIL VENEZOLANA DE PETRÓLEOS HOLDINGS, INC.,
MOBIL CERRO NEGRO, LTD., AND
MOBIL VENEZOLANA DE PETRÓLEOS, INC.
(CLAIMANTS)

AND

BOLIVARIAN REPUBLIC OF VENEZUELA
(RESPONDENT)

(ICSID CASE NO. ARB/07/27)

DECISION ON JURISDICTION

Members of the Tribunal:

H.E. Judge Gilbert Guillaume, *President*
Professor Gabrielle Kaufmann-Kohler, *Arbitrator*
Dr. Ahmed Sadek El-Kosheri, *Arbitrator*

Secretary of the Tribunal:

Ms. Katia Yannaca-Small

Representing the Claimants:

Mr. Oscar M. Garibaldi,
Mr. Eugene Gulland,
Mr. Miguel Lopez Forastier
Covington & Burling LLP
and
Ms. Toni D. Hennike
Exxon Mobil Corporation

Representing the Respondent:

Mr. George Kahale, III,
Mr. Mark H. O'Donoghue,
Ms. Miriam K. Harwood,
Ms. Gabriela Álvarez-Avila
Curtis, Mallet-Prevost, Colt & Mosle LLP

Date: June 10, 2010

CONTENTS

(iv) rights in the field of intellectual property, technical processes, goodwill and know-how;

(v) rights granted under public law, including rights to prospect, explore, extract and win natural resources".

165. The Tribunal notes that there is no explicit reference to direct or indirect investments in the BIT. The definition of investment given in Article 1 is very broad. It includes "every kind of assets" and enumerates specific categories of investments as examples. One of those categories consists of "shares, bonds or other kinds of interests in companies and joint ventures". The plain meaning of this provision is that shares or other kind of interests held by Dutch shareholders in a company or in a joint venture having made investment on Venezuelan territory are protected under Article 1. The BIT does not require that there be no interposed companies between the ultimate owner of the company or of the joint venture and the investment. Therefore, a literal reading of the BIT does not support the allegation that the definition of investment excludes indirect investments. Investments as defined in Article 1 could be direct or indirect as recognized in similar cases by ICSID Tribunals[102].

166. The second objection to the Tribunal jurisdiction based on the text of the BIT cannot be upheld.

2- <u>Abuse of right</u>

167. The Respondent then submits that the Exxon Mobil's corporate restructuring through the creation of the Dutch holding in 2005-2006 constituted an abuse of right and that, as a consequence, the Tribunal has no jurisdiction under the BIT. The Claimants contend that this allegation has no legal or factual basis.

[102] *Siemens AG v. The Argentine Republic* – ICSID Case No. ARB/02/8 – Decision on Jurisdiction, (3 August 2004),- §136-137, 12 ICSID Reports 174 (2007) ; *Ioannis Kardassopoulos v. Georgia* – ICSID Case No. ARB/05/18, Decision on Jurisdiction, (6 July 2007), §123-124.

168. The Tribunal will first consider the law applicable to abuse of right before applying it to the present case.

(a) The applicable law

169. The Tribunal first observes that in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law. Reference may be made in this respect to "good faith" ("bonne foi"), "détournement de pouvoir" (misuse of power) or "abus de droit" (abuse of right).

170. The principle of good faith has been recognized by the International Court of Justice as "one of the basic principles governing the creation and performance of legal obligations"[103]. It has been recognized in the law of treaties[104] and has been referred to by a number of courts and tribunals including the Appellate Body of the World Trade Organisation[105] and ICSID tribunals[106].

171. The concept of *détournement de pouvoir* (misuse of power) has also been relied upon in international law, in particular in the law of the sea[107], the law of international organisations[108], and in European Community law[109].

172. The same is true of abuse of right. As Hersch Lauterpacht noted in his book entitled "Development of International Law by the International Court": "There is no right,

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[103] Nuclear Tests – ICJ Report 1974 p. 268 §46 – p.473 § 49; Armed action (Honduras v/Nicaragua – ICJ Report 1988 p. 105 § 94.

[104] Vienna Convention on the Law of Treaties 23 May 1969, Articles 26 and 31 §1.

[105] WTO Appellate Body WT/DS/08/AB/R – 24 February 2000 – US Tax Treatment for foreign sales corporations § 166- WT/DS/184/AB/R 24 July 2001.

[106] *Amco Asia Corporation v. Indonesia*. ICSID Case No. ARB/81/1, Decision on Jurisdiction, (25 September1983); *SPP v. Egypt* ,Decision on Jurisdiction II, (14 April 1988), § 63; *Inceysa v. Salvador*, ICSID Case No. ARB/03/26,(2 August 2006), §230.

[107] United Nations Convention on the Law of the Sea of 10 December 1982, Article 187.

[108] See for instance Administrative Tribunal of the International Labour Organisation – Judgments N°13 of 3 September 1954, N° 1129 of 3 July 1991 and N° 1392 of 1 February 1995.

[109] Article 263 § 2 of the Treaty on European Union as revised in Lisbon. See for instance ECJC – Infried Hochbaum v. Commission – Aff. C 107/90 – Rep. 1992 p. 174 § 14.

however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused"[110].

173. It has thus long been recognized in arbitration that "abuse of authority"[111] or "abuse of administration"[112] could engage State responsibility. The Permanent Court of International Justice referred in two judgments to "abus de droit" in general. In the Upper Silesia case, the Court recognized the right of Germany to dispose of her [its?] property in this district until the actual transfer of sovereignty has been made under the Versailles Treaty. However, it added that "a misuse of this right could endow an act of alienation with the character of a breach of the Treaty"[113].

174. Some years later, in the Free Zones of Upper Savoy and District of Gex case, the Permanent Court recognized to France the right to impose "fiscal taxes within the zones as apart from customs duties at the frontier". However it added that "a reservation must be made as regard the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zone by creating a customs barrier under the guise of a control cordon"[114].

175. More recently, the Appellate Body of the World Trade Organisation stated that "the principle of good faith, at once a general principle of law and general principle of international law, controls the exercise of rights by States. One application of this

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[110] Sir Hersch Lauterpacht – Development of International Law by the International Court – London 1958 p. 164 – See also Oppenheim's International Law – Longman 9th Edition by Jennings and Watts Volume I § 124.

[111] Mixed Claims Commission France-Venezuela – Lalanne and Ledour Case – United Nations Reports of International Awards – Volume X p. 17 and 18, in which the arbitrator sanctionned an « abuse of authority » of the President of the Venezuelan State of Guayana ».

[112] Tacna – Arica Question (Chile v. Peru) - 4th March 1925 – United Nations Reports of International Arbitral awards – Volume II p. 941 and 945. In that case the arbitrator considered whether there had been « abuse of administration » by Chile in the disputed area. It arrives to the conclusion that Chile had used its conscription "laws not so much for obtaining of recruits… but with the result, if not the purpose, of driving young Peruvians from the [disputed] provinces». So far as it has been done, the Arbitrator holds it to be an abuse of Chilean authority ».

[113] Permanent Court of International Justice – Polish Upper Silesia – PCIJ – Report – Serie A – Judgment N°7 p. 30. The term « misuse of right » comes from the English version of the judgment. It corresponds to « abus de droit » and « manquement au principe de bonne foi » in the original French text.

[114] Permanent Court of International Justice - Free Zones of Upper Savoy and District of Gex – 7 June 1932 – Serie A.B N°46.

general principle, widely known as the doctrine of "abus de droit", prohibits the abusing exercise of a State's right"[115]. The European Court of Justice in many cases also referred to such "*abus de droit*"[116].

176. For their part, ICSID tribunals had a number of occasions to consider whether or not the conduct of an investor does constitute "an abuse of the convention purposes"[117], "an abuse of legal personality"[118], an "abuse of corporate form"[119] or an "abuse of the system of international investment protection"[120].

177. Under general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case.

178. In *Autopista v. Venezuela*, the investor, a Mexican company, ICA, restructured its investment in a Venezuelan company, Aucoven in transferring 75 % of its shares to a US corporation. It was alleged by Venezuela that this restructuring had been an abuse of the corporate form in order to gain access to ICSID jurisdiction. The Tribunal recalled that the transferee entity had been incorporated eight years before the parties entered into the concession agreement. It noted that the transferee was not just a shell corporation. It added that the Claimant had directly requested and had obtained in due time Venezuela's approval of the transfer of shares. It finally observed that the transfer was justified by the difficulties for Mexican companies to obtain financing for projects

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115 WTO Appellate Body – Decision WT/DS58/AB/R of 12 December 1998 - US Import prohibition of certain shrimps and shrimps products § 158.

116 See Triantafyllou, « L'interdiction des abus de droit en tant que principe général du droit communautaire ». Cahiers de droit européen n° 5.6. 2002 p. 611-663.

117 *Autopista Concesionada de Venezuela. C.A v. Bolivarian Republic of Venezuela*. ICSID Case ARB/00/5. Decision on Jurisdiction, (27 September 2001), 16 ICSID Review - Foreign Investment Law Journal 5 (2001) §. 122.

118 *Tokos Tokelés v. Ukraine* – ICSID Case No. ARB/02/18. Decision on Jurisdiction,(29 April 2009) – 20 ICSID Review - Foreign Investment Law Journal 205 (2005) § 56.

119 *Aguas del Tunari S.A. v. Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, (21 October 2005) – 20 ICSID Review – Foreign Investment Law Journal – 450 (2005).

120 *Phoenix Action Ltd v. The Czech Republic*, ICSID case No. ARB/06/5, Award- § 113.

because of the peso crisis. On those bases it considered that the restructuring did not constitute "an abuse of the Convention purposes"[121].

179. In *Tokios Tokelés v. Ukraine*, the Claimant company was organised under Lithuanian law and was owned and controlled at 99 % by Ukrainian nationals. The tribunal noted that this enterprise was formed before the BIT between Ukraine and Lithuania entered into force. It added that there was "no evidence in the record that the Claimant used its formal legal personality for any improper use" such as fraud or malfeasance. It concluded that there had been no abuse of legal personality"[122]. However, the President of the Tribunal dissented in a strongly motivated opinion noting that the investment had been made "in Ukraine by Ukrainian citizens with Ukrainian capital" and as such could not benefit from the protection of the ICSID mechanism[123].

180. In *Aguas del Tunari v. Bolivia*, the Claimant, a Bolivian company, had entered into a water concession contract with the Bolivian authorities. Bechtel, a US corporation, owned 55 % of Aguas del Tunari. Bechtel then joined its water management projects with Edison and its shares in Aguas del Tunari were transferred to a Dutch company. The Tribunal was seized on the basis of the Dutch-Bolivian BIT. Bolivia argued that the Dutch entity was a mere shell created solely for the purpose of gaining access to ICSID and that therefore, the tribunal had no jurisdiction under the BIT.

181. In a divided opinion, the Tribunal held that the Dutch entity was "not simply a corporation shell established to obtain ICSID jurisdiction over the case"[124]. It added that "it is not uncommon in practice and - absent a particular limitation – not illegal to locate one's operation in a jurisdiction perceived to provide a beneficial regulatory and legal

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[121] *Autopista Concesionada de Venezuela, CA v. Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, (27 September 2001), § 123-126, 16 ICSID Review Foreign Investment Law Journal 5 (2001).

[122] *Tokios Tokeles v.Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, (29 April 2004), § 53 to 56. 20 ICSID Review Foreign Investment Law Journal. 205 (2005).

[123] *Ibidem* – Dissenting Opinion § 23 and 25.

[124] *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, (21 October 2005), § 321, 20 ICSID Review - Foreign Investment Law Journal – 450 (2005).

environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT"[125]. It concluded that it "did not find a sufficient basis in the present record to support the allegation of abuse of corporate form or fraud"[126].

182. The Tribunal arrived at a different conclusion in *Phoenix v. Czech Republic*. In that case, the Claimant, Phoenix, was controlled by a former Czech national who incorporated Phoenix under Israeli law and caused it to acquire an interest in two Czech companies owned by members of his family. Before the acquisition, the Czech companies had already been involved in lawsuits in the Czech Republic and in disputes with the Czech authorities. Approximately two months after the acquisition, Phoenix notified the Czech Republic of an investment dispute and subsequently commenced ICSID arbitration.

183. The Tribunal examined successively the timing of the investment, the initial request to ICSID, the timing of the claim, the substance of the transaction, and the true nature of the operation. It noted that "all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies, when the alleged investment was made". It observed that the initial request "was based on a claim by the two Czech companies, which were supposedly assigned to Phoenix". It added that the timing of the claim showed that "what was really at stake were indeed the pre-investment violations and damages". The "whole operation was not an economic investment, based on the actual or future value of the companies, but indeed, simply a rearrangement of assets within a family, to gain access to ICSID jurisdiction. Moreover, "no activity was either launched or tried after the alleged investment was made". "All the elements analysed lead to the same conclusion of an abuse of right". As a consequence the Tribunal concluded that it lacked jurisdiction on the Claimant's request[127].

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125 *Ibidem* § 330 (d).
126 *Ibidem* § 331.
127 *Phoenix Action Ltd v.The Czech Republic*, ICSID Case No. ARB/06/5, Award, (15 April 2009),- § 136 to 145.

184. Those decisions and awards use different criteria to determine in each case whether or not there has been abuse of right. But in all cases, as stated by Professor Prosper Weil in his dissenting opinion in Tokios Tokelés, the question is to give "effect to the object and purpose of the ICSID Convention" and to preserve "its integrity"[128].

185. In the present case, the Tribunal has to act accordingly and to consider whether or not the restructuring of Mobil's investments in Venezuela in 2005-2006 is to be deemed as an abuse of right and as a consequence whether or not it has jurisdiction under the BIT.

(b) Application of the Law to the Case

186. Initially, Mobil investments in Venezuela were structured as follows:

(i) Mobil (Delaware) owned 100% of Mobil CN Holding (Delaware), which in turn owned 100 % of Mobil CN Holding (Bahamas), which has a 41 2/3 % participation in the Cerro Negro Association.
(ii) Mobil (Delaware) also owned 100 % of Mobil Venezolana Holding (Delaware), which in turn owned 100 % of Mobil Venezolana (Bahamas), which had a 50 % participation in the La Ceiba Association.

187. On 27 October 2005, Claimants created a new entity under the law of the Netherlands, called Venezuela Holdings. On 21 February 2006, this entity acquired all the shares of Mobil CN Holding (Delaware). Then on 23 November 2006, it also acquired all the shares of Mobil Venezolana Holding (Delaware). The Dutch holding company was thus inserted into the corporate chain for the Cerro Negro and La Ceiba projects.

188. Respondent submits that this restructuring occurred long after the investments. It adds that it did not consent to it. It contends that "the disputes were not only foreseeable, but they had actually been identified and notified to Respondent before the Dutch company was even created"[129]. Thus, according to Venezuela, the only purpose of this restructuring was to gain access to ICSID for existing disputes. This was "an abusive manipulation of the system of international protection under the ICSID Convention and

[128] *Tokio Tokeles v. Ukraine* – Dissenting Opinion § 25.
[129] Rejoinder p. 83.

the BITs"[130]. According to Venezuela it is therefore the duty of the Tribunal not to protect such manipulation and to decline its jurisdiction.

189. Claimants contest each of those points. They explain that they were "surprised" by Venezuela's "unilateral imposition of a 16 2/3 % royalty rate in October 2004", which in their opinion was contrary to the existing agreements. They say that Mobil promptly "undertook a review of the extent of the legal protection for its investments in Venezuela". Upon doing so, it concluded in early 2005 that it should restructure its Venezuelan investments through a holding company incorporated in the Netherlands, which had a bilateral investment treaty with Venezuela"[131]. This choice was considered as "logical", taking into account the double taxation agreements concluded by the Netherlands and the activities that Exxon Mobil already had in that country.

190. It thus appears to the Tribunal that the main, if not the sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch-Venezuela BIT.

191. Such restructuring could be "legitimate corporate planning" as contended by the Claimants or an "abuse of right" as submitted by the Respondents. It depends upon the circumstances in which it happened.

192. In this respect, the Tribunal first observes that, contrary to the situation in *Autopista v. Venezuela*, there was no contractual obligation in the present case for Mobil or its subsidiaries to submit the proposed restructuring to the approval of the Venezuelan authorities. Yet, Mobil did not hide this operation. In fact, Mobil Cerro Negro notified the Respondent of Venezuela Holdings' ownership of the Cerro Negro investment on 16 October 2006. On 7 March 2007, Venezuela Holdings also informed Venezuela of the acquisition of the La Ceiba investments. The Respondent did not raise any objection at the time.

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[130] Rejoinder p. 147.
[131] Counter Memorial § 195-197.

193. With respect to the timing of the investments, the Tribunal observes that, as stated by the Respondent, "the main investment at issue is the investment in the Cerro Negro project"[132]. The bulk of this investment, *i.e.* 1,915 billion US dollars, was made from 1999 to 2002. "By 2000, sales from early production of extra-heavy crude oil blended with condensate had commenced. By 2001 the upgrade had been completed and by 2002 the project was already generating more than enough income to cover all its expenses and cash needs"[133].

194. As a consequence from 2002 to 2005, the annual investment was far smaller than before and varied from a minimum of 45 million US dollars in 2003 to a maximum of 175 million US dollars in 2005.

195. In the last period, however, a gas facility modification and new wells (Pad 8) were constructed. The wells were completed in late 2005[134] and the gas facility became operational in December 2006[135]. The investments in 2006 amounted to 89 million US dollars.

196. The Tribunal does not have at its disposal such precise figures in the case of the La Ceiba project. However the Claimants submit that in "December 2005, Mobil Venezolana, along with its partner, Petro-Canada La Ceiba GmbH, commited itself to invest roughly US $ 1.3 billion in the La Ceiba project. Mobil re-confirmed its intention to proceed with that investment in January 2007". This is not contested by the Respondent.

197. Moreover, it is not disputed that the Claimants contributed their part to those investments.

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132 Reply § 119.
133 *Ibidem.*
134 Reply § 124.
135 Rejoinder – footnote 183.

198. It thus appears that in 2005-2006, the two projects had developed normally through the required investments. Therefore the investments made in 2006 in Cerro Negro were far lower than those made each year from 1999 to 2001 (although higher than in 2002 and 2003). As stated by the Respondent, they were financed, as through the funds "generated by the project itself rather than brought into Venezuela from or through the Netherlands"[136]. This was so because the project was already "up and running"[137]. The situation in the present case is thus quite different from the situation which the arbitral tribunal had to consider in the Phoenix case. The limited amount of investment made in particular in 2006 and the fact that it was financed without external funding was in harmony with the project at the time of the restructuring as it then stood. No adverse inference can be drawn from that situation. It should also be added that the Treaty contains no requirement that the origin of the capital be foreign. Nor does general international law provide a basis for imposing such a requirement[138].

199. The Tribunal will now turn from the timing of the investment to the timing of the dispute. To that end, it will recall what complaints had already been lodged by the Claimants at the time of the restructuring.

200. In two letters dated 2 February 2005, and 18 May 2005, drafted in comparable terms, the Claimants first complained of the increase from 1 % to 16 2/3 % of the royalties decided by Venezuela both for the Cerro Negro and the La Ceiba projects. They requested the Government to designate representatives to meet with them in order to discuss an amicable settlement. They added that "as you well know, in accordance with Article 22 of the Investment Law, the Bolivarian Republic of Venezuela has consented to submit to arbitration under the ICSID Convention, investment disputes between the Bolivarian Republic of Venezuela and foreign investors". They went on, consenting "to

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[136] Reply § 124.

[137] *Ibidem.*

[138] For comparable cases, see *Olguin v. Paraguay*, ICSID Case No. ARB/98/5, Award, (26 July 2001), IIC 97 (2001) at 13 n 4; *Saipem S.p.a. v. The People Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, (21 March 2007), IIC 280 (2007) at 106

ICSID's jurisdiction for arbitration of the investment dispute, and of any further investment dispute with the Bolivarian Republic of Venezuela, so that, should arbitration become necessary, it can be carried out under the ICSID Convention". They finally concluded in requesting "an early meeting to commence consultation" in order "to explore an amicable solution of the matter"[139].

201. Then, on 20 June 2005, Mobil Cerro Negro Holding, Mobil Cerro Negro and Operadora Cerro Negro informed the Venezuelan authorities that the recent ministerial decision to increase the royalties to 30 % "has broadened the investment dispute" previously brought to their attention. They stated that the introduction of a bill that would increase income tax rates from 34 % to 50 % would further broaden that dispute. They contended those decisions were "in breach of the obligations" of Venezuela and requested again consultations "in an effort to reach an amicable resolution of this matter". They recalled Article 22 of the Investment Law and the position they took on this matter in their previous letters. They added that "[o]ut of an abundance of caution, each of the Mobil Parties hereby confirms its consent to ICSID jurisdiction over the broadened dispute described above and any other investment disputes with the Bolivarian Republic of Venezuela existing at the present time or that may arise in the future, including without limitation any dispute arising out of any expropriation or confiscation of all or part of the investment" of the Mobil Parties.

202. It results from those letters that in June 2005 there were already pending disputes between the Parties relating to the increase of royalties and income taxes decided by Venezuela. Claimants had even accepted to submit those disputes to ICSID arbitration under Article 22 of the Venezuelan Investment Law. "Out of an abundance of caution", they had further indicated that on the same basis they were also consenting to arbitration for any future dispute, including future dispute arising from expropriation or confiscation.

[139] Quotations from the letter of 18 May 2005.

203. As recalled above, the restructuring of Mobil's investments through the Dutch entity occurred from October 2005 to November 2006. At that time, there were already pending disputes relating to royalties and income tax. However, nationalisation measures were taken by the Venezuelan authorities only from January 2007 on. Thus, the dispute over such nationalisation measures can only be deemed to have arisen after the measures were taken.

204. As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.

205. With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs [140]. The Claimants seem indeed to be conscious of this, when they state that they "invoke ICSID jurisdiction on the basis of the consent expressed in the Treaty only for disputes arising under the Treaty for action that the Respondent took or continued to take after the restructuring was completed"[141].

206. The Tribunal thus:

a. has jurisdiction under the ICSID Convention and the BIT with respect to any dispute born after 21 February 2006 for the Cerro Negro project and after 23 November 2006 for the La Ceiba project, and in particular with respect to the pending dispute relating to the nationalisation of the investments;

[140] *Phoenix v. Czech Republic* - § 144.
[141] Reply §4.

b. has no jurisdiction under the ICSID Convention and the BIT with respect to any dispute born before those dates.

207. Finally, the Tribunal notes that Mobil Corporation has only raised claims on the basis of Article 22 of the Investment Law and not on the basis of the BIT. In § 140 above, the Tribunal has concluded that Article 22 of the Investment Law does not provide a basis for jurisdiction in the present case. As a consequence, the Tribunal has no jurisdiction over the claims of Mobil Corporation, which will thus not be a Party to the continuation of these proceedings.

C – COSTS OF THE PROCEEDINGS

208. Lastly, the Tribunal makes no order at this stage regarding the costs of the proceeding and reserves it to a later stage of the arbitration.

IV. DISPOSITIVE PART OF THE DECISION

209. For the foregoing reasons;

The Tribunal unanimously decides:

(a) that it has jurisdiction over the claims presented by Venezuela Holdings (Netherlands), Mobil CN Holding and Mobil Venezolana Holdings (Delaware), Mobil CN and Mobil Venezolana (Bahamas) as far as:

(i) they are based on alleged breaches of the Agreement on encouragement and reciprocal protection of investments concluded on 22 October 1991 between the Kingdom of the Netherlands and the Republic of Venezuela;

(ii) they relate to disputes born after 21 February 2006 for the Cerro Negro Project and after 23 November 2006 for the La Ceiba Project and in particular as far as they relate to the dispute concerning the nationalization measures taken by the Republic of Venezuela;

LAW OF TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/167 and Add.1-3

Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur

[*Original text : English*]
[*3 March, 9 June, 12 June and 7 July 1964*]

CONTENTS

paragraph 12 of its report for 1963,[9] the Commission's plan is to prepare three groups of the draft articles covering the principal topics of the law of treaties and, when these have been completed, to consider whether they should be amalgamated to form a single draft convention or whether the codification of the law of treaties should take the form of a series of related conventions. The Special Rapporteur has therefore prepared the present draft in the form of a third self-contained group of articles closely related to those in parts I and II, which have already been transmitted to Governments for their observations. However, in accordance with the Commission's decision at its fifteenth session, the Special Rapporteur has not given the articles in the present group a separate set of numbers, but has numbered them consecutively after the last article of part II — the first article being numbered 55.

6. " Application of treaties " overlaps to a certain extent with two topics which are the subject of separate studies by the Commission and which it has assigned to other Special Rapporteurs, namely, the responsibility of States and the succession of States and Governments.[10] In the case of the responsibility of States, the problem that faced the Special Rapporteur on the law of treaties was how far he should go into the legal liability arising from a failure to perform treaty obligations. This question involves not only the general principles governing the reparation to be made for a breach of a treaty but also the grounds upon which a breach may or, alternatively, may not be justified or excused, e.g. self-defence, reprisals, deficiencies in the internal law of the State, etc. From the point of view of State responsibility the breach of a treaty obligation does not appear to be materially different from the breach of any other form of international obligation ; and the Special Rapporteur concluded that, if he were to deal with the principles of responsibility and of reparation in the draft articles on the law of treaties, it would be found that he had covered a substantial part of the law of State responsibility. To do this would not, he considered, be in accord with the decisions of the Commission regarding its programme of work. The present group of draft articles does not therefore contain detailed provisions regarding the principles of responsibility or of reparation for a failure to perform treaty obligations. Instead, there is a general provision in the first article — article 55 — laying down the principle of State responsibility for breach of a treaty as one of the facets of the *pacta sunt servanda* rule and at the same time incorporating in this rule by reference the justifications and exemptions admitted in the law of State responsibility. In the case of State succession, the overlap relates to the question of the effects of treaties on third States. Here again, although the area of the overlap may be somewhat smaller, to examine how far successor States may constitute exceptions to the *pacta tertiis nec nocent nec prosunt* rule would be to deal with a major point of principle which is of the very essence of the topic of State succession. Consequently, this aspect of the effects of treaties on third States has been omitted from the Special Rapporteur's study of that subject.

7. In this part, as in parts I and II, the Special Rapporteur has sought to codify the modern rules of international law on the topics with which the report deals. On some questions, however, the articles formulated in the report contain elements of the progressive development as well as of the codification of the applicable law.

Part III. Application, effects, revision and interpretation of treaties

SECTION I : THE APPLICATION AND EFFECTS OF TREATIES

Article 55. — Pacta sunt servanda

1. A treaty in force is binding upon the parties and must be applied by them in good faith in accordance with its terms and in the light of the general rules of international law governing the interpretation of treaties.

2. Good faith, *inter alia,* requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.

3. The obligations in paragraphs 1 and 2 apply also —

(*a*) to any State to the territory of which a treaty extends under article 59 ; and

(*b*) to any State to which the provisions of a treaty may be applicable under articles 62 and 63, to the extent of such provisions.

4. The failure of any State to comply with its obligations under the preceding paragraphs engages its international responsibility, unless such failure is justifiable or excusable under the general rules of international law regarding State responsibility.

Commentary

(1) The articles so far adopted by the Commission in parts I and II do not contain any formulation of the basic rule of the law of treaties, *pacta sunt servanda ;* and the appropriate place in which to state the rule appears to be at the beginning of the present part dealing with the application and effects of treaties. At this date in history it hardly seems necessary to adduce authority or precedents to support or explain the principle of the binding character of treaties[11] which is enshrined in the preambles to both the Covenant of the League and the Charter of the United Nations. On the other hand, in commenting upon the rule it may be desirable to underline a little that the obligation to observe treaties is one of good faith and not *stricti juris.*

[9] *Yearbook of the International Law Commission, 1963,* vol. II, p. 189.

[10] *Ibid.,* p. 224, paras. 55 and 61.

[11] See the full discussion of the principle *pacta sunt servanda* in the commentary to article 20 of the *Harvard Research Draft, A.J.I.L.,* 1935, Special Supplement, p. 977 ; J.L. Kunz, *A.J.I.L.,* 1945, pp. 180-197 ; C. Rousseau, *Principes généraux du droit international public* (1944), pp. 355-364.

(2) The rule *pacta sunt servanda* is itself founded upon good faith and there is much authority for the proposition that the application of treaties is governed by the principle of good faith.[12] So far as the Charter is concerned, Article 2, paragraph 2, expressly provides that Members are to " fulfil in good faith the obligations assumed by them in accordance with the present Charter ". In its opinion on *Admission of a State to Membership in the United Nations,*[13] the Court, without referring to Article 2, paragraph 2, said that the conditions for admission laid down in Article 4 did not prevent a Member from taking into account in voting " any factor which it is possible *reasonably and in good faith* to connect with the conditions laid down in that Article ". Again, speaking of certain valuations to be made under Articles 95 and 96 of the Act of Algeciras, the Court said in the *Rights of United States Nationals in Morocco* case : [14] "The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith ". Similarly, the Permanent Court, in applying treaty clauses prohibiting discrimination against minorities, insisted in a number of cases [15] that the clauses must be so applied as to ensure the absence of discrimination in fact as well as in law ; in other words, the obligation must not be evaded by a merely literal application of the clauses. Numerous other instances where international tribunals have insisted upon good faith in the interpretation and application of treaties could be mentioned, but it must suffice to give one precedent from the jurisprudence of arbitral tribunals. In the *North Atlantic Coast Fisheries Arbitration* the Tribunal, dealing with Great Britain's right to regulate fisheries in Canadian waters in which she had granted certain fishing rights to United States nationals by the Treaty of Ghent, said : [16]

> " From the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the treaty."

(3) *Paragraph 1* of the article accordingly provides that a treaty in force is binding upon the parties and must be applied by them in good faith in accordance with its terms. It has also been thought desirable to continue with the words " in the light of the generally accepted rules of international law governing the interpretation of treaties ", not as a qualification of but as an addition to the rule. The reason is that " interpretation " is an essential element in the application of treaties. Moreover, divergent interpretations are one of the main problems in the application of treaties, and it seems desirable to connect the obligation of good faith with the interpretation of the treaty no less than with its performance. Pending the Commission's decision whether or not to codify the rules for the interpretation of treaties, it seems sufficient here to refer to the " general rules of international law governing the interpretation of treaties ".

(4) The Commission has already recognized in article 17, paragraph 2, of the present articles [17] that even before a treaty comes into force a State which has established its consent to be bound by the treaty is under an obligation of good faith to " refrain from acts calculated to frustrate the objects of the treaty, if and when it comes into force ". *A fortiori,* when the treaty is in force the parties are under an obligation of good faith to refrain from such acts. Indeed, when the treaty is in force such acts are not only contrary to good faith but also to the undertaking to perform the treaty according to its terms which is implied in the treaty itself. *Paragraph 2* of the present article therefore provides that a party must refrain from " any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects ".

(5) Paragraphs 1 and 2 apply the rule *pacta sunt servanda* to the actual parties to the treaty, and that is the way in which the rule is usually formulated. The question, however, arises as to the application of the rule to States which, though not parties, are subject to the régimes of the treaty or to certain of its provisions either by an extension of the treaty to their territory under article 59 or under one of the exceptions to the *pacta tertiis* rule recognized in articles 62 and 63. It seems logical that paragraphs 1 and 2 should apply to these States to the extent to which they are subject to the régime of the treaty ; and *paragraph 3* so provides.

(6) As recalled in the introduction to this report, the Commission is undertaking a separate study of the general principles of State responsibility, which will therefore be formulated in another set of draft articles. Although, in consequence, the inclusion in the present articles of detailed provisions regarding the impact of the principles of State responsibility upon the rule *pacta sunt servanda* would appear to be inappropriate, some reference to them is necessary, because they obviously may mitigate the rigour of the rule in particular cases. It further seems necessary to lay down somewhere in the draft article the principle, however self-evident, that failure to carry out obligations undertaken in a treaty engages the State's responsibility. These considerations also arise with respect to third States in any case where they may be bound by the obligations of a treaty. Accordingly, there has been added in *paragraph 4* a general provision covering the question of the responsibility of the State in the event of a failure to perform a treaty and incorporating by reference any exceptions or defences that may be applicable under the general rules governing State responsibility.

Article 56. — The inter-temporal law

1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up.

[12] See especially Bin Cheng, *General Principles of Law,* chapter 3.

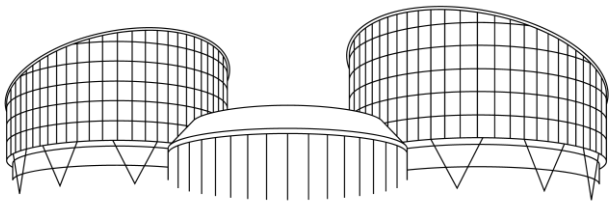
[13] I.C.J. *Reports, 1948,* p. 63.

[14] I.C.J. *Reports, 1952,* p. 212.

[15] E.g. *Treatment of Polish Nationals in Danzig, P.C.I.J.* (1932), Series A/B, No. 44, p. 28 ; *Minority Schools in Albania, P.C.I.J.* (1935), Series A/B, No. 64, pp. 19-20.

[16] (1910) *U.N.R.I.A.A.* Vol. XI, p. 188. The Tribunal also referred expressly to "the principle of international law that treaty obligations are to be executed in perfect good faith ".

[17] *Yearbook of the International Law Commission, 1962,* vol. II, p. 175.



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

1959 · 50 · 2009

TROISIÈME SECTION

AFFAIRE MIROĻUBOVS ET AUTRES c. LETTONIE

(Requête n° 798/05)

ARRÊT

STRASBOURG

15 septembre 2009

DÉFINITIF

15/12/2009

Cet arrêt peut subir des retouches de forme.

informations dont dispose la Cour, un problème de ce type ne s'est jamais posé en pratique sous le régime de la loi susmentionnée.

51. La loi de 1935 autorisait les paroisses vieilles-croyantes à se fédérer en unions (*savienības*). Toutefois, même dans une telle hypothèse, chaque paroisse restait libre de quitter l'union à tout moment si la réunion plénière de ses membres le décidait (article 7). L'article 12, quant à lui, se lisait ainsi :

> « Afin de gérer la vie spirituelle et ecclésiastique vieille-orthodoxe et de débattre des questions d'ordre religieux et cultuel, des congrès de délégués de paroisses peuvent être convoqués ; de tels congrès peuvent être soit communs à toutes les paroisses vieilles-croyantes, soit particuliers à une obédience vieille-croyante. Les modalités de la convocation et du déroulement de [ces] congrès, ainsi que celles de la nomination des délégués de paroisses, sont définies par une instruction [du ministre de l'Interieur]. »

52. Après la restauration définitive de l'indépendance de Lettonie, en 1991, la loi susmentionnée ne fut pas remise en vigueur. Par conséquent, entre 1991 et 2008, le statut des paroisses vieilles-croyantes relevait de la législation générale sur les organisations religieuses.

53. Le 31 mai 2007, le Parlement adopta une loi relative à l'Église vieille-orthodoxe pomore de Lettonie (*Latvijas Vecticībnieku Pomoras Baznīcas likums*). Entré en vigueur le 1er mai 2008, ce texte législatif s'inspire en partie du contenu de l'accord (du concordat) entre la Lettonie et le Saint-Siège, conclu en 2000. A la différence de celle de 1935, la nouvelle loi ne régit plus « les paroisses vieilles-croyantes », mais « l'Eglise vieille-croyante (...) avec toutes ses paroisses » (article 1 § 2). En d'autres termes, tous les droits et les obligations découlant de la loi visent l'Eglise en tant que structure organisée, dotée d'une personnalité morale *ex lege*, ayant à sa tête un « président de l'Eglise » et dont les paroisses individuelles font partie. En revanche, la nouvelle loi ne prévoit pas, même implicitement, qu'une paroisse vieille-croyante puisse exister en dehors de l'Eglise.

EN DROIT

I. SUR LE PRÉTENDU ABUS DU DROIT DE RECOURS INDIVIDUEL

54. Dans sa lettre du 3 décembre 2008, le Gouvernement soulève une exception d'irrecevabilité fondée sur un prétendu abus du droit de recours individuel de la part des requérants. A cet égard, le Gouvernement invoque les dispositions suivantes de la Convention et du règlement de la Cour :

Article 35 § 3 de la Convention

« La Cour déclare irrecevable toute requête individuelle introduite en application de l'article 34, lorsqu'elle estime la requête incompatible avec les dispositions de la Convention ou de ses Protocoles, manifestement mal fondée ou abusive. »

Article 38 de la Convention

« 1. Si la Cour déclare une requête recevable, elle

(...)

b) se met à la disposition des intéressés en vue de parvenir à un règlement amiable de l'affaire s'inspirant du respect des droits de l'homme tels que les reconnaissent la Convention et ses Protocoles.

2. La procédure décrite au paragraphe 1 b) est confidentielle. »

Article 62 §§ 2 et 4 du règlement

« 2. En vertu de l'article 38 § 2 de la Convention, les négociations menées en vue de parvenir à un règlement amiable sont confidentielles et sans préjudice des observations des parties dans la procédure contentieuse. Aucune communication écrite ou orale ni aucune offre ou concession intervenues dans le cadre desdites négociations ne peuvent être mentionnées ou invoquées dans la procédure contentieuse.

(...)

4. L[e] paragraph[e] 2 (...) s'appliqu[e], *mutatis mutandis*, à la procédure prévue à l'article 54A du présent règlement [relatif à un examen conjoint de la recevabilité et du fond de l'affaire]. »

A. Observations des parties

55. Le Gouvernement fait valoir que le contenu de certains documents relatifs aux négociations en vue de parvenir à un règlement amiable en l'espèce a été communiqué à une personne étrangère au procès. A l'appui de cette allégation, le Gouvernement a fourni copies de deux lettres envoyées au Premier ministre de Lettonie par un certain M. F. Le Gouvernement affirme que celui-ci est un condisciple des requérants, c'est-à-dire membre de la « RGVD en exil » canoniquement fidèle au premier d'entre eux ; en tout état de cause, sa signature figure sur les déclarations solennelles de la RGVD du 14 juillet 2002 (paragraphe 30 ci-dessus). Les lettres litigieuses concernent M. B., qui était le chef de la Direction à l'époque des faits dénoncés par les requérants, qui avait personnellement signé la décision du 10 septembre 2002 (paragraphe 37 ci-dessus) et que le conseil des ministres

a nommé au poste du greffier en chef du registre des entreprises (*Uzņēmumu reģistra galvenais valsts notārs*) en juin 2008.

56. La première lettre de F., signée le 30 mai 2008, se lisait ainsi :

« En mai 2008, les médias ont annoncé qu'une commission du ministère de la Justice avait choisi [B.], professeur de l'Université de Lettonie, comme le meilleur candidat au poste du greffier en chef du registre des entreprises.

Je considère que le ministre de la Justice (...) n'a pas le droit de recommander au conseil des ministres de nommer [B.] à ce poste, car, à l'époque où il était à la tête de la Direction des affaires religieuses, il s'est avéré être un fonctionnaire incompétent et malhonnête. [Au cours des années] 2001 et 2002, la Direction des affaires religieuses, dirigée par [B.], a pris des décisions illégitimes et illégales au sujet de l'enregistrement des décisions des assemblées plénières de la [RGVD]. Plusieurs décisions [prises par B.] en 2001 ont été annulées par le ministère de la Justice, d'autres actes de l'administration [adoptés en] 2002 font actuellement l'objet d'un examen devant la Cour européenne des droits de l'homme. La Cour européenne est en train d'examiner la requête de *Miroļubovs et autres c. Lettonie*. La substance de la requête [porte sur] les violations des droits de l'homme et de la loi provoquées par des décisions illégales et malhonnêtes de la Direction dirigée par [B. au cours des années] 2001 et 2002, en ce qui concerne l'enregistrement les décisions de l'assemblée plénière d'une organisation religieuse.

Le 3 octobre 2007, par une lettre n° 03/491-8795, l'agente du gouvernement letton, [I.] Reine, a informé la Cour européenne que le gouvernement letton souhaitait un règlement amiable dans cette affaire et qu'il avait demandé à la Cour d'indiquer une compensation pécuniaire adéquate pour les requérants, compte tenu de la situation économique en Lettonie (voir, en annexe, copie de la lettre de I. Reine). Se fondant sur la demande du gouvernement letton (...), la Cour européenne a proposé une compensation pécuniaire (...) pour chacun des trois requérants (voir, en annexe, copie de la déclaration de la Cour européenne).

En accordant la compensation, le gouvernement letton a reconnu qu'en 2002, la Direction des affaires religieuses avait violé les droits de l'homme et les lois lettonnes. Dès lors, en enregistrant les décisions d'une organisation religieuse contrairement à la loi, la Direction des affaires religieuses dirigée par [B.] a causé à l'Etat letton un préjudice matériel (...).

Les décisions illégales de la Direction des affaires religieuses, enregistrant les décisions de l'assemblée plénière de la [RGVD], en 2002, non seulement ont entraîné un préjudice matériel pour l'Etat letton ; elles ont également engendré une situation de conflit entre les représentants des vieux-croyants de Riga et la Direction des affaires religieuses (...). Les actes de l'administration [en question] ont fait l'objet d'un recours devant les tribunaux lettons, et ils contiennent [suffisamment d'éléments de fait et de droit] pour au moins une nouvelle requête contre la Lettonie devant la Cour européenne des droits de l'homme.

Eu égard à ce qui précède, et avant de prendre la décision de nommer [B.] au haut poste [de greffier en chef], je vous demande d'évaluer [son] comportement [à la tête de] la Direction des affaires religieuses, à la lumière de la requête pendante devant la Cour européenne et du préjudice causé à l'Etat letton. »

57. Cette lettre contenait, en annexe, des photocopies de trois documents suivants : la lettre du Gouvernement du 3 octobre 2007, adressée au greffier de la section concernée de la Cour et l'invitant à intervenir pour parvenir à un règlement amiable dans la présente affaire ; la lettre du greffier adressée aux requérants le 20 décembre 2007 et formulant une proposition en ce sens ; enfin, le projet d'une déclaration de règlement amiable, préparé par le greffe, destiné à être signé par les trois requérants mais ne portant aucune signature.

58. Il apparaît que cette lettre, accompagnée de ses annexes, a été transmise au ministre de la Justice qui a répondu à F. au nom du Gouvernement. Non satisfait de cette réponse, le 22 juillet 2008, F. a adressé au Premier ministre un deuxième courrier contenant des critiques à l'encontre de la manière dont la première lettre avait été traitée. Cette nouvelle lettre – qui est elle aussi mise en cause par le Gouvernement – était accompagnée d'une copie de celle du 30 mai 2008 avec toutes ses annexes.

59. Selon le Gouvernement, le fait que les lettres et les documents concernant le règlement amiable ont été obtenus par F., personne étrangère au procès devant la Cour, démontre qu'il y eu en l'espèce infraction à l'obligation de confidentialité de la part des requérants. Dès lors, le Gouvernement demande à la Cour de déclarer la requête irrecevable pour abus du droit de recours individuel, au sens de l'article 35 § 3 de la Convention.

60. Qui plus est, le Gouvernement informe la Cour « qu'aux termes de l'article 3 § 4 de la loi sur les secrets de l'Etat, les documents relatifs aux négociations aux fins de règlement amiable devant la Cour européenne des droits de l'homme sont confidentiels, c'est-à-dire qu'ils ne peuvent pas être divulgués à quiconque sans autorisation spéciale ». Dans ces circonstances, l'agente du Gouvernement déclare qu'elle s'estime obligée « d'informer les autorités répressives » de la divulgation des informations litigieuses.

61. Les requérants, quant à eux, déclarent ne pas être au courant comment le projet de déclaration et les lettres litigieuses ont abouti entre les mains de F. En tout état de cause, selon eux, un projet de déclaration sans signature n'est pas un « document » auquel on pourrait attribuer la confidentialité. Quant au règlement de la Cour, il ne lierait pas F. puisque celui-ci n'est pas partie au procès devant cette juridiction.

B. Appréciation de la Cour

1. Principes généraux

62. La Cour rappelle d'emblée qu'afin de déterminer le sens des expressions et formules contenues dans la Convention, elle s'inspire essentiellement des règles d'interprétation établies par les articles 31 à 33 de la Convention de Vienne sur le droit des traités. En particulier, en vertu de

l'article 31 § 1 de la Convention de Vienne, elle doit établir le sens ordinaire à attribuer aux termes dans leur contexte et à la lumière de l'objet et du but de la disposition dont ils sont tirés (voir, par exemple, *Demir et Baykara c. Turquie* [GC], n° 34503/97, § 65, 12 novembre 2008). La Cour considère donc que la notion d'« abus », au sens de l'article 35 § 3 de la Convention, doit être comprise dans son sens ordinaire retenu par la théorie générale du droit – à savoir le fait, par le titulaire d'un droit, de le mettre en œuvre en dehors de sa finalité d'une manière préjudiciable. Dans sa jurisprudence constante, la Cour a fait recours à cette notion notamment dans deux cas de figure, tout en soulignant qu'il s'agit d'une mesure procédurale exceptionnelle.

63. En premier lieu, une requête peut être déclarée abusive si elle se fonde délibérément sur des faits controuvés en vue de tromper la Cour (*Varbanov c. Bulgarie*, n° 31365/96, § 36, CEDH 2000-X). La falsification des documents adressés à la Cour en constitue l'exemple le plus grave et caractérisé (*Jian c. Roumanie* (déc.), n° 46640/99, 30 mars 2004 ; *Bagheri et Maliki c. Pays-Bas* (déc.), n° 30164/06, 15 mai 2007, et *Poznanski et autres c. Allemagne* (déc.), n° 25101/05, 3 juillet 2007). Ce type d'abus peut également être commis par inaction, lorsque le requérant omet dès le début d'informer la Cour d'un élément essentiel pour l'examen de l'affaire (*Al-Nashif c. Bulgarie*, n° 50963/99, § 89, 20 juin 2002, et *Kérétchachvili c. Géorgie* (déc.), n° 5667/02, 2 mai 2006). De même, si de nouveaux développements importants surviennent au cours de la procédure devant la Cour et si – en dépit de l'obligation expresse lui incombant en vertu de l'article 47 § 6 du règlement –, le requérant ne l'en informe pas, l'empêchant ainsi de se prononcer sur l'affaire en pleine connaissance de cause, sa requête peut être rejetée comme étant abusive (*Hadrabová et autres c. République tchèque* (déc.), n°s 42165/02 et 466/03, 25 septembre 2007, et *Predescu c. Roumanie*, n° 21447/03, §§ 25-27, 2 décembre 2008). Toutefois, même dans de tels cas, l'intention de l'intéressé d'induire la Cour en erreur doit toujours être établie avec suffisamment de certitude (voir, *mutatis mutandis*, *Melnik c. Ukraine*, n° 72286/01, §§ 58-60, 28 mars 2006, et *Nold c. Allemagne*, n° 27250/02, § 87, 29 juin 2006).

64. En deuxième lieu, il y a abus du droit de recours individuel lorsque le requérant utilise, dans sa communication avec la Cour, des expressions particulièrement vexatoires, outrageantes, menaçantes ou provocatrices – que ce soit à l'encontre du gouvernement défendeur, de son agent, des autorités de l'Etat défendeur, de la Cour elle-même, de ses juges, de son greffe ou des agents de ce dernier (*Řehák c. République tchèque* (déc.), n° 67208/01, 18 mai 2004 ; *Duringer et Grunge c. France* (déc.), n°s 61164/00 et 18589/02, CEDH 2003-II (extraits), ainsi que *Stamoulakatos c. Grèce*, n° 27567/95, décision de la Commission du 9 avril 1997). Là encore, il ne suffit pas que le langage du requérant soit simplement vif, polémique ou sarcastique ; il doit excéder « les limites

d'une critique normale, civique et légitime » pour être qualifié d'abusif (*Di Salvo c. Italie* (déc.), nº 16098/05, 11 janvier 2007). Si, au cours de la procédure, le requérant cesse d'utiliser les expressions litigieuses après une mise en garde expresse de la part de la Cour, les retire expressément ou, mieux encore, présente ses excuses, la requête n'est plus rejetée comme étant abusive (*Tchernitsine c. Russie*, nº 5964/02, §§ 25-28, 6 avril 2006).

65. Cependant, la notion d'abus du droit de recours individuel, au sens de l'article 35 § 3 de la Convention, ne se limite pas à ces deux hypothèses, et d'autres situations peuvent également se révéler être des actes abusifs. En principe, tout comportement d'un requérant manifestement contraire à la vocation du droit de recours établi par la Convention et entravant le bon fonctionnement de la Cour ou le bon déroulement de la procédure devant elle, peut être qualifié d'abusif. Ainsi, par exemple, même si une requête inspirée par un désir de publicité ou de propagande n'est pas, de ce seul fait, abusive (*McFeeley et autres c. Royaume-Uni*, nº 8317/78, décision de la Commission du 15 mai 1980, Décisions et rapports (DR) 20, p. 139), il en va autrement si le requérant, mû par des intérêts d'ordre politique, accorde à la presse ou à la télévision des entretiens montrant une attitude irresponsable et frivole à l'égard de la procédure pendante devant la Cour (*Parti Travailliste Géorgien c. Géorgie* (déc.), nº 9103/04, 22 mai 2007). De même, est abusif le fait, pour un requérant, de multiplier, devant la Cour, des requêtes chicanières et manifestement mal fondées, analogues à sa requête déjà déclarée irrecevable dans le passé (*M. c. Royaume-Uni*, nº 13284/87, décision de la Commission du 15 octobre 1987, DR 54, p. 214, et *Philis c. Grèce*, nº 28970/95, décision de la Commission du 17 octobre 1996).

66. La Cour considère enfin qu'une violation intentionnelle, par un requérant, de l'obligation de confidentialité imposée aux parties par l'article 38 § 2 de la Convention et l'article 62 § 2 du règlement, peut également être qualifiée d'abus du droit de recours et aboutir au rejet de la requête (décision *Hadrabová et autres*, précitée, ainsi que *Popov c. Moldova (nº 1)*, nº 74153/01, § 48, 18 janvier 2005). La Cour a maintes fois jugé que les règles de procédure prévues en droit interne visent à assurer la bonne administration de la justice et le respect du principe de sécurité juridique, et que les intéressés doivent pouvoir s'attendre à ce que ces règles soient appliquées (voir, en dernier lieu, *Andrejeva c. Lettonie* [GC], nº 55707/00, § 99, 18 février 2009, et *Pérez de Rada Cavanilles c. Espagne*, 28 octobre 1998, § 45, *Recueil des arrêts et décisions* 1998-VIII) ; or, le même constat s'impose *a fortiori* au regard des dispositions procédurales de la Convention et du règlement de la Cour. En outre, la règle de confidentialité des négociations du règlement amiable revêt une importance particulière dans la mesure où elle vise à préserver les parties et la Cour elle-même de toute tentative de pression politique ou de quelque autre ordre que ce soit (voir, *mutatis mutandis*, *Malige c. France*, nº 26135/95, décision de la

Commission du 5 mars 1996). Il est donc logique qu'un non-respect intentionnel de cette règle s'analyse en un abus de procédure. Toutefois, à la lumière de sa jurisprudence constante énoncée ci-dessus, la Cour estime que la responsabilité directe de l'intéressé dans la divulgation des informations confidentielles doit toujours être établie avec suffisamment de certitude, une simple suspicion ne suffisant pas pour déclarer la requête abusive au sens de l'article 35 § 3 de la Convention.

2. Application en l'espèce

67. Dans la présente affaire, la Cour relève que, les 30 mai et 22 juillet 2008, M. F. – qui n'est ni l'un des requérants ni leur représentant, mais, apparemment, un membre de leur communauté religieuse –, a adressé au Premier ministre deux lettres mettant en cause la compétence professionnelle et l'intégrité de M. B., chef de la Direction à l'époque des faits dénoncés par les requérants. Ces lettres se référaient à la correspondance entre le greffe de la Cour, les requérants et l'agente du Gouvernement au sujet de l'éventuel règlement amiable de la présente affaire. Qui plus est, elles contenaient en annexe des copies de trois documents émanant tant du Gouvernement que du greffe, y compris le projet d'une déclaration de règlement amiable préparé par ce dernier. Il va sans dire que tous ces documents sont confidentiels au sens des articles 38 § 2 de la Convention et 62 § 2 du règlement.

68. La Cour rappelle que les deux dispositions précitées établissent une exception à la règle générale de publicité des documents, consacrée par l'article 40 § 2 de la Convention et 33 § 1 du règlement. L'obligation de « confidentialité », telle qu'elle est comprise par la Convention et le règlement, doit être interprétée à la lumière de l'objectif général énoncé ci-dessus, à savoir celui de faciliter le règlement amiable en protégeant les parties et la Cour contre d'éventuelles pressions. Dès lors, si le fait de communiquer à un tiers le contenu des documents relatifs au règlement amiable peut en principe constituer un « abus » au sens de l'article 35 § 3 de la Convention, l'on ne saurait pour autant en tirer une interdiction totale et inconditionnelle de montrer ces documents à un tiers quelconque ou de lui en parler. En effet, une interprétation aussi large et rigoureuse risquerait de porter atteinte à la défense des intérêts légitimes du requérant – par exemple, lorsqu'il s'agit pour lui de se renseigner ponctuellement auprès d'un conseil éclairé dans une affaire où il est autorisé à se représenter lui-même devant la Cour. Au demeurant, il serait trop difficile, sinon impossible, pour la Cour de contrôler le respect d'une telle interdiction. Ce que les articles 38 § 2 de la Convention et 62 § 2 du règlement interdisent aux parties, c'est d'accorder la publicité aux informations litigieuses, que ce soit par le biais des médias, dans une correspondance susceptible d'être lue par un grand nombre de personnes, ou de toute autre manière.

69. En l'espèce, les requérants déclarent ne pas savoir comment les documents litigieux ont fini entre les mains de leur coreligionnaire. Sur ce point, la présente affaire est différente de l'affaire *Hadrabová et autres*, précitée, où c'étaient les requérants eux-mêmes qui avaient cité les propositions de règlement amiable préparées par le greffe de la Cour dans leur demande adressée au ministère de la Justice de l'Etat défendeur. Pour sa part, le Gouvernement n'a fourni aucun élément de preuve susceptible de démontrer la faute des requérants. Dans ces circonstances, ne disposant d'aucune preuve de ce que tous les requérants ont donné leur consentement à la divulgation du contenu des pièces confidentielles par F., la Cour ne peut que leur accorder le bénéfice du doute. Tout en déplorant le fait que la correspondance confidentielle entre elle-même et les parties a figuré dans la correspondance d'un tiers avec le Premier ministre letton, elle ne peut pas conclure à l'existence d'un abus du droit de recours individuel de la part des requérants, au sens de l'article 35 § 3 de la Convention.

70. Par ailleurs, la Cour note que le Gouvernement l'a informé de son intention éventuelle de mettre en œuvre les mécanismes répressifs de son Etat pour sanctionner la prétendue divulgation d'informations confidentielles par les requérants (paragraphe 60 ci-dessus). A cet égard, et sans vouloir prendre position sur ce point, la Cour tient à rappeler que c'est à elle-même, et non au gouvernement défendeur, qu'il incombe de surveiller le respect des obligations procédurales imposées par la Convention et par son règlement à la partie requérante. Même si un gouvernement a des raisons de croire que, dans une affaire donnée, il y a abus du droit de recours individuel, il doit en avertir la Cour et lui faire part de ces informations, afin qu'elle puisse en tirer les conclusions appropriées (voir, par exemple, *Tanrıkulu c. Turquie* [GC], n° 23763/94, § 131, CEDH 1999-IV, et *Fedotova c. Russie*, n° 73225/01, § 51, 13 avril 2006). En revanche, l'intention éventuelle d'engager des poursuites pénales ou disciplinaires contre un requérant pour un prétendu manquement à ses obligations procédurales devant la Cour pourrait poser problème sur le terrain de l'article 34 *in fine* de la Convention, lequel interdit toute entrave à l'exercice efficace du droit de recours individuel (voir, *mutatis mutandis*, *McShane c. Royaume-Uni*, n° 43290/98, §§ 149-152, 28 mai 2002, et *Colibaba c. Moldova*, n° 29089/06, §§ 65-69, 23 octobre 2007).

71. Eu égard à tout ce qui précède, la Cour ne saurait retenir l'exception du Gouvernement.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 9 DE LA CONVENTION

72. Les requérants se plaignent que la manière dont la Direction est intervenue dans le conflit concernant leur communauté religieuse a entraîné une violation de l'article 9 de la Convention, ainsi libellé :

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ARTICLE

Abuse of Process in International Arbitration

Emmanuel Gaillard[1]

I. INTRODUCTION

Speaking at a conference held at McGill University in 1988, the late Professor Philippe Fouchard observed that the field of international arbitration had become plagued by misconduct and riddled with procedural disputes.[2] He had not seen anything yet. Over the past decades, parties to arbitrations and their lawyers have developed an unprecedented array of procedural tactics designed to undermine and prejudice their opponents and to increase the chances that their claims prevail. The past five years in particular have witnessed the emergence of litigation strategies of the very worst kind, which threaten to undermine the reputation of international arbitration as an effective and reliable means of resolving international disputes.

To take just one example, I act as counsel in an on-going matter involving four parallel arbitrations concerning the same dispute. The arbitrations were brought against our clients, a State and two State-owned companies, for the benefit of the same interests. Shareholders at different levels of a chain of companies initiated two duplicative investment treaty arbitrations against the State under separate investment treaties.[3] The locally incorporated company sought the same relief as its shareholders in two duplicative commercial arbitrations in different fora.[4] Seeking to multiply their chances of obtaining recovery, these related parties dragged our clients through a series of four full-blown proceedings before four different tribunals, each with two-week hearings involving essentially the same fact witnesses and experts.

The tremendous growth of investment treaty arbitration has no doubt contributed to the increasingly litigious nature of international arbitration. Gone are the days when investment arbitrations were largely based on an investment contract between the State and a specific counterparty: today, most investment

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[2] Phillipe Fouchard, 'Où va l'arbitrage international' (1989) 34 McGill LJ 435, 436.

[3] *Ampal American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No ARB/12/11 [L. Yves Fortier (President), Campbell Alan Mclachlan and Francisco Orrego Vicuña]; *Yosef Maiman, Merhav (Mnf) Ltd, Merhav Ampal Group Ltd, and Merhav Ampal Energy Holdings Limited Partnership v the Arab Republic of Egypt*, PCA Case No 2012 26 [Donald McRae (President), J. Christopher Thomas and Michael Reisman]. These cases are discussed further below.

[4] ICC Case No 18215/GZ/MHM (unpublished), CRCICA Case No 829/2012 (unpublished).

arbitrations are initiated under a bilateral or multilateral investment treaty in which a State has offered its advance consent to arbitrate with an anonymous class of investors.[5] Even if this latter variety of investment arbitration is based on State consent, the respondent State will in most cases only discover the identity of a claimant investor when it receives a notice of dispute. As the *intuitus personæ* between parties to international arbitrations continue to fade, international arbitration can no longer be immune to the culture of litigiousness that has become prevalent in the courts of many jurisdictions. This is not to say that all arbitrations have become unduly litigious, as many proceedings still provide an efficient, speedy and economical resolution of international disputes. From a sociological standpoint, these diverging trends illustrate how international arbitration is not as homogeneous as it once was, but has instead become more and more complex and fragmented and in some instances, more polarized.[6]

In this context, increasing attention has been paid to the notion of 'abuse of process' by arbitral tribunals and commentators on international arbitration.[7] As will be discussed below abuse of process is a particularly difficult topic as it denotes conduct that is not *prima facie* illegal. Of the increasingly creative litigation strategies adopted by parties to international arbitrations, true instances of 'abuse of process' therefore pose a significant challenge for arbitrators.

An abuse of process ought to be distinguished from a sheer violation of an established rule. For instance, while it is not uncommon for a party to an arbitration to file large numbers of documents immediately before the start of an evidentiary hearing in order to hinder its opponent's preparations and one might loosely refer to this conduct as 'abusive', such conduct should be properly characterized as a violation of due process and can be remedied under existing procedural rules, for example by a decision that such documents are inadmissible. Similarly, where parties conclude a contract that contains a valid arbitration clause, and one party submits a claim to a national court in order to avoid its adjudication by an arbitral tribunal, that party does not commit any abuse of process *per se*, but rather violates the agreement to arbitrate, which may entitle the other party to seek an anti-suit injunction before a national court or claim monetary damages from an arbitral tribunal.

In contrast to these procedural strategies, a true 'abuse of process' does not violate any hard and fast legal rule and cannot be tackled by the application of classic legal tools. An abuse of process can nonetheless cause significant prejudice to the party against whom it is aimed and can undermine the fair and orderly resolution of disputes by international arbitration. For all of these reasons, the increased incidence of abuse of process urgently calls for a reflection on how it can be tackled.

Drawing from arbitral case law and my experience as counsel and arbitrator, I will first describe the different types of abuse of process that have arisen in

[5] As at June 30, 2016, only 16.8% of all cases submitted to ICSID were based on an investment contract between an investor and a host State, while the remaining 83.2% of cases were based on a bilateral or multilateral investment treaty, free trade agreement or an investment law of the host State. See ICSID, *Caseload Statistics* (2016 2).

[6] Emmanuel Gaillard, 'The Sociology of International Arbitration' (2015) 31 Arb Intl, 1 17.

[7] For recent commentary on abuse of process in international arbitration, see John P Gaffney, "Abuse of Process' in Investment Treaty Arbitration' (2010) 11 JWIT 515; Eric De Brabandere, "Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims' (2012) 3 JIDS 609; Hervé Ascensio, 'Abuse of Process in International Investment Arbitration' (2014) Chinese J Intl L 763; Daniel Levy, *Les abus de l'arbitrage commercial international* (L'Harmattan 2015).

contemporary arbitral practice, and will then discuss the tools which may provide an effective response to this increasingly serious issue.

II. THE GROWING PHENOMENON OF ABUSE OF PROCESS IN INTERNATIONAL ARBITRATION

Parties to international arbitrations have developed an array of different litigation tactics that can each be labelled as an 'abuse of process'. These tactics can be grouped into three general categories.

A. *A First Type of Abuse of Process: Schemes Designed at Securing Jurisdiction under an Investment Treaty*

The first type of behaviour that may qualify as an abuse of process arises exclusively in investment treaty arbitration and concerns the manner in which a corporate investor seeks to secure the jurisdiction of an arbitral tribunal.

Contemporary investment treaties and laws on investment protection typically contain liberal definitions of 'investor' and 'investment', and extend protection to indirect investments made through one or more corporate entities. The policy of protecting indirect investments raises no particular concerns and these types of situations will arise often in arbitral practice.[8] In this context, it is now settled law that a prudent investor may, at the time of making its investment, design its corporate structure in order to maximize its protection, possibly under multiple investment treaties, which in turn increases its options to bring claims in the international arena.[9] Arbitral case law also permits an investor who has re-invested in its home State through a subsidiary company incorporated in a third State to benefit from the protection of an international investment treaty.[10] Of course, a company will choose its place of incorporation based on other specific advantages, such as a low level of taxation.[11]

The permissive terms of investment treaties and the relatively low costs of incorporating a subsidiary abroad or migrating to another jurisdiction has enabled some companies to push the boundaries of legitimate investment protection in the event of a dispute with a host State.[12] An investment treaty tribunal will lack jurisdiction *ratione temporis* where an investor who is not protected by an investment treaty restructures its investment in order to fall within the scope of

[8] See eg Martin J Valasek and Patrick Dumberry, 'Developments in the Legal Standing of Shareholders and Holding Corporations in Investor State Disputes' (2011) 26(1) ICSID Rev FILJ 34.

[9] *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006) [Neil Kaplan (President), Charles Brower and Albert Jan van den Berg] paras 335 62; *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) [VV Veeder (President), Brigitte Stern and Guido Santiago Tawil] para 2.4.5; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v The Republic of Paraguay*, ICSID Case No ARB/07/9, Further Decision on Objections to Jurisdiction (9 October 2012) [Rolf Knieper (President), Philippe Sands and L Yves Fortier] para 93. See also Mark Feldman 'Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration' (2012) 27 ICSID Rev FILJ 281.

[10] *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) [Prosper Weil (President), Daniel Price and Piero Bernardini] para 21 ff.

[11] *Aguas del Tunari, SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) [David Caron (President), José Luis Alberro Semerena and Henri Alvarez] para 300.

[12] The point at which legitimate treaty planning becomes inadmissible treaty shopping has been considered by a number of arbitral tribunals. For a recent analysis of this issue, see Jorun Baumgartner, *Treaty Shopping in International Investment Law* (Thèse Université de Lausanne 2015).

protection after the date on which the challenged act of the host State occurred.[13] Abuse of process will arise where a corporate claimant makes or restructures its investment in order to gain access to a dispute with the host State that is foreseeable, but may not yet have crystallized. This was the issue before the tribunal in *Pac Rim*, where the tribunal found that the claimant had changed its seat of incorporation from the Cayman Islands to the United States for the principal purpose of gaining access to the protection of investment rights under the Central American Free Trade Agreement (CAFTA).[14] El Salvador objected to the tribunal's jurisdiction on grounds that it had 'abused the provisions of the CAFTA and the international arbitration process by changing Pac Rim Cayman's nationality to a CAFTA Party to bring a pre-existing dispute before [the] Tribunal under CAFTA'.[15] The tribunal considered that the dividing line between legitimate treaty planning and an abuse of process was the point when a party 'can foresee a specific future dispute as a very high probability and not merely as a possible controversy', and that this would almost always 'include a significant grey area'.[16] It ultimately dismissed El Salvador's abuse of process objection based on its finding that the claimant's restructuring had occurred before the dispute had become a high probability. On the facts of the case, this was when the claimant had actually learned of the government's *de facto* ban on mining in El Salvador.[17]

An objection that a claimant's corporate restructuring amounted to an abuse of process led the arbitral tribunal to dismiss the claimant's claims in a recent interim award in the *Philip Morris* case, which concerned Australia's introduction of legislation requiring that tobacco products be sold in plain packaging.[18] Australia had objected to the tribunal's jurisdiction on grounds that Philip Morris had restructured its corporate group in February 2011 with the principal aim of bringing an investment claim under the Hong Kong-Australia BIT in respect of a specific, foreseeable dispute. The tribunal held that there was a 'reasonable prospect' that a specific dispute would arise following the Australian government's announcement in April 2010 of its decision to implement the legislation, and that the dispute was therefore foreseeable 'well before the Claimant's decision to restructure was taken (let alone implemented)'.[19] While the tribunal noted that 'it would not normally be an abuse of rights to bring a BIT claim in the wake of a

[13] See eg *Libananco Holdings Company Limited v. Republic of Turkey*, ICSID Case No ARB/06/8, Award (2 September 2011) [Michael Hwang (President), Franklin Berman and Henri Alvarez] para 121 28; *Vito G Gallo v. The Government of Canada*, NAFTA/UNCITRAL, Award (15 September 2011) [Juan Fernández Armesto (President), J. Christopher Thomas and Jean Gabriel Castel] para 328; *Société Générale in Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, SA v The Dominican Republic*, UNCITRAL, LCIA Case No UN 7927, Award on Preliminary Objections to Jurisdiction (19 September 2008) [Francisco Orrego Vicuña (President), R. Doak Bishop and Bernardo Cremades] para 106 7.

[14] *Pac Rim* Decision on the Respondent's Jurisdictional Objections (n 9), para 2.41.

[15] ibid para 2.17.

[16] ibid.

[17] ibid para 2.47, 2.85 2.86, 2.110. An allegation that a claimant's corporate restructuring amounted to an abuse of process was similarly rejected in the *Tidewater* case. In that case, Venezuela alleged that the claimant incorporated a shell entity in Barbados and placed its local Venezuelan business under its ownership in order to gain access to arbitration under the Barbados Venezuela BIT in respect of acts of expropriation that were already foreseeable at the time of restructuring. The tribunal concluded that the dispute was not reasonably foreseeable at the time of the restructuring and there was no abuse of process. *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA, and others v The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction (8 February 2003) [Campbell McLachlan (President), Brigitte Stern and Andrés Rigo Sureda].

[18] *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*, PCA Case No 2012 12, Award on Jurisdiction and Admissibility (17 December 2015) [Karl Heinz Böckstiegel (President), Donald McRae and Gabrielle Kaufmann Kohler].

[19] ibid para 586.

corporate restructuring, if the restructuring was justified independently of the possibility of such a claim',[20] it rejected the claimant's argument that the restructuring formed part of a broader, group-wide process that had been underway since 2005 and that would optimize the claimant's cash flow and tax advantages, finding that these arguments were unsupported by the factual and expert evidence.

In other cases, the close temporal proximity between a claimant's restructuring or acquisition of an investment and the dispute with the host State may be redressed through the application of the requirement of jurisdiction *ratione temporis*. In the *ST-AD* case,[21] for instance, a German company had acquired an ownership stake in a Bulgarian company which was embroiled in ongoing disputes with Bulgaria over the acquisition of a tract of land. Four years after acquiring its interest in the company, the claimant initiated arbitration against Bulgaria under the Germany Bulgaria BIT, alleging that its investment had been expropriated. The tribunal found that it lacked jurisdiction *ratione temporis* over the claimant's claims, as all of the alleged BIT violations had occurred before the claimant acquired its investment. The claimant's attempt to fabricate a dispute after that date based on the same facts as the dispute between the local company and the host State was unavailing.[22]

A different analysis was applied by the arbitral tribunal in *Mobil Oil*.[23] Mobil and its subsidiaries were incorporated in the USA and in the Bahamas, and held an interest in two local Venezuelan companies. Following the imposition by Venezuela of a series of tax and royalty measures on Mobil's investment, Mobil created a Dutch entity (Venezuela Holdings), which became the indirect owner of the local companies. Venezuela subsequently nationalized Mobil's investment, following which several companies in Mobil's corporate chain initiated arbitration under both the Venezuelan investment law and the Dutch-Venezuela BIT. The tribunal looked to the timing of Mobil's corporate restructuring as the determining factor in assessing its effect on jurisdiction. While finding that the 'sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures [by] getting access to ICSID arbitration through the Dutch Venezuela BIT', the tribunal held that this conduct was 'perfectly legitimate' in relation to future disputes with the host State over the nationalization of its assets. Conversely, Mobil's corporate restructuring to create jurisdiction over its existing tax and royalty disputes with Venezuela amounted to 'an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs'.[24] The *Mobil* tribunal's conclusion that the investor's restructuring amounted to an abuse of process was not strictly necessary based on the facts of the case. As in the *ST-AD* case, the *Mobil* tribunal could have assessed the consequences of the restructuring by reference to the rules of jurisdiction *ratione*

[20] ibid para 570.

[21] *ST AD GmbH v Republic of Bulgaria,* UNCITRAL, PCA Case No 2011 06, Award on Jurisdiction (18 July 2013) [Brigitte Stern (President), J Christopher Thomas and Bohuslav Klein].

[22] ibid para 298 333. The tribunal also accepted Bulgaria's jurisdictional objection that the claimant's attempt to repackage an essentially domestic dispute as an international one for the sole purpose of gaining access to international arbitration amounted to 'an abuse of right in making the investment' and an 'abuse of process'. Its reasoning drew heavily from the decisions in *Mobil Oil* and *Phoenix Action*, discussed below.

[23] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petróleos, Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010) [Gilbert Guillaume (President), Ahmed El Kosheri and Gabrielle Kaufmann Kohler].

[24] ibid para 205.

temporis, by finding that it lacked jurisdiction under the Dutch-Venezuela BIT over disputes arising *before* Mobil became an investor with a protected investment, in that case, the date when Venezuela Holdings (the Dutch subsidiary) was incorporated.

In yet other cases, claimants have sought to secure the protection of an investment treaty tribunal through an act of pure fraud. While such conduct is objectionable, it cannot be characterized as an abuse of process, and can be addressed using established legal tools. For instance, in the *Europe Cement* case, Turkey raised an objection that the claimant had committed an abuse of process by failing to prove that it had made any investment at all, and requested the tribunal to declare that its claim to jurisdiction was 'manifestly ill-founded and has been asserted using inauthentic documents'.[25] The claimant had supplied copies, but not original versions, of transfer agreements by which it had allegedly acquired an interest in two local companies, as well as a statement by a witness who had allegedly sold it the shares. After examining the evidence, the tribunal held that 'the claim to ownership of the shares at a time that would establish jurisdiction was made fraudulently' and that 'there was no investment on which [the] claim can be based and the Tribunal has no jurisdiction to hear [the] dispute'. Having concluded that there was no investment at all, the tribunal was not required to make a determination on the issue of abuse of process. It was only in passing that it stated:

> Such a claim cannot be said to have been made in good faith. If . . . a claim that is based on the purchase of an investment solely for the purpose of commencing litigation is an abuse of process, then surely a claim based on the false assertion of ownership of an investment is equally an abuse of process.[26]

Similarly, in *Saba Fakes v Turkey*, a case in which I sat as President of the tribunal, the share transfers on which the claimant's alleged investment was premised were fictitious and the claimant had not made any investment at all. It was therefore unnecessary for the arbitral tribunal to decide whether the claimants' conduct was 'abusive and frivolous' as Turkey had alleged.[27]

B. *A Second Type of Abuse of Process: The Multiplication of Arbitral Proceedings to Maximize Chances of Success*

It is axiomatic that a claimant to an international arbitration will endeavour, wherever possible, to submit its claims to a venue where it considers that it has the greatest chance of prevailing. The strategy of seeking to secure a preferred tribunal or venue is not in itself objectionable, provided that it accords with the terms of the parties' agreement to arbitrate. On the other hand, a claimant will commit an abuse of process when it initiates more than one proceeding to resolve the same or related dispute in order to maximize its chances of success. This strategy is highly prejudicial to a respondent, who is forced to defend multiple sets of claims before

[25] *Europe Cement Investment & Trade SA v Republic of Turkey*, ICSID Case No ARB(AF)/07/2, Award (13 August 2009) [Pierre Tercier (President), J Christopher Thomas and Marc Lalonde] para 146.

[26] ibid para 167. See also the comments of the same arbitral tribunal in *Cementownia 'Nowa Huta' SA v Republic of Turkey*, ICSID Case No ARB(AF)06/2, Award (17 September 2009) [Pierre Tercier (President), J. Christopher Thomas and Marc Lalonde] para 159.

[27] *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award (14 July 2010) [Emmanuel Gaillard (President), Laurent Lévy and Hans van Houtte] para 44.

different arbitral tribunals rather than in a single arbitration. This tactic also fragments the parties' disputes and leads to excessive costs and delays.

Even the simplest arbitration agreement is susceptible to being exploited in this manner. For instance, a contract of sale might contain an arbitration clause providing for the resolution of all disputes between the parties in a given forum under an agreed set of institutional rules and for the appointment of a tribunal president by the designated arbitral institution. The seller might commit various breaches of contract and the buyer might decide to initiate arbitration. In the event the buyer becomes concerned about whether the arbitral tribunal (and in particular the institutionally-appointed president) will be sympathetic to its case, it could decide to 'test the waters' by submitting to arbitration only one of its claims against the seller, but not its other claims. Once the tribunal is constituted, and if the buyer is satisfied with the tribunal's composition, it could amend its initial request for arbitration to include its remaining claims. On the other hand, if the buyer considers that it might have greater chances of prevailing before different arbitrators, it could submit its remaining claims to an entirely new arbitral tribunal pursuant to the same arbitration clause. This type of conduct is increasingly common in construction arbitrations, which typically involve dozens of claims that can be submitted to separate arbitrations by opportunistic claimants.

The risk that a party might abusively multiply arbitral proceedings to secure its preferred venue is compounded where an arbitration agreement creates an incentive to manipulate the arbitral process. For instance, I act as counsel in an on-going case concerning a sales contract containing an arbitration clause that provides for alternative arbitral seats, with the resolution of claims in a first arbitration in the seller's country and a second set of claims in the buyer's country.[28] In that case, the buyer submitted only a minor portion of its claims, an insignificant sub-issue to a first arbitral tribunal constituted in the seller's country, and shortly thereafter, submitted the balance of its true claims (which are valued at more than 300 times the claim presented in the first arbitration and which were ripe when the first arbitration was launched) to a second arbitral tribunal in its own country. The arbitral tribunals in the two fora (which shared the same tribunal president) rendered partial awards holding that the buyer's strategy was legitimate manipulation of the parties' arbitration agreement and that the parallel proceedings were the natural consequence of its agreed wording.[29] However, this multiplication of legal proceedings is unlikely to have been what the parties originally intended when drafting their arbitration clause. Given the parties' express agreement that claims should be submitted to arbitration in the seller's country in the first instance, the arbitral tribunal in the buyer's country could have declined jurisdiction on the basis that all ripe claims were required to be referred to a single tribunal, or alternatively stayed its proceedings pending the outcome of the first arbitration. Following the parties' first exchange of written submissions, each tribunal has affirmed that the written briefing schedule should continue in both arbitrations, while deciding that the tribunal in the first arbitration in the

[28] The arbitration clause in question states: 'Should [a controversy or claim arising out of or in connection with the contract], the first arbitration to be initiated under this Agreement shall take place in [Seller's country], the second one in [Buyer's country] and successive arbitration proceedings shall take place in [Buyer's and Seller's country], alternatively.'

[29] CRCICA Case No 896/2013, Partial Award (7 August 2015); CRCICA Case No 899/2013, Partial Award (7 August 2015).

seller's country will hold an evidentiary hearing and issue an award on the merits before the second tribunal in the buyer's country proceeds to a hearing. While this solution would appear to address the risk of contradictory decisions, it fails to sanction the buyer's strategy of fragmenting the parties' dispute to secure its chances of prevailing on its claims.[30]

In recent years, claimants to investment treaty arbitrations have also sought to secure the preferred venue for their claims through initiating multiple arbitral proceedings. As noted above, State parties to investment treaties often agree to protect direct and indirect investments made by nationals of one State party in the territory of the other State party. As a separate matter, arbitral case law, unlike most domestic laws,[31] grants shareholders who participate in a locally incorporated company standing to claim, under an investment treaty entered into by their home State, any damages resulting from the host State's treatment of their local company. At the same time, investment treaties are concluded bilaterally and multilaterally without any particular regard for coordinating parallel arbitral proceedings under different treaties based on the same dispute.

Thus, for example, a French company who invested in Kazakhstan will be protected under the France Kazakhstan investment treaty of 3 February 1998. This protection will apply, be it direct or indirect, if the investment was made through a Dutch subsidiary company.[32] Dutch investments in Kazakhstan are in turn protected under the investment treaty concluded between The Netherlands and Kazakhstan in 2002. If a French investor believes that the host State's treatment of its investment violates its obligations under the relevant investment treaties, it might be tempted both to initiate arbitration under the France Kazakhstan BIT and also to cause its Dutch affiliate to commence arbitration under the Dutch Kazakhstan BIT about the exact same dispute. In addition, if one of the treaties also provides that a locally incorporated company under foreign control enjoys the protection accorded to the foreign controlling interest, the local company could also initiate investment arbitration against the host State under Article 25(2)(b) of the ICSID Convention.

Taken in isolation, the initiation of none of these proceedings is problematic, as each reflects the ordinary operation of the agreement to arbitrate contained in each investment treaty. It is, however, an abuse of process for an investor to simultaneously initiate multiple proceedings against a host State before multiple arbitral fora with respect to the same dispute in an effort to multiply its chances of securing a tribunal that will render an award in its favour. In these multiple proceedings, the locally incorporated company, its direct foreign shareholder and

[30] The solution adopted by the tribunals may also result in unenforceable awards in light of the fact that the buyer's decision to appoint different arbitrators in the two proceedings has resulted in an unfair situation where the Chairman has been required to consult on procedural matters with two arbitrators appointed by the buyer and only one appointed by the seller.

[31] David Gaukrodger, 'Investment treaties as corporate law: Shareholder claims and issues of consistency' (2013) OECD Working Papers on International Investment, No 2013/3, 15 21; Michael Waibel, 'Coordinating Adjudication Processes' in Zachary Douglas and others (eds), *The Foundations of International Investment Law* (OUP 2014) 12 14.

[32] See eg Treaty on the promotion and reciprocal protection of investments between the Government of the French Republic and the Government of the Republic of Kazakhstan (France Kazakhstan BIT) (signed 3 February 1998, entered into force 21 August 2000) Article 1(3): 'The term "companies" means all legal persons incorporated in the territory of one of the Contracting Parties in accordance with its laws and having its corporate seat in the territory of that Contracting Party, or being directly or indirectly controlled by the nationals of one of the Contracting Parties or by a legal person with its corporate seat in the territory of one of the Contracting Parties and incorporated in accordance with the laws of that Party' (unofficial translation).

its indirect foreign shareholder would each advance the same claims, arising out of the same facts. To prevail in the overall dispute, the host State must win each of the arbitrations brought against it, while the investor need only succeed before any one of the tribunals to prevail. In the above example of three separate arbitral proceedings, the investor would only need to convince the majority of one arbitral tribunal (ie two of the nine arbitrators) to prevail in its claims, while the host State, in order to escape liability, would have to convince the majority of all three tribunals (ie six of the nine arbitrators).

These concerns are not merely theoretical: in recent years, investment treaty arbitration has repeatedly witnessed this type of procedural tactic. In an ICSID arbitration, OI European Group BV prevailed in a claim against Venezuela,[33] while the local company has initiated claims against Venezuela on the same facts, pursuant to Article 25(2)(b) of the ICSID Convention and Article 1(b)(iii) of the Netherlands Venezuela investment treaty, which are still pending.[34] A further example is found in the two arbitrations brought against Egypt for the benefit of Mr Yosef Maiman, on the one hand under the US Egypt investment treaty and the ICSID Convention by Ampal-American Israel Corporation (Ampal),[35] a company controlled by Mr Maiman, and on the same facts under the Egypt Poland investment treaty in Mr Maiman's own name and in the name of other companies in the same chain of ownership (including the direct subsidiary of Ampal) in an UNCITRAL arbitration.[36] In a recently published Decision on Jurisdiction, the ICSID tribunal found that while the claimants' tactics might appear to be abusive, the parallel arbitrations did not amount to an abuse of process *per se*, but were 'merely the result of the factual situation that would arise were two claims to be pursued before two investment tribunals in respect of the same tranche of the investment.'[37] At the same time, it held that because the tribunal in the parallel UNCITRAL arbitration had already signalled that it had jurisdiction over the claims asserted in that arbitration, the abuse of process had 'crystalised'. Rather than dismissing the portion of the claims over which the UNCITRAL tribunal had already affirmed jurisdiction, the ICSID tribunal extended an opportunity to the claimants to 'cure' the abuse of process by electing whether to pursue those claims in the ICSID proceedings or the UNCITRAL proceedings.[38] The tribunal's generosity towards the claimants sits somewhat uncomfortably with its concurrent finding that, pursuant to Article 26 of the ICSID Convention, once the claimants had given their consent to ICSID arbitration, they had lost their right to seek relief in another forum.[39] Furthermore, neither the ICSID tribunal nor the UNCITRAL tribunal considered it objectionable when the claimants then opted to divide their overlapping claims between the two arbitrations, rather than pursuing them before one of the two

[33] *OI European Group BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/25 [Juan Fernández Armesto (President), Alexis Mourre and Francisco Orrego Vicuña].
[34] *Fábrica de Vidrios Los Andes, CA and Owens Illinois de Venezuela, CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/21, Notice of Arbitration (10 August 2012) [Hi Taek Shin (President), Alexis Mourre and L. Yves Fortier].
[35] *Ampal* (n 3).
[36] *Mr Yosef Maiman and Others* (n 3).
[37] *Ampal* (n 3), Decision on Jurisdiction (1 February 2016) para 331.
[38] ibid para 334.
[39] ibid paras 336 to 338.

tribunals, even though this strategy enabled them to continue to hedge their bets and to maximize their chances of obtaining a favourable award.

C. *A Third Type of Abuse of Process: Gaining a Benefit Which Is Inconsistent with the Purpose of International Arbitration*

International arbitration concerns the resolution of disputes by a tribunal which derives its power from a private agreement.[40] One of the main characteristics illustrating the judicial nature of the role of arbitrators is that, in their award, they resolve a genuine dispute between two or more parties which those parties cannot resolve themselves.[41] This is universally recognized in national legal systems and in international conventions. For example, the provisions of the 1958 New York Convention contemplate that the parties submit their 'differences' to arbitration.[42] Article 1496 of the French New Code of Civil Procedure states that the '[t]he arbitrator shall resolve the dispute'.[43]

In recent years, however, parties have sought to instrumentalize the arbitral process by initiating one or more arbitrations for purposes other than the resolution of genuine disputes, in clear violation of the spirit of international arbitration law. For instance, the ICC arbitration initiated by a wholly-owned entity of the German State of Baden-Württemberg, and the State itself (joined as an additional party) against the French electricity company EDF was brought with the primary purpose of gaining media attention.[44] Following the nuclear disaster in Fukushima, a newly-elected coalition government in Baden-Württemberg (which included members of the Green Party) brought a claim against EDF, arguing that it had overpaid EDF for shares in a local nuclear power company. The clear motive behind the claim was to demonstrate that the previous administration in Baden-Württemberg was misguided in purchasing EDF's shares in the company immediately before the Fukushima events, which had a dramatic impact on their value. Baden-Württemberg's goal of gaining publicity was made amply clear when it televised an expert report concerning the value of the shares six months before the report was even submitted to the arbitral tribunal.[45]

Parties to investment treaty arbitrations have also initiated proceedings for purposes other than resolving genuine disputes, such as to evade criminal investigations. In a number of recent examples, individual and corporate investors under investment treaties have brought claims in the international arena and requested provisional measures from arbitral tribunals in order to block on-going

[40] Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999), at 9, para 7.

[41] Gary B Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer Law International 2001) 252.

[42] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) (the New York Convention) art II (1): 'Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.'

[43] Decree No 2011 48 (13 January 2001) French Code of Civil Procedure, art 1496.

[44] ICC Case No 1815/GFG/FS (unpublished). See Kyriaki Karadelis and Alison Ross, 'EDF Faces ICC Claim Over German Power Company Purchase' *Global Arbitration Review* (6 June 2012).

[45] In its Final Award of 6 May 2016, the majority of the arbitral tribunal took this conduct into account in its allocation of costs, and considered that 'a very substantial part of the arbitration costs' should be borne by the State owned entity and the State, namely 75% of the arbitration costs and a further €4 million towards EDF's legal costs and fees, plus interest. See Alison Ross, 'EDF Defeats Claim by German Federal State' (n 44).

investigations against them by a host State. For instance, the question arose before the tribunal in the *Rompetrol* case whether the claimants had initiated arbitration in order to compel the Romanian government to terminate pending criminal investigations against managers of the Rompetrol group.[46]

More generally, a claimant's motivation for initiating arbitration may simply be to harass and exert pressure on another party. For instance, shareholders at various levels of the corporate chain might initiate multiple arbitrations in respect of the same dispute to exert maximum pressure on the host State and to exhaust its resources.

III. TOOLS FOR REDRESSING ABUSE OF PROCESS IN INTERNATIONAL ARBITRATION

Arbitrators have a number of classic tools at their disposal when faced with certain types of abuse of process described above. For instance, certain investment treaty tribunals have awarded full costs against a claimant who has engaged in improper conduct.[47] In situations where a party initiates multiple proceedings arising out of the same dispute, arbitrators can also apply their wide discretion when assessing what damages are recoverable. For instance, any decision on quantum rendered by a first tribunal could be taken into account in the assessment of damages by a second tribunal seized of the same dispute.

However, the new litigation strategies adopted by parties to international arbitrations cannot be fully addressed by these classic tools. The payment of the costs of an arbitral proceeding would not suffice to deter most parties, particularly claimant companies in investment treaty arbitrations, from engaging in abusive tactics. Likewise, any adjustment of a final award on quantum would at most prevent a party or related parties from recovering more than once for the same claim, which would only be possible if one tribunal seized of the dispute were to postpone any award on quantum until the other tribunal issues its award. In any event, an adjustment of quantum does nothing to address the improper multiplication of chances of success which claimants seek to secure when they initiated arbitration (more than one) in respect of the same claim.

More effective tools are required to redress the different abuses of process that have emerged in contemporary arbitral practice. Three of these possible tools are addressed below.

A. *Is* lis pendens *the answer?*

The doctrine of *lis pendens* has been proposed as a possible solution to the problem of abuse of process that results from the initiation of parallel proceedings concerning the same underlying dispute.[48] As applied by national courts, the *lis pendens* doctrine allows a court to suspend or stay its proceedings or defer to a

[46] *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3 [Franklin Berman (President), Marc Lalonde and Donald Francis Donovan]. The objections by Romania that the claims constituted an abuse of process were subsequently withdrawn during the pleadings stage.

[47] See eg *Phoenix Action, Ltd v The Czech Republic,* ICSID Case No ARB/06/5, Award (15 April 2009) [Brigitte Stern (President), Andreas Bucher and Juan Fernandez Armesto]; *Cementownia* (n 26); *Europe Cement* (n 25).

[48] For a general discussion of the doctrine of *lis pendens* in international arbitration, see Campbell McLachlan, 'Lis Pendens in International Litigation' (2008) 336 Recueil des Cours 201; August Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 L Practice Intl Courts Tribunals 37; Laurent Lévy and Elliot Geisinger, 'Applying the principle of litispendence' (2001) 3 Intl

proceeding pending in another forum in order to avoid conflicting decisions on the merits, as well as to avoid the duplication of costs and the inefficiency of litigating before arbitral tribunals in two or more fora that are seized of the same dispute.[49]

In both common and civil law jurisdictions, the application of the doctrine of *lis pendens* assumes that each of the various fora that have been seized has legitimate jurisdiction over the same dispute.[50] For this reason, as a number of commentators have noted,[51] the doctrine of *lis pendens* is not readily applicable to the field of international arbitration, which rests on the premise that a valid arbitration agreement confers exclusive jurisdiction on the arbitral tribunal that has been constituted to hear disputes referred to it.

Furthermore, even if *lis pendens* could be applied to remedy the problem of parallel proceedings, this tool would be insufficient to preclude the types of abuse of process described above. For instance, where a party seeks to secure its preferred venue by submitting only a portion of its claims to a first tribunal and its remaining claims to a second tribunal, each tribunal would be seized of different disputes, such that the conditions for the application of *lis pendens* would not apply.[52]

The doctrine of *lis pendens* has also proven ineffective to redress the problem of parallel investment arbitrations initiated by claimants at different levels of the same chain of companies arising out of the same dispute.[53] The controversial decisions

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Arb L Rev; Pierre Mayer, 'Litispendance, connexité et chose jugée dans l'arbitrage international' in *Liber amicorum Claude Reymond* (Litec, Paris 2004) 195 203.

[49] See Filip De Ly and Audley Sheppard, 'ILA Final Report on *Lis Pendens* and Arbitration' (2009) 25 Arb Intl 3. Within Europe, the *lis pendens* principle is embodied in Article 27(1) of the Brussels Regulation (Brussels I Regulation 4/2001/EC), which provides: 'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall by its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.'

[50] For discussion of this requirement under English law, see Lord Collins of Mapesbury and others (eds), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet and Maxwell 2012); Adrian Briggs, *The Conflict of Laws* (1st edn, Oxford University Press 2004). Under French law, see Cass Civ 1, 6 December 2005, Bull 2005, I, n° 466; Cass Civ 1, 26 November 1974, Bull 1974, I, n° 312.

[51] Gary B Born, *International Commercial Arbitration* (Kluwer Law International 2014) 3791; Filip De Ly and Audley Sheppard (n 49); Elliot Geisinger and Laurent Lévy, 'Lis Alibi Pendens in International Commercial Arbitration', Complex Arbitrations: Perspectives on their Procedural Implications, Special Supplement ICC Intl Court of Arb Bulletin (December 2003) 53; Campbell McLachlan (n 48) 342.

[52] Similarly, the doctrine of *lis pendens* offers no assistance in situations of concurrent proceedings where contractual parties have agreed to resolve disputes through arbitration, but where one party seizes a national court to resolve all or part of its claims. This is rather a question of the negative effect of the principle of competence competence, which safeguards the priority given to arbitrators for the determination of their own jurisdiction without undue interference from the courts. In the 2001 decision *Fomento de Construcciones y Contratas SA v Colon Container Terminal SA*, the Swiss Federal Tribunal misapplied the *lis pendens* doctrine by setting aside an award by a Swiss arbitral tribunal based on a finding that the tribunal had no jurisdiction to decide a dispute that was already pending before the courts of Panama. The basis of the Federal Tribunal's decision was that the arbitral tribunal, by ruling on its own jurisdiction instead of staying its proceedings, had violated the jurisdictional rule contained in Article 9 of the previous version of the Swiss Private International Law Act (PILA). This decision paved the way for parties to bring proceedings in foreign courts prior to the initiation of arbitration in Switzerland, as a tactic to circumvent the arbitration process. The Swiss legislature ultimately remedied the uncertainty created by this decision in 2006, when it adopted a new paragraph to Article 186 of the PILA, which modified the first paragraph of Article 186 of the PILA and which provides that '[t]he arbitral tribunal shall decide on its own jurisdiction without regard to proceedings having the same object already pending between the same parties before another State court or arbitral tribunal, unless there are serious reasons to stay the proceedings'. See Emmanuel Gaillard and Yas Banifatemi, 'Negative Effect of Competence Competence: The Rule of Priority in Favour of the Arbitrators' in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards The New York Convention in Practice* (Cameron May 2008).

[53] Some commentators have argued that the doctrine of *lis pendens* could apply in the context of parallel investment treaty arbitrations, and that parallel treaty arbitration claims by a company and a shareholder relating to the same underlying facts could meet the requirements of identity of cause of action and parties. Campbell McLachlan QC, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration, Substantive Principles* (OUP 2008) paras 4.133 4.143; Campbell McLachlan (n 48) 430 32.

rendered in the parallel arbitrations brought by the US entrepreneur Ronald Lauder under the US Czech Republic BIT, and Mr Lauder's Dutch investment vehicle Central European Media (CME), provide an instructive example.[54] The *Lauder* tribunal, which delivered its decision before the *CME* tribunal, rejected the Czech Republic's argument that *lis pendens* should prevent the parallel arbitrations from proceeding, holding that the requirements for the application of the *lis pendens* doctrine were not present. In particular, the tribunal considered that the causes for action in the two proceedings were different, because each claim had been brought under a separate investment treaty:

> The Arbitral Tribunal considers that the Respondent's recourse to the principle of *lis alibi pendens* to be of no use, since all the other court and arbitration proceedings involve different parties and different causes of action. . . . Therefore, no possibility exists that any other court or arbitral tribunal can render a decision similar to or inconsistent with the award which will be issued by this Arbitral Tribunal, i.e. that the Czech Republic breached or did not breach the Treaty, and is or is not liable for damages towards Mr. Lauder.[55]

B. *The Duty to Concentrate a Dispute*

Another potential tool to redress abuse of process in international arbitration would be to require parties to raise all arguments or claims relating to the same dispute before the same arbitral tribunal. This duty has been imposed on litigating parties in civil and common law jurisdictions, albeit under different legal doctrines and to different degrees.[56]

French courts have debated extensively whether litigating parties should be required to raise all of their arguments or claims relating to the same dispute in a single proceeding.[57] In the 2006 decision in *Cesareo*, the French Court of Cassation dismissed an appeal by a claimant who brought a claim for the payment of a sum of money in two different proceedings. After its first claim founded on provisions of the French Rural Code was dismissed, the claimant brought a second claim against the same defendant based on principles of unjust enrichment.[58] The Agen Court of Appeal held that the second proceedings were inadmissible based on principles of *res judicata* codified at Article 1351 of the French Civil Code.[59] Appealing these findings to the Court of Cassation, the claimant argued that the condition for *res judicata* of identity of cause of action (*identité de cause*) was not

[54] *Ronald S Lauder v The Czech Republic*, UNCITRAL, Final Award (3 September 2001) [Robert Briner (President), Bohuslav Klein and Lloyd Cutler]; *CME Czech Republic BV v The Czech Republic*, Partial Award (13 September 2001) [Wolfgang Kühn (President), Jaroslav Hándl and Stephen Schwebel].

[55] *Lauder* (n 54) para 171. Similarly, the *CME* tribunal rejected the Czech Republic's submission that the decision in *Lauder* amounted to *res judicata*, reasoning that the parties in the *Lauder* arbitration were different and that two arbitrations were based on different bilateral investment treaties. *CME* (n 54) para 355.

[56] For commentary on the case law of French and English courts, see Anne Marie Lacoste, 'The Duty to Raise all Arguments Related to the Same Facts in a Single Proceeding: Can We Avoid a Second Bite at the Cherry in International Arbitration?' (2013) 1 Les cahiers de l'arbitrage 2.

[57] See Georges Wiederkehr, 'Étendue de l'autorité de la chose jugée en matière civile: notion d'identité de cause' (2007) JCP G No 17 33 36; Roger Perrot, 'Chose jugée: sa relativité quant à la cause' (2006) 10 Procédures 10.

[58] Cass Ass Plén, 7 juillet 2006, n° 04 10.672, *Cesareo.* In the first proceeding, the claimant had relied on provisions of the French Rural Code. In the second proceeding, the claimant relied on principles of unjust enrichment.

[59] CA d'Agen, 29 avril 2003, n° 04 10.672; Cass Civ 2, 15 décembre 2005, n° 1958 F D; French Civil Code, Article 1351: « *L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formées par elles et contre elles en la même qualité.* » ('*Res judicata* takes place only with respect to what was the subject matter of a judgment. It is necessary that the thing claimed be the same; that the claim be based on the same grounds; that the claim be between the same parties and brought by them and against them in the same capacity.')

met on the facts of the case because the first and second claims were based on different legal grounds. Rejecting the appeal, the Court of Cassation held that it was incumbent on the claimant to present in the first set of proceedings all possible submissions that it considered appropriate to justify its claim. Imposing on the litigating parties the duty to concentrate grounds (*l'obligation de concentrer les moyens*),[60] the Court of Cassation held that the *res judicata* effect of a decision would extend not only to grounds that a party actually raised in a first set of proceedings, but also to grounds that it could have raised but did not.

Following the decision in *Cesareo*, French courts considered whether a more extensive duty, the duty to concentrate claims (*l'obligation de concentrer des demandes*), should require litigating parties to raise all of their pending claims (and not simply the grounds underlying a single claim) against an opponent in a single proceeding. This was the conclusion of the Court of Cassation in the 2008 *Prodim* case,[61] in which a franchiser initiated a first arbitration against its franchisee, alleging wrongful termination of the parties' supply and franchise contracts. In the first arbitration, the tribunal declared the franchisee responsible for the termination of the contracts. The franchiser then brought a second arbitration and sought damages for the franchisee's violation of the non-affiliation clause in the contract, which the franchiser had not claimed in the first arbitration. The decision of the Versailles Court of Appeal that the franchiser was entitled to seek damages in a second action[62] was quashed by the Court of Cassation, which held that it is incumbent on a litigant to raise all of its claims against an opponent in a single proceeding, with the result that the franchiser could not seek additional compensation against the franchiser in a second action.[63]

While the *Cesareo* decision indicated that litigating parties in France would be required to concentrate all grounds underlying the same claim and even all claims relating to the same factual background in a single proceeding, French courts have shied away from imposing such a duty in subsequent cases. In the 2011 *Somercom* decision, for instance, the Paris Court of Appeal held that the principle of the duty to concentrate grounds should not apply to international proceedings.[64] Other decisions of the French courts following *Prodim* similarly refused to impose the duty to concentrate claims on litigating parties.[65]

In contrast to the position taken by courts in France, other continental legal systems have squarely adopted the rule that a party has the duty to raise all of its arguments or claims relating to the same dispute in a single proceeding. In Spain, for instance, this rule is codified at Article 400(1) of the Code of Civil Procedure, which provides:

[60] As stated by the Court of Cassation, « *il incombe au demandeur de présenter dès l'instance relative à la première demande l'ensemble des moyens qu'il estime de nature à fonder celle ci.* » ('It is incumbent on the claimant to submit in the first instance all of the relevant materials, which it deems appropriate in order to establish its case.')

[61] Cass 1ère civ, 28 mai 2008, n° 07 13.266, *Prodim*.

[62] CA Versailles, 30 janvier 2007, no 05/354.

[63] As stated by the Court of Cassation, « *il incombe au demandeur de présenter dans la même instance toutes les demandes fondées sur la même cause et il ne peut invoquer dans une instance postérieure un fondement juridique qu'il s'est abstenu de soulever en temps utile.* » ('It is incumbent on the claimant to submit in the same instance all the claims based on the same cause of action and he cannot invoke in a later instance any legal basis that he failed to raise in good time.')

[64] CA Paris, 5 mai 2011, n° 10/05314, *Somercom*.

[65] See Cass 1ère civ, 1er juillet 2010, n° 09 10.364 ; Cass 2ème civ, 23 septembre 2010, n° 09 69.730; Cass 2ème civ, 16 mai 2012, n° 11 16.973.

> Where the claims advanced in the application can be based on different facts, different grounds or different legal arguments, they must be advanced in the application when they are known or can be advanced at the time at which the application is lodged. It is not permissible to defer claims to later proceedings.[66]

The common law has also proven to be more daring than French law in this respect, and has developed far-reaching and flexible tools to preclude certain types of abuses of process. Over the past decades, English courts have developed a flexible and discretionary rule based on the nineteenth century decision *Henderson v Henderson*.[67] While initially expressed as an application of the principle of *res judicata*,[68] in subsequent cases English courts have characterized the *Henderson* rule as a rule of abuse of process that precludes parties from raising matters in a subsequent proceeding that they could and should have raised in earlier proceedings, but did not.[69] Unlike the application by French courts of the principles of the duty to concentrate grounds and the duty to concentrate claims, English courts have applied the *Henderson* rule flexibly without regard to the rigid rules of the triple identity test.[70] More than a century after the *Henderson* case was rendered, Lord Bingham explained the rule in the landmark case *Johnson v Gore-Wood No. 1:*

> ... the abuse in question need not involve the reopening of a matter already decided in proceedings between the same parties, as where a party is estopped in law from seeking to re-litigate a cause of action or issue already decided in earlier proceedings. ... The bringing of the claim or raising of the defence in later proceedings may, without more, amount to an abuse if the court is satisfied (the onus being on the party raising the abuse) that the claim or defence should have been raised in earlier proceedings if it was to be raised at all.[71]

Despite the notorious reluctance of English law jurists to embrace broad legal concepts, such as good faith, known in continental legal systems, the *Henderson* rule allows a judge to exercise his or her discretion and to take the entire context of the action into account when deciding whether a party could and should have raised a matter or claim in a previous proceeding, and whether the party should subsequently be barred from bringing the matter or claim in the subsequent one.

Given the duty of arbitrators to ensure that the conditions for their jurisdiction are met, it is unclear whether they would be prepared to apply the *Henderson* rule in a systematic way to preclude a party from raising a matter that could and should have been submitted to an arbitral tribunal that was previously constituted

[66] Article 400(1) of the Spanish Code of Civil Procedure.

[67] *Henderson v Henderson* (1843) 3 Hare 100.

[68] In *Henderson v Henderson*, Sir Wigram VC expressed the rule as follows: '[W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time', ibid para 115.

[69] For a recent critical account of the judicial roots of the *Henderson* rule and its application by English courts see *Virgin Atlantic Airways Limited (Respondent) v Zodiac Seats UK Limited* [2013] UKSC 46.

[70] *Ya Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581; *Brisbane City Council and Myer Shopping Centres Pty Ltd v Attorney General for Queensland William Percival Boon* [1978] 3 WLR 299. But see *Virgin Atlantic* (n 69).

[71] *Johnson v Gore Wood No 1* [2002] 2 AC 1 (HL) 31 paras B, D.

to hear the same dispute.[72] As one commentator has noted, in the context of arbitration 'there is a logical difficulty in treating the absence of any decision or any reasons in the first award as a ground for precluding a new argument in subsequent proceedings'.[73]

In a recent unpublished ICC case, however, an arbitral tribunal seated in Singapore applied the *Henderson* doctrine to preclude the claimant State from seeking an order that the respondent should refrain from enforcing or attempting to enforce an award rendered in 2009 against that State in a separate investment treaty arbitration.[74] In 2008, the State had initiated a first ICC arbitration requesting that the respondent be ordered to irrevocably withdraw its claims in the investment treaty arbitration, which was still pending at the time. The arbitral tribunal in the second ICC arbitration noted that once the BIT award had been rendered, the State had twice amended its prayer for relief in the first ICC arbitration, including by requesting an order of moral damages for the respondent's alleged bad faith. In the second ICC tribunal's view, the respondent could have brought a prayer for non-enforcement of the award in the first ICC arbitration, but did not. The tribunal held the State's claims had 'reach[ed] the point in which repeated litigation is unduly repressing to the [r]espondent' and that it 'should be barred from bringing its claims'. One would hope that in future cases, arbitral tribunals will continue to assess their jurisdiction in the context of the overall circumstances of the parties' dispute and will increasingly apply the *Henderson* doctrine to preclude claimants from bringing claims that they could and should have raised in earlier proceedings.

C. *Abuse of Rights and Abuse of Process*

While the principle of *lis pendens* and the duty to concentrate a dispute have an uncertain application in the realm of international arbitration, the prohibition of abuse of rights and abuse of process provides a more promising avenue to redress the litigation strategies discussed above.

Broadly speaking, the doctrine of abuse of rights is founded upon the notion that a party may have a valid right, including a procedural right, and yet exercise it in an abnormal, excessive or abusive way, with the sole purpose of causing injury to another or for the purpose of evading a rule of law, so as to forfeit its entitlement to rely upon it.[75] The theory of abuse of rights has its origins in private law and is recognized in the great majority of national legal systems. In France, a general theory of abuse of rights was developed by legal theorists[76] and came to be applied by the French courts as early as the mid-nineteenth

[72] In one recent case, an English High Court considered in obiter dictum that 'in proper cases, an arbitral tribunal could apply the principle in [*Henderson*] or an analogous one to dispose of a case before it'. *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), para 40.

[73] VV Veeder, 'Issue Estoppel, Reasons for Awards and Transnational Arbitration' in *Complex Arbitrations* (ICC Pub No 688E, 2003) 73.

[74] *Country X v XYZ, Court Appointed Insolvency Administrator Regarding the Assets of ABC (In Liquidation)* (ICC Case no unpublished).

[75] For a general account of the principle of abuse of right, see Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 McGill LJ 389.

[76] The main proponent of abuse of rights in French legal theory was Louis Josserand. See Louis Josserand, *De l'esprit des droits et de leur relativité : Théorie dite de l'abus des droits* (Dalloz 1927); Georges Ripert, 'Abus ou relativité des droits A propos de l'ouvrage de M. Josserand' (1929) Rev Crit 33; Louis Josserand, 'A propos de la relativité des droits Réponse à l'article de M. Ripert' (1929) Rev Crit 277; Georges Ripert, *La règle morale dans les obligations civiles* (1926).

century.[77] The principle of abuse of rights is also enshrined in several provisions of the French Code of Civil Procedure.[78] Other civil law jurisdictions recognize a general theory of abuse of right, including Switzerland,[79] Germany,[80] Austria,[81] Italy,[82] Spain,[83] The Netherlands,[84] Québec[85] and Louisiana in the United States.[86]

While common law systems do not recognize any general principle of abuse of right, English courts have long upheld their inherent jurisdiction to sanction a party's exercise of its procedural rights in an abusive manner. For instance, in *Hunter v Chief Constable of the West Midlands Police*, Lord Diplock elaborated on:

> [the] inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.[87]

Certain torts developed by English courts, particularly that of malicious process, also impose liability on a party who exercises a procedural right in an unreasonable or excessive manner. While the tort of malicious process has been applied in only a small number of English cases,[88] it is widely applied by courts in the USA to sanction various forms of procedural misconduct.[89]

The principle of abuse of rights also forms part of public international law,[90] and occurs where 'a State avails itself of its right in an arbitrary manner in such a

[77] See eg CA Colmar, 2 mai 1855; CA Chambéry, 21 juillet 1914; Cass 19 décembre 1817; Cass 3 août 1915.

[78] French law recognizes that a party may be liable for abusing its procedural rights (art 32.1 of the French Code of Civil Procedure provides « *Celui qui agit en justice de manière dilatoire ou abusive peut être condamné à une amende civile d'un maximum de 3 000 euros, sans préjudice des dommages intérêts qui seraient réclamés.* » ('He who acts in justice in a dilatory or abusive manner may be condemned to a civil fine of €15 to €1.500, in addition to the reparation of damages that would be claimed.'). The French Code of Civil Procedure also includes several specific provisions providing for damages where a claimant engages in dilatory tactics: see eg arts 118, 123, 550, 559 and 560.

[79] Swiss Civil Code, art 2.

[80] German Civil Code, art 226.

[81] Austrian Civil Code, art 1295(2).

[82] Italian Civil Code, art 833.

[83] Spanish Civil Code, art 7.

[84] Dutch Civil Code, Property Law, art 13(2).

[85] Civil Code of Québec, art 7.

[86] *Morse v J Ray Mc Dermott & Co* (1976) 344 So.2d 1353 at 1369; *Hero Lands Co v Texaco, Inc* (1975) 310 So.2d 93 at 99.

[87] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536. The inherent power of an English court to strike out cases that amount to an abuse of its process is expressly stated in Rule 3.4 of the English Civil Procedure Rules. CPR 3.4(2)(b) provides that '[t]he court may strike out a statement of case if it appears to the court . . . that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings'.

[88] *Granger v Hill* (1838) 4 Bing NC 212; *Metall Und Rohstoff AG v Donaldson Lufkin & Jenrette Inc & Aml Holdings Inc* [1989] 3 WLR 563. Some authors have argued that the notion of abuse of rights is the basis on which the law of tort developed. According to Hersch Lauterpacht: 'The law of torts as crystallized in various legal systems of law in judicial decisions or legislative enactment is to a large extent a list of wrongs arising out of what society considers to be an abuse of rights.' Sir Hersch Lauterpacht, *The Function of Law in the International Community* (OUP 2011) 303. Michael A Jones and others (eds), *Clerk & Lindsell on Torts* (Sweet & Maxwell 2010) 16 62.

[89] See Restatement (Second) of Torts, s 382 (1965).

[90] See eg Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (CUP 1993) 129, who considers the principle of abuse of rights to be an application of good faith, which is a general principle of law under Article 38(1)(c) of the Statute of the International Court of Justice. Others commentators, notably Hersch Lauterpacht, have argued for a broad interpretation of abuse of rights whose application depends on the circumstances of each case, rather than a rigid legal standard. Sir Hersch Lauterpacht QC, *The Development of International Law by the International Court* (CUP 1982) 162.

way as to inflict upon another State an injury which cannot be justified by legitimate considerations of its own advantage'.[91] The notion of abuse of process is considered an application of the abuse of rights principle, and 'consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established'.[92] These principles have frequently been recognized by the International Court of Justice (ICJ).[93]

Being principles common to many national legal systems and recognized under public international law, the prohibitions of abuse of rights and abuse of process may be recognized as general principles of law that may be applied by an arbitral tribunal, irrespective of the seat of the arbitration or the applicable law. Because abuse of rights looks beyond the literal application of the black letter law, it is perfectly suited to tackle circumstances in which parties to international arbitrations engage in tactics that do not violate any hard and fast rules, but which are nevertheless objectionable in the particular circumstances of the case.

In a number of reported cases, investment treaty tribunals have relied on principles of abuse of rights and abuse of process to sanction situations in which claimant investors have exercised their procedural rights in a manner that undermines the arbitral process.[94]

The decision in *Phoenix Action v Czech Republic* was the first award in which an investment treaty tribunal dismissed an entire claim based on a finding that the claimant had committed an abuse of right.[95] In that case, a former Czech national, Mr Beno, created the claimant company Phoenix Action in 2002 under Israeli law and caused it to acquire an interest in two Czech companies, which were ultimately owned by members of his family and which were involved in ongoing disputes in the Czech Republic. Two months after the acquisition, Phoenix Action initiated ICSID arbitration pursuant to the Israel Czech Republic BIT. One of the companies was subsequently sold back to its original owner for the same price paid by Mr. Beno in 2002. The Czech Republic objected to the tribunal's jurisdiction on the ground that Phoenix Action had not made any 'investment' within the meaning of Article 25(1) of the ICSID Convention or Articles 1 and 7 of the Israel Czech Republic BIT,[96] and raised a further, alternative objection that the case should be dismissed as Phoenix Action had committed an 'abuse of the corporate structure'.[97]

The *Phoenix* tribunal considered the main issue pertaining to its jurisdiction to be whether the dispute was connected with any investment.[98] After reviewing the criteria for an investment under Article 25(1) of the ICSID Convention set out in *Salini v Morocco*, the tribunal supplemented the test with the further requirement that 'only investments that are made in compliance with the international principle of good faith and do not attempt to abuse the system [should be]

[91] Sir Robert Jennings QC and Sir Arthur Watts KCMG QC (eds), *Oppenheim's International Law* (9th edn, OUP 2009) 407.
[92] Robert Kolb, 'General Principles of Procedural Law' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice, A Commentary* (OUP 2006) 831, para 65.
[93] See eg *Fisheries Case (United Kingdom v Norway)* [1951] ICJ 3; *Case of Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9; *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ 1; 12 *Gabcíkovo Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.
[94] For a recent review of this case law, *see Philip Morris* (n 18) paras 538 to 554.
[95] *Phoenix Action* (n 47).
[96] ibid para 38.
[97] ibid para 40.
[98] ibid para 73.

protected'.[99] According to the tribunal, the 'unique goal' of Phoenix Action's acquisition of the Czech companies 'was to transform a pre-existing domestic dispute into an international dispute' which was 'not a *bona fide* transaction and [could not] be a protected investment under the ICSID system'.[100]

The tribunal invoked the notion of abuse of rights to justify its conclusion that Phoenix Action's purchase of the companies was not an investment within the meaning of Article 25(1) of the ICSID Convention. According to the tribunal, the rearrangement of assets within the same family was 'aimed at creating a legal fiction in order to gain access to ICSID' and '[a]ll the elements analysed lead to the same conclusion of an abuse of right'. The tribunal continued:

> If it were accepted that the Tribunal has jurisdiction to decide Phoenix's claim, then any *pre-existing* national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. Such transfer from the domestic arena to the international scene would ipso facto constitute a 'protected investment' – and the jurisdiction of BIT and ICSID tribunals would be virtually unlimited.[101]

Whether the *Phoenix* tribunal was correct that Article 25(1) of the ICSID Convention includes a requirement that investments be made in good faith is beyond the scope of this discussion: it suffices to note here that this requirement does not seem to have been contemplated by the drafters of the ICSID Convention.[102] In light of its finding that Phoenix Action had not made a protected investment, the tribunal's reliance on the notion of abuse of process was not strictly necessary. However, the rearrangement of assets within the same family with the goal of gaining access to ICSID jurisdiction over an on-going domestic dispute would qualify as an abuse of process. As the *Phoenix* tribunal acknowledged, the doctrine of abuse of process would offer a powerful tool to preclude parties from engaging in these types of strategies.

The principle of abuse of process was also applied in the recent case of *Renée Rose Levy*.[103] In this case, a group of companies owned by the Levy family acquired shares in Gremcitel, a local company, which acquired rights to develop tourism and real estate projects on Peru's Pacific coast. Less than one month before the Peruvian government passed a resolution that allegedly frustrated the investment, the family transferred the majority interest in the company to Renée Rose Levy, the only French national in the family. Ms Levy and Gremcitel then initiated ICSID arbitration under the France Peru BIT.

The tribunal held that Ms Levy's claim fulfilled the jurisdictional requirements under the ICSID Convention and the BIT because she had both the requisite nationality under the French Peru BIT and had acquired her investment before the dispute had crystallized.[104] The tribunal nonetheless declined jurisdiction based on its separate finding that a 'striking proximity of events' exists between the transfer of shares in Gremcitel to Ms Levy and the issuing and publication of the

[99] ibid para 113.
[100] ibid para 142.
[101] ibid para 144 (emphasis added).
[102] See eg *Saba Fakes* (n 27).
[103] *Renée Rose Levy and Gremcitel SA v Republic of Peru*, ICSID Case No ARB/11/17, Award (9 January 2015) [Gabrielle Kaufmann Kohler (President), Eduardo Zuleta and Raúl Vinuesa].
[104] ibid para 63.

resolution of the Peruvian government. Having reviewed the evidence, it found that 'the Levys could foresee the 2007 Resolution as a very high probability when Ms Levy was inserted into Gremcitel's ownership' and accordingly, 'the only reason for the sudden transfer of the majority of the shares in Gremcitel to Ms Levy was her nationality'.[105] Noting that the claimants could furnish no reasonable explanation for the timing of the share transfer, the tribunal concluded that 'the corporate restructuring by which Ms. Levy became the main shareholder of Gremcitel ... constitutes an abuse of process' and declined jurisdiction on this basis.[106]

Technically speaking, the notion at play in the *Renée Rose Levy* case was *fraus legis* (*fraude à la loi*), a principle which makes unlawful any act designed to evade a law while in apparent conformity with its letter.[107] In France, the theory of *fraude à la loi* derives from the seminal case of the Court of Cassation, *Princesse de Bauffremont*,[108] where Princesse de Bauffremont acquired German nationality in order to obtain a divorce under German law, at a time when divorces were not permitted under French law. Neither the Princesse's acquisition of German nationality, nor the transfer of assets to Ms Levy, were illegal *per se*. However, in both cases the claimants acquired their rights in order to obtain a benefit to which they should otherwise not have been entitled, in violation of the spirit of the law. The insertion of Ms Levy into the ownership structure of the family's investment in Peru was done in contemplation of the dispute and thus qualifies as a *fraus legis*.[109]

The prohibition of abuse of rights and abuse of process is applicable outside the specific context of investment treaty arbitration. For instance, where a party seeks to secure its preferred venue by submitting only a portion of its claims to a first tribunal, and its remaining claims to a second tribunal, the second tribunal could refuse to hear the claims if it concludes that the party's exercise of its rights had the sole purpose of evading the jurisdiction of the first tribunal, and would be manifestly unfair to the respondent to those claims. As we have seen, such a conclusion could not be reached through the literal application of existing substantive or procedural rules and, at least in the context of international arbitration, could not be remedied through the doctrine of *lis pendens* or by imposing on the parties a duty to concentrate their arguments or claims in a single proceeding. An arbitrator's recourse to the abuse of process principle could similarly allow for the dismissal of claims initiated for purposes ulterior to the resolution of a genuine dispute, such as for media attention or in order to harass or exert pressure; something that results in the misuse of the arbitral procedure.

[105] Ms Levy also presented evidence to the Tribunal to prove that she had acquired shares in the company two years (instead of one month) before Peru had passed its resolution. The Tribunal held that these documents were 'utterly misleading': at the hearing, it was revealed that Ms Levy had asked a notary to backdate her notarization of a corporate resolution that she had fabricated for this purpose. This conduct amounts to pure fraud and need not be addressed using the notion of abuse of process; ibid para 194.

[106] ibid para 195.

[107] See José Vidal, *Essai d'une théorie générale de la fraude en droit français* (Thèse Toulouse 1957); B Audit, *La fraude à la loi* (Paris 1974); Pierre Mayer and Vincent Heuzé, *Droit international privé* (11th edn, LGDJ 2014) 191 ff.

[108] Cass Civ 18 mars 1978.

[109] The question arises in the context of investment treaty arbitration whether abuse of process should be addressed as an issue relating to the arbitral tribunal's jurisdiction, or relating to the admissibility of the investor's claims. The answer will vary depending on the case, and the specific rule whose spirit is alleged to have being violated.

IV. CONCLUSION

The panoply of new litigation tactics adopted by parties will continue to call for arbitral tribunals to apply and refine the doctrine of abuse of process in international arbitration. The continued application of the concept is a perfect illustration of how the law evolves in any given field. Where certain types of conduct generate a sense of unease, they are first addressed through the application of general principles such as 'abuse of rights' or 'good faith'. Over time, new legal rules will emerge that are specifically designed to tackle particular types of procedural conduct. One would expect the same development to take place in the field of international arbitration with respect to abuse of process.

In the meantime, the least one could say is that arbitrators should not take parties' allegations at face value and should look beyond the literal application of the law to consider the entire context of a party's conduct. In order words, arbitral naiveté is not in order in contemporary arbitral practice.

PCA Case No. 2012-12

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT BETWEEN THE GOVERNMENT OF HONG KONG AND THE GOVERNMENT OF AUSTRALIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, SIGNED ON 15 SEPTEMBER 1993 (THE "TREATY")

-and-

THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW RULES OF ARBITRATION AS REVISED IN 2010 ("UNCITRAL RULES")

-between-

PHILIP MORRIS ASIA LIMITED

("Claimant")

-and-

THE COMMONWEALTH OF AUSTRALIA

("Respondent", and together with the Claimant, the "Parties")

AWARD ON JURISDICTION AND ADMISSIBILITY

17 December 2015

ARBITRAL TRIBUNAL

Professor Karl-Heinz Böckstiegel (President)
Professor Gabrielle Kaufmann-Kohler
Professor Donald M. McRae

REGISTRY

Dr. Dirk Pulkowski
Permanent Court of Arbitration

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Claimant was to have acquired its investment by the date of enactment of the TPP Act, *i.e.* by 21 November 2011. The Tribunal observes that, whether the Tribunal refers to the date when the restructuring was decided (3 September 2010) or when it was completed (23 February 2011), both events occurred before the date of the enactment of the TPP Act.

534. Therefore, and without prejudice to its later finding on abuse of rights, the Tribunal concludes that the requirements for the Tribunal's jurisdiction *ratione temporis* are met.

E. WHETHER THE CLAIMANT'S INVOCATION OF THE TREATY CONSTITUTES AN ABUSE OF RIGHTS

535. Finally, the Tribunal must address whether the invocation of the Treaty by the Claimant constitutes an abuse of rights under the present circumstances.

536. The essence of the Respondent's position is as follows. The doctrine of abuse of rights delimits the tribunal's jurisdiction as defined by the consent of the Parties to the Treaty.[1043] While the Respondent accepts that it must meet the burden establishing an abuse, it does not accept that there is a presumption that the Claimant acted in good faith in bringing its claim, in undergoing a corporate restructuring and subsequently relying on Treaty protections.[1044] According to the Respondent, there is no case law to support this contention.[1045] Rather, cases hold that the entitlement of the Claimant to bring a claim under the Treaty is circumscribed by the scope of the consent of the parties to the Treaty, and such consent and its scope cannot be presumed, but instead must be positively established.[1046] In discharging the burden of proof, the Respondent does not need to meet an exceptionally high evidentiary standard,[1047] such as a standard of "egregious conduct".[1048] The case law indicates that an abuse of right can be found where a corporate restructuring is *motivated* wholly or partly by a desire to gain access to treaty protection in order to bring a claim in respect of a specific dispute[1049] that, at the time of the restructuring, *exists* or is *foreseeable*.[1050] In these circumstances, the restructuring is intended to

1043 Respondent's Reply on Preliminary Objections, para. 443.

1044 Respondent's Reply on Preliminary Objections, para. 450.

1045 Respondent's Reply on Preliminary Objections, paras 447–448.

1046 Respondent's Reply on Preliminary Objections, para. 448.

1047 Respondent's Reply on Preliminary Objections, para. 458.

1048 Respondent's Reply on Preliminary Objections, para. 458.

1049 Respondent's Reply on Preliminary Objections, paras 455, 508.

1050 Respondent's Reply on Preliminary Objections, para. 466.

create an unfair advantage for the foreign investor because the investor has no intention of performing any economic activity in the host State.[1051]

537. The Claimant argues that the application of the doctrine of abuse of rights results in depriving a claimant of rights that otherwise fall squarely within the jurisdiction of the tribunal.[1052] Such a deprivation is to be made only in exceptional circumstances.[1053] To meet the burden of proof, the Respondent must overcome a presumption in favour of the Claimant that it has brought its claim in good faith.[1054] The threshold for establishing an abuse of rights is that of compelling evidence of egregious bad faith akin to fraud.[1055] "Foreseeability" is not relevant to establishing abuse of rights—the critical test is bad faith.[1056] To the extent that foreseeability is relevant, it must be to a very high standard of probability. The "motivation" of an investor is indeed a criterion of abuse of rights. However, bad faith does not exist by virtue of a mere corporate restructuring with a view to taking advantage of Treaty protections. Such normal business practice meets neither the standard of "egregious" conduct nor that of bad faith.[1057]

1. Arbitral Case Law Regarding "Abuse of Rights"

538. The present case is by no means the first investment arbitration in which it is disputed whether a BIT claim brought shortly after restructuring is admissible. Therefore, the Tribunal considers that it is appropriate to review the relevant case law on this point.

539. As a preliminary matter, it is clear, and recognised by all earlier decisions that the threshold for finding an abusive initiation of an investment claim is high. It is equally accepted that the notion of abuse does not imply a showing of bad faith. Under the case law, the abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute. Although it is sometimes said that an abuse of right might also exist in the case of restructuring in respect of an existing dispute, if the dispute already exists, then a tribunal would normally lack jurisdiction *ratione temporis*.

1051 Respondent's Reply on Preliminary Objections, para. 491.

1052 Claimant's Counter-Memorial on Preliminary Objections, para. 323.

1053 Claimant's Counter-Memorial on Preliminary Objections, para. 323.

1054 Claimant's Rejoinder on Preliminary Objections, para. 324.

1055 Claimant's Counter-Memorial on Preliminary Objections, para. 336.

1056 Claimant's Counter-Memorial on Preliminary Objections, paras 345.

1057 Claimant's Counter-Memorial on Preliminary Objections, para. 337.

540. A detailed examination of the relevant cases reveals the following considerations in connection with the legal test for an abuse of right. Among these, it is first and foremost uncontroversial that the mere fact of restructuring an investment to obtain BIT benefits is not *per se* illegitimate.

541. In *Tidewater v. Venezuela*, the tribunal said:

> 184. [I]t is a perfectly legitimate goal and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host [S]tate in this way.[1058]

542. In *Mobil Corporation v. Venezuela*, the tribunal said:

> 204. The aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.[1059]

543. In a similar vein, the tribunal in *Gremcitel v. Peru* said:

> 184. In the Tribunal's view, it is now well-established, and rightly so, that an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate per se, including where this is done with a view to shielding the investment from possible future disputes with the host [S]tate.[1060]

544. In *Aguas del Tunari SA v. Bolivia*, the tribunal observed:

> … [T]o the extent that Bolivia argues that the December 1999 transfer of ownership was a fraudulent or abusive device to assert jurisdiction under the BIT, that:… (d) it is not uncommon in practice and—absent a particular limitation—not illegal to locate one's operation in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.[1061]

545. At the same time, it may amount to an abuse of process to restructure an investment to obtain BIT benefits in respect of a foreseeable dispute. After commenting that it is legitimate for an investor to seek to protect itself from the general risk of future disputes, the tribunal in *Tidewater v. Venezuela* went on to say:

1058 *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013 ("*Tidewater* Decision on Jurisdiction"), para. 184.

1059 *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 ("*Mobil Corporation* Decision on Jurisdiction"), para. 204.

1060 *Gremcitel* Award, para. 184.

1061 *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 330.

> At the heart, therefore, of this issue is a question of fact as to the nature of the dispute between the parties, and a question of timing as to when the dispute that is the subject of the present proceedings arose or could reasonably have been foreseen… If the Claimants' contentions are found to be correct as a matter of fact, then, in the view of the Tribunal, no question of abuse of treaty can arise. On the other hand, if the Respondent's submissions on the course of events are correct, then there may be a real question of abuse of treaty.
> […]
> But the same is not the case in relation to pre-existing disputes between the specific investor and the [S]tate. Thus, the critical issue remains one of fact: was there such a pre-existing dispute?[1062]

546. The point was reiterated in *Mobil Corporation v. Venezuela*:

> 205. With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the *Phoenix* Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID convention and the BITs".[1063]

547. The tribunal in *Pac Rim v. El Salvador* elaborated on this point, setting out a test for distinguishing between a general risk of future disputes and a specific dispute, stating:

> 2.99. […] In the Tribunal's view, the dividing-line [between legitimate restructure and an abuse of process] occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.[1064]

548. The *Gremcitel* tribunal posited a simpler test stating:

> 185. However, a restructuring carried out with the intention to invoke the treaty's protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances.[1065]

549. The principle that a restructuring undertaken to gain treaty protection in light of a specific dispute can constitute an abuse was reiterated in *Lao Holdings v. Laos* in the following terms:

> 70. The Tribunal considers that it is clearly an abuse for an investor to manipulate the nationality of a company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration. In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith who is fully aware prior to the change in nationality of the "legal dispute," as submitted by the Respondent. [1066]

550. While they admit that, under certain circumstances, a restructuring may constitute an abuse, investor-State tribunals have set a high threshold for finding an abuse of process, requiring proof of the foreseeability of the claim and depending on the particular circumstances of each case. The *Tidewater* tribunal said:

1062 *Tidewater* Decision on Jurisdiction, paras 145–146 and 184.

1063 *Mobil Corporation* Decision on Jurisdiction, para. 205.

1064 *Pac Rim* Decision on the Respondent's Jurisdictional Objections, para. 2.99.

1065 *Gremcitel* Award, para. 185.

1066 *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, para. 70.

> 147. [u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case…[1067]

551. That statement was reiterated in *Mobil Corporation v. Venezuela*.[1068]

552. The requirement of a high threshold was articulated by the *Chevron (I)* tribunal in the following terms:

> 143. … [I]n all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold results from the seriousness of a charge of bad faith amounting to abuse of process. As Judge Higgins stated in her 2003 Separate Opinion in the *Oil Platforms* case, there is "a general agreement that the graver the charge the more confidence must there be in the evidence relied on."[1069]

553. A similar approach was taken by the tribunal in *Gremcitel* when it said:

> 186. As for any abuse of right, the threshold for a finding of abuse of process is high, as a court or tribunal will obviously not presume an abuse, and will affirm the evidence of an abuse only "in very exceptional circumstances". Furthermore, as the Tribunal in *Mobil v. Venezuela* stated, "[u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, *taking into account all the circumstances of the case*."[1070]

554. Despite the variations in the formulations used in the decisions just quoted, this Tribunal considers that case law has articulated legal tests on abuse of right that are broadly analogous, revolving around the concept of foreseeability.[1071] In the Tribunal's view, foreseeability rests between the two extremes posited by the tribunal in *Pac Rim v. El Salvador*—"a very high probability and not merely a possible controversy". On this basis, the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable. The Tribunal is of the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the *Tidewater* tribunal, that a measure which may give rise to a treaty claim will materialise. The Tribunal will now apply this test to the facts of the case.

2. The Restructuring in the Context of Political Developments

555. Both Parties have presented long timelines of events, which need to be taken into account. In the following paragraphs, the Tribunal will juxtapose developments occurring at the corporate

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1067 *Tidewater* Decision on Jurisdiction, para. 147.

1068 *Mobil Corporation* Decision on Jurisdiction, para. 177.

1069 *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, para. 143.

1070 *Gremcitel* Award, para. 186.

1071 See also *Gremcitel* Award, fn. 219.

level within the PMI Group of companies and events arising at the political level within the Australian Government. Doing so, it will focus on occurrences which the Tribunal considers particularly relevant to place the Claimant's restructuring into temporal perspective.

556. The PMI Group has been restructured in various ways at least since 2005,[1072] although it is not entirely clear to the Tribunal to what extent these changes in the corporate structure were part of a single restructuring plan rather than a series of *ad hoc* improvements. The Respondent began considering tobacco Plain Packaging Measures as early as 2008 with the introduction of the Fielding Bill in August 2009.[1073] The Tribunal notes that on 2 September 2009 the PMI Group received a memorandum containing legal advice [redacted],[1074] and, a month later, PML's solicitors wrote to the Health Minister, Nicola Roxon, expressing concerns about the effect of the plain packaging legislation on Philip Morris's property rights.[1075]

557. In February 2010, while several opinion polls in Australia indicated that the popularity of Prime Minister Rudd's Government dropped,[1076] Australia's Department of Foreign Affairs and Trade stated that the Fielding Bill "did not represent government policy and that there was no government plan to introduce plain packaging legislation".[1077] On 14 April 2010, the PMI Group approved its first plan to further streamline its corporate structure,[1078] and in the ensuing months of the same year, correspondence was exchanged within the PMI Group concerning legal advice regarding corporate restructuring and investment treaty protections for the Group's investments in Australia in the context of plain packaging.[1079] On 29 April 2010, the Australian Government, under the leadership of Prime Minister Rudd, announced major tobacco control

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1072 [redacted]

1073 Memorandum from Australian Department of Foreign Affairs and Trade Union to Unknown Recipient Regarding Plain Packaging (**Exhibit C-221**); Parliamentary Digest, Tobacco Plain Packaging Bill 2011 (**Exhibit C-456**).

1074 PM Asia, Claimant's Revised Privilege Log – October 31, 2014 (RPL doc. 299) (**Exhibit R-1058**).

1075 Letter from AAR (solicitors for PML) to Health Minister Roxon (9 October 2009) (**Exhibit R-007**).

1076 Parliament of Australia Research Paper, p. 10 (**Exhibit C-189**).

1077 Letter from Australian Department of Foreign Affairs and Trade to Redacted Recipient on Plain Packaging (23 February 2010) (**Exhibit C-100**); Memorandum from Australian Department of Foreign Affairs and Trade Union to Unknown Recipient Regarding Plain Packaging (**Exhibit C-221**).

1078 Claimant's Counter-Memorial on Preliminary Objections, para. 50; [redacted].

1079 Email from Leo O'Keeffe to Ian Goss forwarded to Philip Noonan, Director General IP Australia (23 April 2010) (**Exhibit C-113**); RPL doc. 249 (**Exhibit R-1058**); RPL doc. 81 (**Exhibit R-1058**).

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reforms, including the intention to introduce legislation to mandate plain packaging of tobacco products.[1080] On 24 June 2010, then-Deputy Prime Minister Julia Gillard replaced Prime Minister Rudd, and at her first press conference, she indicated "a willingness to revise the policies of the Rudd Government".[1081] There was however no specific reference to the fate of plain packaging legislation. On 7 July 2010, the Australian Government published a timetable which showed that the plain packaging legislation would be ready for introduction before 30 June 2011 and would be fully implemented by 1 July 2012.[1082] The House of Representatives was dissolved on 19 July 2010.[1083]

558. E-mail exchanges dated 26–29 July 2010 between the PMI Group and the Claimant's solicitors reveal that PMI was advised [redacted]. In addition, the Tribunal observes that the Claimant was aware that the Gillard Government would pursue the plain packaging policy and that there were no indications that a newly elected Labor Government would discard plain packaging plans as articulated by the former Prime Minister.[1084]

559. On 4 August 2010, at the height of the federal election campaign, the Hon. Tony Abbott MP, then leader of the Liberal Party and the Leader of Opposition, said that "if we are returned on the 21st August, we will certainly consider going ahead with the Government's plain packaging for cigarettes".[1085] At the same time, when the PMI Group requested legal advice [redacted], on 16 August 2010, the Coalition Shadow Health Minister, Peter Dutton, reiterated his opposition to the plain packaging legislation and stated "we haven't seen any legislation from the

1080 Prime Minister, "Anti-Smoking Action" (Media Press Release, 29 April 2010) (**Exhibit C-120**); Transcript of Joint Press Announcement of Opposition Leader The Hon. Tony Abbott MP, The Hon. Scott Morrison MP and The Hon. Louise Markus MP (29 April 2010) (**Exhibit C-117**).

1081 Wanna John, Political Chronicles – Commonwealth of Australia: July to December 2010, *Australian Journal of Politics and History*, *Vol. 57, No. 2* (2010) (**Exhibit C-136**).

1082 Australian Government, "A National Health and Hospitals Network for Australia's Future: Delivering the Reforms" (7 July 2010), p. 45 (**Exhibit R-672**).

1083 Parliament of Australia Research Paper No. 8, 2011-12, "2010 Federal Election: a brief history" (**Exhibit C-189**).

1084 Respondent's Reply on Preliminary Objections, para. 58; Email [redacted] (Franchise Partners) to [redacted] (PM Group), "Plain packaging issue we spoke about" (26 July 2010) (**Exhibit R-774**).

1085 Respondent's Reply on Preliminary Objections, para. 60; S. Benson, "Abbott smoke signal – Australia Decides 2010", *The Daily Telegraph* (5 August 2010) (**Exhibit R-695**).

Government. So really apart from a press release, we don't know what it is the Government's asking us to sign up to".[1086]

560. On 21 August 2010, no political party achieved an absolute majority in the federal election and the Labor Party and the Opposition Coalition, which had criticised plain packaging, now had an equal number of seats in the House of Representatives.[1087] On 26 August 2010, the Parliament discontinued its consideration of the Fielding Bill, and the next day, the PMI Group circulated an internal e-mail titled "urgent ownership transfer" which contained advice regarding corporate restructuring.[1088] On 3 September 2010, as part of its ongoing restructuring, PMI approved, *inter alia*, the restructuring proposal of several companies within its Group and the transfer of its wholly owned Australian subsidiaries to the Claimant.[1089]

561. Following weeks of negotiations, on 14 September 2010, Prime Minister Gillard formed a Labor Party-led minority government which did not have sufficient votes to pass legislation including the (not yet drafted) plain packaging legislation.[1090] Although a Parliamentary briefing book stated that, "[i]t is difficult to determine the likely fate of the plain packaging proposal given that the position of the Coalition and the independent members is unknown",[1091] on 17 November 2010, in a media press release, Health Minister Roxon confirmed the Government's decision to mandate plain packaging.[1092]

562. From November to December 2010, while PMI Group engaged in extensive communication to transfer shares among its companies including the Claimant, DoHA conducted targeted

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1086 Transcript of the Election 2010 – Health Debate at the National Press Club, *ABC News* (11 August 2010) (**Exhibit C-320**); Transcript of Radio National interview with Shadow Health Minister Peter Dutton (16 August 2010) (**Exhibit C-321**).

1087 Parliament of Australia Research Paper No. 8, 2011-12, "2010 Federal Election: a brief history" (**Exhibit C-189**); Wiltshire Kenneth, "Political Overview – Retrospect 2010" CEDA, *Economic and Political Overview 2011* (**Exhibit C-144**).

1088 [redacted]

1089 [redacted]

1090 Parliament of Australia Research Paper No. 8, 2011-12, "2010 Federal Election: a brief history", pp. 31–32 (**Exhibit C-189**).

1091 Dr. Matthew Thomas, *Plain Packaging of Tobacco Products*, Parliamentary Library Briefing Book: Key Issues for the 43rd Parliament, Social Policy Section, (16 September 2010) (**Exhibit C-325**).

1092 Health Minister Roxon, "Internet tobacco advertising to face new tough restrictions" (Media Release, 17 November 2010) (**Exhibit R-024**).

consultations with the tobacco industry including PML about potential anti-counterfeiting measures to be included in the design of the Plain Packaging Measures,[1093] and Health Minister Roxon wrote to Prime Minister Gillard seeking her agreement for the drafting of the plain packaging legislation.[1094]

563. After receiving legal advice [redacted] the PMI Group filed the Foreign Investment Application with the FIRB on 21 January 2011 and the Claimant's solicitors notified the Treasurer under the FATA of the proposed transfer of ownership of the Australian subsidiaries to PM Asia.[1096] While the PMI Group continued receiving legal advice [redacted], on 11 February 2011, a Treasury Official from the FIRB sent the Claimant's solicitor the No-objection Letter stating that the Government had no objection to PM Asia's proposed acquisition of PM Australia. On 23 February 2011, the Claimant formally acquired its shareholding in PM Australia and PML, its first acquisition of a PM subsidiary in the Asia region.[1097]

564. On 6 April 2011, the TPP Bill 2011 was introduced into the Australian Parliament.[1098] On 22 May 2011, Health Minister Roxon stated that the Government had a "very big fight on [its] hands" to pass plain packaging legislation and stated that they were "finding resistance not just from big tobacco, but also unfortunately, from Mr. Abbott and the Liberal Party". When asked whether the Government would have the votes to pass plain packaging legislation without support from the Coalition, Health Minister Roxon did not commit to an answer.[1099] Shortly thereafter, on 26 May 2011, the Australian press reported that Parliament would likely pass the

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1093 Statement of Defence, Vol. A, para. 100; Respondent's Reply on Preliminary Objections, para. 77; DoHA, Info/Advice Brief, "Tobacco Plain Packaging: Consultations with Tobacco Industry" (30 November 2010) (**Exhibit R-008**).

1094 Letter from Health Minister Roxon to Prime Minister (20 December 2010) (**Exhibit R-706**); Letter from Health Minister Roxon to the Treasurer (20 December 2010) (**Exhibit R-707**).

1095 [redacted]

1096 Statement of Defence, Vol A., para. 102; [redacted].

1097 Statement of Claim, para. 48; [redacted].

1098 Respondent's Reply on Preliminary Objections, para. 92.

1099 Transcript of Meet the Press interview with Minister for Health Nicola Roxon (22 May 2011) (**Exhibit C-338**).

plain packaging legislation because the Labor Party had secured the four extra votes that it needed to pass the legislation.[1100]

565. On 22 June 2011, a memorandum from Mr. Pellegrini indicates that PMI sought approval to refine its affiliates' corporate structure in the Asia region.[1101] The Claimant then served the Respondent with the Notice of Claim under the BIT on 27 June 2011. On 6 July 2011, the TPP Bill was introduced into the House of Representatives.[1102] On 13 July 2011, the Claimant acquired Philip Morris (Malaysia) Sdn Bhd and Philip Morris Taiwan SA from PM Brands Sàrl.[1103] Finally, on 21 November 2011, the TPP Bill passed both Houses of Parliament and the TPP Act was enacted. On the same date, the Claimant served the Respondent with a Notice of Arbitration under the BIT.[1104]

566. For the Tribunal, the key question is whether a dispute about plain packaging was reasonably foreseeable before the restructuring. In line with jurisprudence, the Tribunal considers that a dispute in the legal sense is a disagreement about rights, not merely about policy. It is clear that the dispute contemplated here was a dispute about rights. The record shows that PMI stated clearly even before the Rudd announcement that plain packaging would deprive it of its legal rights. As early as 2009, it had informed the Australian Government that plain packaging would interfere with its property rights, and its internal memoranda made it clear that it was considering the matter in legal terms. On 29 April 2010, Australia's Prime Minister Rudd and Health Minister Roxon unequivocally announced the Government's intention to introduce Plain Packaging Measures. In the Tribunal's view, there was no uncertainty about the Government's intention to introduce plain packaging as of that point. Accordingly, there was at least a reasonable prospect that legislation equivalent to the Plain Packaging Measures would eventually be enacted, which would trigger a dispute. The Tribunal is not convinced that political developments after 29 April 2010 were such that the Claimant could reasonably conclude that the enactment of Plain Packaging Measures and the ensuing dispute were no longer foreseeable.

1100 Phillip Coorey, "Tobacco plain packaging to pass despite Opposition," *The Sydney Morning Herald* (26 May 2011) (**Exhibit C-341**).

1101 [redacted]

1102 Statement of Defence, Vol. A., para. 113; Commonwealth, *Parliamentary Debates*, House of Representatives (6 July 2011), pp. 7708, 7711 (Ms. Roxon, Minister of Health) (**Exhibit R-291**).

1103 PM Asia, "Directors' Report and Financial Statements for the year ended 31 December 2011" (6 July 2012), p. 24 (**Exhibit R-745**).

1104 Tobacco Plain Packaging Act 2011 (**Exhibit C-176**).

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567. The Tribunal wishes to make two further general but at the same time case-specific considerations. First, in this case a period of 19 months passed between the announcement of the intention to legislate and the passage of the actual legislation. However, the length of time it takes to legislate is not a decisive factor in determining whether the legislation is foreseeable. The Tribunal notes that democratic States often have long legislative processes involving consultations with a variety of stakeholders. In this case, the process, which led to the approval of the TPP Act, was transparent, involving preliminary reports and consultations and discussions with all stakeholders, including the tobacco companies. However, this does not make the outcome any less foreseeable than in the case of a State that does not have the same sort of democratic oversight of the legislative process and might enact legislation almost overnight.

568. Second, in April 2010, long before the restructuring, the Australian Government announced that it would introduce Plain Packaging Measures and never withdrew from that position even though political leaders changed and the Government became a minority government. What became uncertain was not whether the Government intended to introduce plain packaging, but whether the Government could maintain a majority or would be replaced. But that is a difficulty which any minority government faces, and if it were treated as a basis for saying that there was no reasonable prospect of a dispute, then there would be one rule for majority governments and another for minority governments, which would create particular difficulty for States whose electoral processes can result in minority governments.

569. The Tribunal thus concludes that, at the time of the restructuring, the dispute that materialised subsequently was foreseeable to the Claimant. Indeed, at least after the 29 April 2010 announcement, it was reasonably foreseeable that legislation equivalent to the Plain Packaging Measures would eventually be enacted and, consequently, a dispute would arise.

3. The Cogency of PM Asia's Alleged Other Reasons for Restructuring

570. Having held that the dispute was foreseeable prior to the restructuring, the Tribunal now turns to the Claimant's reasons for restructuring. In this context, the Parties have discussed whether the restructuring was solely motivated by the desire to obtain treaty protection or whether such protection was merely an ancillary consequence of the restructuring. The Tribunal considers that the mere fact that a company prepared for "the worst case" by seeking legal advice about a BIT claim at an early stage would not be unusual; such conduct might simply be normal and prudent business behaviour. In the view of the Tribunal, it would not normally be an abuse of right to bring a BIT claim in the wake of a corporate restructuring, if the restructuring was justified independently of the possibility of bringing such a claim. The Tribunal acknowledges the reality

that corporate groups—and particularly multinationals—are routinely restructured for a variety of reasons.

571. The Parties have addressed the cogency or persuasiveness of PM Asia's alleged other reasons for restructuring extensively both by arguments and by the submission of evidence. A summary of these submissions follows:

572. The Claimant alleges that the restructuring was part of a broader, group-wide process that had been ongoing since 2005.[1105] In support, the Claimant relies on internal memoranda that refer to proposals for restructuring PMI's European affiliates in 2004, and PMI's Latin American and Canadian affiliates in 2008.[1106] The Claimant also submits one internal memorandum dated 3 September 2010 as evidence of a proposal to restructure affiliates in the African and Asian regions at that time,[1107] and one internal memorandum dated 22 June 2011 as evidence of a proposal to restructure certain Asian affiliates under PM Asia Limited "as part of ongoing efforts to refine PMI affiliates' corporate structure in the Asia region."[1108] In addition, the Claimant presents a Board decision as evidence of ongoing restructuring of other PMI affiliates.[1109] To reinforce this documentary evidence, the Claimant relies on the witness statements and oral testimony of Mr. Pellegrini in support of its assertion that the transfer of ownership of PM Australia to the Claimant was consistent with the objectives of these other restructuring initiatives.[1110]

573. The Respondent, on the other hand, relies on the witness statement of Professor Lys, who notes that the only contemporaneous piece of evidence provided by the Claimant that directly relates to a broader project to restructure PMI Asia is the internal memorandum dated 3 September 2010 and that this memorandum raises a number of questions about whether this restructuring

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1105 Statement of Claim, para. 44; Claimant's Rejoinder on Preliminary Objections, paras 334–343; Claimant's First Post-Hearing Brief, paras 103, 106; Claimant's Second Post-Hearing Brief, paras 22–23; Amended Transcript of the Hearing, Day 1, pp. 102–105; Amended Transcript of the Hearing, Day 3, p. 12:1–2.

1106 [redacted]

1107 [redacted]

1108 [redacted]

1109 [redacted]

1110 Pellegrini Statement, paras 30–37 (**Exhibit CWS-002**); Second Pellegrini Statement at para. 18 (**Exhibit CWS-016**); Amended Transcript of the Hearing, Day 2, p. 189:11–12, pp. 204:25–205:25. See also Claimant's Second Post-Hearing Brief, para. 23.

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made real business sense.[1111] The Respondent also questions the veracity of that memorandum, citing to excerpts from company registers, Annual Reports of the affected affiliates, as well as previous internal PMI memoranda that appear to contradict the 3 September 2010 memorandum.[1112] The Respondent criticises the Claimant's reliance on documentary evidence on the basis that it was prepared in contemplation of this arbitration, that it contradicts the Claimant's purported restructuring strategy, and that certain documents are too remote to be of relevance.[1113] Finally, the Respondent argues that [redacted] oral testimony directly contradicts the Claimant's position, since "[h]e agreed that [the restructuring] had no 'commercial advantage'"[1114] and "conceded he was not really a part of [the restructuring] and said it had no meaningful impact on this region".[1115]

574. The Claimant also argues that one relevant and compelling reason motivating the restructuring was the need to align ownership with the Claimant's pre-existing management control of its subsidiaries, thereby creating a "better, leaner, clearer structure".[1116] The Claimant points to internal PM Asia memoranda in support of the contention that a more centralised ownership structure would facilitate PMI's overall objectives.[1117] The Claimant relies on the oral testimony of Mr. Pellegrini who stated that one of the objectives of PMI's group-wide restructuring was to align the ownership and management control of its various affiliates.[1118] Mr. Pellegrini also

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1111 [redacted]

1112 [redacted]

1113 [redacted]

1114 [redacted]

1115 [redacted]

1116 Claimant's Counter-Memorial on Preliminary Objections, para. 52; Claimant's Rejoinder on Preliminary Objections, paras 330, 338–340; Claimant's First Post-Hearing Brief, paras 111–14; Amended Transcript of the Hearing, Day 1, p. 193:6–19; Amended Transcript of the Hearing, Day 2, p. 226:3–12; Amended Transcript of the Hearing, Day 3, p. 12:1–2, p. 40:13–19, p. 10:17–19.

1117 [redacted] See also Pellegrini Statement, para. 33 (**Exhibit CWS-002**); Second Pellegrini Statement, para. 18 (**Exhibit CWS-016**); Amended Transcript of the Hearing, Day 2, p. 215:17–19.

1118 Amended Transcript of the Hearing, Day 2, p. 193:9–16.

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explained why certain PMI affiliates in the Asia region had not been acquired by PM Asia, and that this did not contradict the streamlining objectives of the restructuring.[1119]

575. The Respondent disputes that the restructuring was motivated by the need to align PMI affiliates in the Asia region, pointing to a Table of PMI Affiliates in the Asia region over which PM Asia asserts oversight and control and which, according to the Respondent, establishes that the restructuring has not followed a regional pattern.[1120] Pointing to a PMI internal Memorandum dated 22 June 2011, the Respondent asserts that the decision to transfer certain PMI Asian affiliates to PM Asia was made on the same day that Mr. Pellegrini signed the Notice of Claim.[1121] The Respondent relies on the report of Professor Lys, who stated that the previous structure was functioning "perfectly well" before the restructuring and that the net impact of the restructuring was to complicate, rather than simplify the ownership structure.[1122]

576. Furthermore, the Claimant contends that the restructuring helped to minimise the Claimant's tax liabilities. By way of example, the Claimant refers to an internal PMI memorandum dated [redacted], which indicates that certain tax benefits under the Dutch tax system were associated with shifting certain functions and responsibilities from PM Holland to PMI.[1123] The Claimant also submits internal memoranda dated [redacted], [redacted] and [redacted] that purportedly evidence PMI's efforts to streamline its activities, thereby liquidating redundant entities and creating consequential tax advantages.[1124] These tax advantages, in turn, allowed the Claimant to finance an inter-company debt, as evidenced by a Loan Note between PM Holland and PM International Management S.A.[1125] The Claimant finally relies on

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1119 Amended Transcript of the Hearing, Day 2, pp. 219:20–220:19, pp. 220:20–222:8; Amended Transcript of the Hearing, Day 3, pp. 9:1–10:23.

1120 Respondent's Reply on Preliminary Objections, para. 112; [redacted].

1121 [redacted]

1122 Respondent's Reply on Preliminary Objections, para. 113–115; Respondent's First Post-Hearing Brief, paras 104–107; Respondent's Second Post-Hearing Brief, para. 39; Amended Transcript of the Hearing, Day 2, pp. 215:20–216:10, p. 263:17–22; p. 227:11–13; Amended Transcript of the Hearing, Day 3, p. 11:21–25; pp. 42:25–43:5. See also Second Expert Report of Professor Lys (26 November 2014), paras 194, 197 (**Exhibit RWS-012**).

1123 Claimant's Rejoinder on Preliminary Objections, paras 341; Claimant's First Post-Hearing Brief, para. 107; Philip Morris International, Internal Memorandum, October 22, 2004, p. 2 (**Exhibit C-436**).

1124 Claimant's Rejoinder on Preliminary Objections, paras 341; [redacted].

1125 [redacted]

Mr. Pellegrini's oral testimony wherein he recalled that the restructuring presented "an advantage from a tax point of view" to finance intercompany debt.[1126]

577. The Respondent replies that the restructuring was hurried through and that valuation and tax considerations were only an afterthought. It points in particular to a series of e-mails in this regard.[1127] It adds that the Tribunal has been kept away from any "tax experts" who could speak of the supposed revenue rationale for the restructuring. Similarly, the Respondent observes that there are only few privileged documents listed in the RPL that support the purported tax benefits of the restructuring at the time when it was being approved by the PMI Group.[1128] It refers to the report of Professor Lys which explains that any tax advantage from the restructuring would have been "small and inconsequential" in the context of other sources of income, and that these advantages were "not needed to service its interest obligations under the 'loan-note'".[1129]

578. Furthermore, in reliance on Mr. Pellegrini's written and oral evidence, the Claimant alleges that the restructuring also helped to optimise cash flow, which was useful for everyday operations as well as strategic acquisitions.[1130] It notes that these cash flow benefits provided greater financial flexibility in the event that an acquisition opportunity would arise.[1131] The Claimant relies on internal correspondence and compares PM Asia's financial statements before and after the restructuring as evidence of the cash benefits of the restructuring.[1132]

1126 Amended Transcript of the Hearing, Day 1, p. 206:18–21.

1127 Respondent's First Post-Hearing Brief, para. 103; E-mail from [redacted] to [redacted] (29 January 2010) (**RPL Doc #315**); E-mail from [redacted] to [redacted] (23 August 2010) (**RPL Doc #335**); E-mail from [redacted] to [redacted] (**Exhibit R-766**).

1128 [redacted]

1129 Respondent's Reply on Preliminary Objections, paras 113–115; Respondent's First Post-Hearing Brief, para. 103; First Expert Report of Professor Lys (13 October 2013), Section XI (**Exhibit RWS-001**); Second Expert Report of Professor Lys (26 November 2014), Section III (**Exhibit RWS-012**).

1130 Second Pellegrini Statement, para. 19 (**Exhibit CWS-016**); Amended Transcript of the Hearing, Day 3, pp. 19:8–21:1; p. 19:11–13, 18.

1131 Claimant's Rejoinder on Preliminary Objections, paras 334–343; Claimant's First Post-Hearing Brief, paras 19, 106, 108, 109, 115–116; Amended Transcript of the Hearing, Day 3, p. 20:5–7.

1132 [redacted]

579. The Respondent objects that this alleged reason is "nonsensical and un-persuasive". It refers in particular to the evidence of Professor Lys, who states that the restructuring did not have any of the anticipated financial benefits.[1133] The Respondent also points to PM Asia's financial statements for 2001 and 2010 to show that PM Asia made a profit in those years without the receipt of dividend income from the restructuring.[1134] The Respondent also recalls Professor Lys's report, and PM Asia's financial statements for 2011, 2012 and 2013, in order to demonstrate that any dividend income arising from the restructuring was not used to fund PM Asia's operations or to make strategic acquisitions, in contradiction of the Claimant's purported rationale for the restructuring.[1135] The Respondent relies on internal PMI documents, including various "country reports" and financial statements, as well as public comments made by PMI representatives, as evidence that PMI's growth in the Asia region was the result of non-Asian PMI affiliates making strategic acquisitions in the region, as opposed to the growth of PM Asia.[1136]

580. Finally, the Claimant does not dispute that the restructuring was done partly in order to obtain protection under the BIT, but stresses that this was not the sole motive because the enactment of

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1133 Respondent's Reply on Preliminary Objections, paras 113–115; First Expert Report on Professor Lys (13 October 2013), paras 423, 424 (**Exhibit RWS-001**); Second Expert Report of Professor Lys (26 November 2014), para. 39 (**Exhibit RWS-012**).

1134 [redacted]

1135 Respondent's First Post-Hearing Brief, para. 108; Second Expert Report of Professor Lys (26 November 2014), paras 228–229; [redacted] PM Holland, "Annual report for the year ended December 31st, 2012" (filed in the Dutch Registry on 24 July 2013), pp. 14, 18 (**Exhibit R-909**). See also Amended Transcript of the Hearing, Day 3, p. 3:25, p. 20:11–19.

1136 Respondent's Reply on Preliminary Objections, paras 113–122; Respondent's Second Post-Hearing Brief, paras 40–41; M. Pellegrini, "Remarks by Matteo Pellegrini, President, Asia [r]egion, Philip Morris International Inc, Investor Day, Lausanne", 23 June 2010, pp. 4, 11 (**Exhibit R-016**); L. Camilleri, "Remarks by Louis C. Camilleri Chairman and Chief Executive Officer, Philip Morris International Inc., Morgan Stanley Global Consumer and Retail Conference", 16 November 2011, p. 8 (**Exhibit R-032**); PMI, "India: Country Overview" 11 November 2014 (**Exhibit R-788**); PMI, "Annual Report 2013", 7 March 2014, p. 23 (**Exhibit R-948**); PMI, "Annual Report 2013", 7 March 2014, p. 48 (**Exhibit R-948**); PMI, "Annual Report 2013", 7 March 2014, p. 50 (**Exhibit R-948**); PMI, "Annual Report 2013", 7 March 2014, p. 74 (**Exhibit R-948**); J. Olczak (PMI), "Remarks for 2013 CAGNY Conference", 20 February 2013, p. 4 (**Exhibit R-1106**); PMI, "Philip Morris International Inc. (PMI) Announces New Business Transaction in the Philippines", 25 February 2010 (**Exhibit R-1095**); PMI, "China: Country Overview", 27 November 2014 (**Exhibit R-1166**); PMI, "Indonesia: Country Overview", 27 November 2014 (**Exhibit R-1167**); PMI, "Philippines: Country Overview", 27 November 2014 (**Exhibit R-1172**); PMI, "Vietnam: Country Overview", 27 November 2014 (**Exhibit R-1176**).

the TPP Act was not foreseeable at the time that it decided to restructure.[1137] The Claimant relies to a significant extent on Mr. Pellegrini's testimony that the primary motivations for restructuring were unrelated to the Treaty.[1138] In addition, the Claimant refers to internal PMI documents and statements by the Government of Australia, which in its view, indicate that at the time of the restructuring it was reasonable to assume that the TPP Act was unlikely to be enacted.[1139]

581. By contrast, the Respondent asserts that giving the PMI Group a "corporate vehicle with standing" to bring a treaty claim was the primary motivation and the true reason for the restructuring.[1140] The Respondent relies in part on the cross-examination of Mr. Pellegrini, where he stated that litigation formed part of the "armory of tools we were planning to deploy" to defeat the TPP Act.[1141] It also notes "the sheer number of communications recorded in the RPL which concerned the consideration of investment treaty protections for the Australian subsidiaries and approaches to lawyers for a potential claim in relation to [P]lain [P]ackaging Measures under the BIT."[1142] These e-mails purport to indicate that by 3 July 2010, the PMI

1137 Claimant's Rejoinder on Preliminary Objections, paras 344, 364–367, 371–373, 377.

1138 [redacted]

1139 [redacted]

1140 Statement of Defence, Vol. A, paras 159–162; Respondent's Reply on Preliminary Objections, paras 94–96, 287–289; Respondent's First Post-Hearing Brief, paras 47–50, 63, 79, 83–98; Respondent's Second Post-Hearing Brief, para. 9–13, 20, 30, 33–34.

1141 [redacted]

1142 Respondent's Second Post-Hearing Brief, para. 20. See also E-mail from [redacted] to [redacted] (23 August 2010) (**RPL Doc #335**); E-mail from [redacted] to [redacted] (21 September 2010) (**RPL Doc #343**); E-mail from [redacted] to [redacted] (28 November 2010) (**RPL Doc #366**); E-mail from [redacted] to [redacted] (28 November 2010) (**RPL Doc #368**); E-mail from [redacted] to [redacted] (30 November 2010) (**RPL Doc #322**); E-mail from [redacted] to [redacted] (10 December 2010) (**RPL Doc #355**); E-mail from [redacted] to [redacted] (11 December 2010) (**RPL Doc #266**); E-mail from [redacted] to [redacted] (11 December 2010) (**RPL Doc #283**); E-mail from [redacted] to [redacted] (**RPL Doc #282**); E-mail from [redacted] to [redacted]

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Group had instructed lawyers and retained counsel to act for it in an investment arbitration.[1143] Several e-mails include the subject line "Australia-HK BIT", "HK BIT", and "Philip Morris—Plain Packaging Australia—*Arbitration under the HK BIT*".[1144] One among these documents refers to the adoption of litigation as part of PMI's "Plain Packaging Strategy",[1145] and the PMI Annual Report for 2010 stipulates an intention to sue in the event that the TPP Act passes.[1146] Finally, the Respondent observes "the absence of communications about *any other reason* for the restructur[ing]" (emphasis original).[1147]

582. After a close examination of the evidence, the Tribunal is not persuaded that tax or other business reasons were determinative factors for the Claimant's restructuring. In particular, the Tribunal notes that no witness who was familiar with the rationale of the restructuring was presented by the Claimant in the proceedings. Indeed, the persons most closely involved in the

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[redacted] (12 December 2010) (**RPL Doc #323**); E-mail from [redacted] to [redacted] (12 December 2010) (**RPL Doc #372**); E-mail from [redacted] to [redacted] (25 January 2011) (**RPL Doc #297**); E-mail from [redacted] to [redacted] (9 September 2010) (**RPL Doc #48**); E-mail from [redacted] to [redacted] (28 January 2011) (**RPL Doc #281**); E-mail from [redacted] to [redacted] (25 February 2011) (**RPL Doc #160**).

1143 MCDS, "National Drug Strategy 2010-2015", 2011 (**Exhibit R-64**); E-mail from [redacted] to [redacted], 30 June 2010 (**Exhibit R-673**); E-mail from [redacted] to [redacted] 4 August 2010 (**Exhibit R-675**); E-mail from [redacted] to [redacted], 12 August 2010 (**Exhibit R-685**).

1144 See *e.g.* E-mail from [redacted] to [redacted] (18 January 2011) (**RPL Doc #23**); E-mail from [redacted] to [redacted] (18 January 2011) (**RPL Doc #24**); E-mail from [redacted] to [redacted] (18 January 2011) (**RPL Doc #31**); E-mail from [redacted] to [redacted] (18 January 2011) (**RPL Doc #44**); E-mail from [redacted] to [redacted] (18 January 2011) (**RPL Doc #86**); E-mail from [redacted] to [redacted] (18 January 2011) (**RPL Doc #89**); E-mail from [redacted] to [redacted] (30 November 2010) (**RPL Doc #322**); E-mail from [redacted] to [redacted] (22 September 2010) (**RPL Doc #344**); E-mail from [redacted] to [redacted] (10 December 2010) (**RPL Doc #352**); E-mail from [redacted] to [redacted] (18 January 2011) (**RPL Doc #357**); E-mail from [redacted] to [redacted] (18 January 2011) (**RPL Doc #358**).

1145 [redacted] See also PML, Submission to the Senate Community Affairs Legislation Committee, "Inquiry into *Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009*", 30 April 2010 (**Exhibit R-013**); [redacted]

1146 PMI, "Annual Report 2010", 1 March 2011 (**Exhibit R-986**).

1147 Respondent's First Post-Hearing Brief, para. 97.

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restructuring decision were not offered as witnesses by the Claimant. Nor was the Tribunal presented with contemporaneous corporate memoranda or other internal correspondence sufficiently explaining the business case for the restructuring in detail.

583. In this context, the Tribunal is inclined to place limited weight on Mr. Pellegrini's testimony as it became apparent during the hearing that Mr. Pellegrini was not familiar with details of legal or corporate strategy. Against this background, the expert report of Professor Lys does carry weight, especially as it remains unrebutted by other expert evidence, and Professor Lys was not called for cross-examination.

584. Therefore, the Tribunal finds that the Claimant has not been able to prove that tax or other business reasons were determinative for the restructuring. From all the evidence on file, the Tribunal can only conclude that the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong.

4. Conclusion

585. In view of the above considerations, the Tribunal concludes that the commencement of treaty-based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable. A dispute is foreseeable when there is a reasonable prospect that a measure that may give rise to a treaty claim will materialise.

586. In the present case, the Tribunal has found that the adoption of the Plain Packaging Measures was foreseeable well before the Claimant's decision to restructure was taken (let alone implemented). On 29 April 2010, Australia's Prime Minister Kevin Rudd and Health Minister Roxon unequivocally announced the Government's intention to introduce Plain Packaging Measures. In the Tribunal's view, there was no uncertainty about the Government's intention to introduce plain packaging as of that point. Accordingly, from that date, there was at least a reasonable prospect that legislation equivalent to the Plain Packaging Measures would eventually be enacted and a dispute would arise. Political developments after 29 April 2010 did not involve any change in the intention of the Government to introduce Plain Packaging Measures and, thus, were not such as to change the foreseeability assessment.

587. The Tribunal's conclusion is reinforced by a review of the evidence regarding the Claimant's professed alternative reasons for the restructuring. The record indeed shows that the principal, if not sole, purpose of the restructuring was to gain protection under the Treaty in respect of the very measures that form the subject matter of the present arbitration. For the Tribunal, the

adoption of the Plain Packaging Measures was not only foreseeable but actually foreseen by the Claimant when it chose to change its corporate structure.

588. In light of the foregoing discussion, the Tribunal cannot but conclude that the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute.

F. COSTS OF ARBITRATION

589. As this Interim Award (final save as to costs) comes to the conclusion that this Tribunal cannot exercise its jurisdiction, it brings the present proceedings to an end, but for a decision on the costs of arbitration.

590. The Tribunal will provide the Parties with an opportunity to make submissions regarding the amounts and the allocation of the costs of the proceedings, and the Tribunal will then fix and allocate the costs of arbitration in a final award on costs.

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Churchill Mining PLC and Planet Mining Pty Ltd

The Claimants

v.

Republic of Indonesia

The Respondent

(ICSID Case No. ARB/12/14 and 12/40)

Award

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
Mr. Michael Hwang S.C., Arbitrator
Professor Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal
Mr. Paul-Jean Le Cannu

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Date of dispatch to the Parties: 6 December 2016

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527. Finally, the Claimants' absence of diligence became apparent in the present proceedings when they filed or produced 34 forged documents to support their claims. These notably included two different versions of the PT RTM and PT RTP Survey Licenses and the "copy and paste" signatures in the Gunter Documents that were provided to Mr. Gunter by Mr. Mazak[849] and must therefore have been in the archives of PT ICD. In fact, the record reveals that the first time the Claimants engaged in their own forensic assessment of the disputed signatures was through its expert Dr. Strach for the purposes of the present arbitration.[850]

D. Conclusion

528. In conclusion, the Tribunal cannot but hold that all the claims before it are inadmissible. This conclusion derives from the facts analyzed above, which demonstrate that the claims are based on documents forged to implement a fraud aimed at obtaining mining rights. The author of the forgeries and fraud is not positively identified (although indications in the record all point to Ridlatama possibly with the assistance of a Regency insider). Notwithstanding, the seriousness, sophistication and scope of the scheme are such that the fraud taints the entirety of the Claimants' investment in the EKCP. As a result, the general principle of good faith and the prohibition of abuse of process entail that the claims before this Tribunal cannot benefit from investment protection under the Treaties and are, consequently, deemed inadmissible.

529. The inadmissibility applies to all the claims raised in this arbitration, because the entire EKCP project is an illegal enterprise affected by multiple forgeries and all claims relate to the EKCP. This is further supported by the Claimants' lack of diligence in carrying out their investment.

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849 Tr. (Day 7), 23:1-3, 15-17 (Cross, Gunter).

850 The Tribunal notes that the evaluation report of 2 October 2009, which analyzes the BPK report did not involve a forensic assessment of the disputed signatures, although the BPK report specifically raised the issue of identical signatures. Instead, the evaluation focused on translation issues, discrepancies in registration numbers and irregularities in maps. Analysis and Evaluation Report of the BPK Report by the Ridlatama Group, 2 October 2009 (**Exh. C-516**). *See* further: BPK Audit Report on the Management of Coal Mining for the Fiscal Years of 2006 and 2007 at the Regional Government of Kutai Timur and License Area in Sangatta, 23 February 2009, pp. 4-5 (**Exh. C-145**). The Tribunal also notes that the due diligence conducted by Mr. Soehandjono in 2011 consists of an illustration map depicting the licensing process and did not consist of a forensic analysis of the signatures of the disputed documents. Mr. Soehandjono's EKCP Development Illustration Map and Legal Conclusions, 2011 (**Exh. C-519**).

530. The conclusion reached by the Tribunal is within the scope of the present phase of the arbitration as it was circumscribed in Procedural Orders Nos. 13, 15 and 20. In this context, the Tribunal notes in particular that it arrived at this outcome without there being a need to address the validity of the Exploitation Licenses as a matter of Indonesian law (see above paragraphs 232-233).[851] Indeed, whatever their validity under municipal law, the Exploitation Licenses were embedded in a fraudulent scheme, being surrounded by forgeries. Forged documents preceded and followed them in time with the Re-Enactment Decrees, which under a non-authentic signature purported to revoke the revocation of the Exploitation Licenses. The accumulation of forgeries both before and after the Exploitation Licenses show that, irrespective of their lawfulness under local law, the entire EKCP was fraudulent, thereby triggering the inadmissibility of the claims under international law.

531. The Tribunal further observes that, in light of the declaration of inadmissibility of all the claims, it can dispense with ruling on the Claimants' alleged substitute causes of action. Such causes of action exclusively relate to the Claimants' investments in the EKCP. Since the latter are tainted by the fraud, so are the substitute claims by force of consequence.

532. Since all the claims are held inadmissible, the Tribunal considers that these proceedings have reached their conclusion and therefore turns to the allocation of costs.

V. COSTS

A. Parties' positions

533. The Respondent's incurred costs in connection with these proceedings amounting to USD 12,328,704.18, comprising legal fees and expenses of USD 11,528,704.18 and advance payments to ICSID of USD 800,000.[852] These costs include (i) costs in relation to the Document Authenticity phase of USD 9,627,863.18, comprising legal fees and expenses of

851 *See* also ¶ 34 of PO15 and ¶ 28 of PO13.

852 Respondent's Costs Submissions of 11 December 2015; Respondent's Reply to the Claimants' Costs Submissions of 23 December 2015; Letter from Tribunal to the Parties dated 1 December 2016; Email from the Respondent to the Tribunal dated 2 December 2016 (see above note 52). *See* also: Respondent's Costs Submissions of 11 June 2013.

2. *Strongly deplores* the fact that the Libyan Government has not yet responded effectively to the above requests to cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan Am flight 103 and Union de transports aériens flight 772;

3. *Urges* the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism;

4. *Requests* the Secretary-General to seek the cooperation of the Libyan Government to provide a full and effective response to those requests;

5. *Urges* all States individually and collectively to encourage the Libyan Government to respond fully and effectively to those requests;

6. *Decides* to remain seized of the matter.

Adopted unanimously at its 3033rd meeting.

(a) Letters dated 20 and 23 December 1991

(b) Report by the Secretary-General pursuant to paragraph 4 of Security Council resolution 731 (1992)

(c) Further report by the Secretary-General pursuant to paragraph 4 of Security Council resolution 731 (1992)

Decisions

At its 3063rd meeting, on 31 March 1992, the Council decided to invite the representatives of Iraq, Jordan, the Libyan Arab Jamahiriya, Mauritania and Uganda to participate, without vote, in the discussion of the item entitled:

"(a) Letters dated 20 and 23 December 1991 (S/23306, S/23307, S/23308, S/23309, S/23317);[159]

"(b) Report by the Secretary-General pursuant to paragraph 4 of resolution 731 (1992) (S/23574);[3]

"(c) Further report by the Secretary-General pursuant to paragraph 4 of Security Council resolution 731 (1992) (S/23672)."[3]

At the same meeting, the Council also decided, at the request of the representative of Morocco,[167] to extend an invitation to Mr. Engin Ansay, Permanent Observer of the Organization of the Islamic Conference to the United Nations, under rule 39 of the provisional rules of procedure.

Resolution 748 (1992)
of 31 March 1992

The Security Council,

Reaffirming its resolution 731 (1992) of 21 January 1992,

Noting the reports of the Secretary-General of 11 February[168] and 3 March 1992[169] submitted pursuant to paragraph 4 of Security Council resolution 731 (1992),

Deeply concerned that the Libyan Government has still not provided a full and effective response to the requests in its resolution 731 (1992),

Convinced that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security,

Recalling that, in the statement issued on 31 January 1992 on the occasion of the meeting of the Security Council at the level of heads of State and Government,[170] the members of the Council expressed their deep concern over acts of international terrorism, and emphasized the need for the international community to deal effectively with all such acts,

Reaffirming that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force,

Determining, in this context, that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security,

Determined to eliminate international terrorism,

Recalling the right of States, under Article 50 of the Charter, to consult the Security Council where they find themselves confronted with special economic problems arising from the carrying out of preventive or enforcement measures,

Acting under Chapter VII of the Charter,

1. *Decides* that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests addressed to the Libyan authorities by France,[162,165], the United Kingdom of Great Britain and Northern Ireland,[162] and the United States of America,[162,163]

2. *Decides also* that the Libyan Government must commit itself definitively to cease all forms of terrorist action and all

assistance to terrorist groups and that it must promptly, by concrete actions, demonstrate its renunciation of terrorism;

3. *Decides* that, on 15 April 1992, all States shall adopt the measures set out below, which shall apply until the Security Council decides that the Libyan Government has complied with paragraphs 1 and 2 above;

4. *Decides also* that all States shall:

(*a*) Deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of Libya, unless the particular flight has been approved on grounds of significant humanitarian need by the Security Council Committee established by paragraph 9 below;

(*b*) Prohibit, by their nationals or from their territory, the supply of any aircraft or aircraft components to Libya, the provision of engineering and maintenance servicing of Libyan aircraft or aircraft components, the certification of airworthiness for Libyan aircraft, the payment of new claims against existing insurance contracts and the provision of new direct insurance for Libyan aircraft;

5. *Decides further* that all States shall:

(*a*) Prohibit any provision to Libya by their nationals or from their territory of arms and related material of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment and spare parts for the aforementioned, as well as the provision of any types of equipment, supplies and grants of licensing arrangements, for the manufacture or maintenance of the aforementioned;

(*b*) Prohibit any provision to Libya by their nationals or from their territory of technical advice, assistance or training related to the provision, manufacture, maintenance, or use of the items in subparagraph (*a*) above;

(*c*) Withdraw any of their officials or agents present in Libya to advise the Libyan authorities on military matters;

6. *Decides* that all States shall:

(*a*) Significantly reduce the number and the level of the staff at Libyan diplomatic missions and consular posts and restrict or control the movement within their territory of all such staff who remain; in the case of Libyan missions to international organizations, the host State may, as it deems necessary, consult the organization concerned on the measures required to implement this subparagraph;

(*b*) Prevent the operation of all Libyan Arab Airlines offices;

(*c*) Take all appropriate steps to deny entry to or expel Libyan nationals who have been denied entry to or expelled from other States because of their involvement in terrorist activities;

7. *Calls upon* all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to 15 April 1992;

8. *Requests* all States to report to the Secretary-General by 15 May 1992 on the measures they have instituted for meeting the obligations set out in paragraphs 3 to 7 above;

9. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council, to undertake the following tasks and to report on its work to the Council with its observations and recommendations:

(*a*) To examine the reports submitted pursuant to paragraph 8 above;

(*b*) To seek from all States further information regarding the action taken by them concerning the effective implementation of the measures imposed by paragraphs 3 to 7 above;

(*c*) To consider any information brought to its attention by States concerning violations of the measures imposed by paragraphs 3 to 7 above and, in that context, to make recommendations to the Council on ways to increase their effectiveness;

(*d*) To recommend appropriate measures in response to violations of the measures imposed by paragraphs 3 to 7 above and provide information on a regular basis to the Secretary-General for general distribution to Member States;

(*e*) To consider and to decide upon expeditiously any application by States for the approval of flights on grounds of significant humanitarian need in accordance with paragraph 4 above;

(*f*) To give special attention to any communications in accordance with Article 50 of the Charter of the United Nations from any neighbouring or other State with special economic problems that might arise from the carrying out of the measures imposed by paragraphs 3 to 7 above;

10. *Calls upon* all States to cooperate fully with the Committee in the fulfilment of its task, including supplying such information as may be sought by the Committee in pursuance of the present resolution;

11. *Requests* the Secretary-General to provide all necessary assistance to the Committee and to make the necessary arrangements in the Secretariat for this purpose;

12. *Invites* the Secretary-General to continue his role as set out in paragraph 4 of resolution 731 (1992);

13. *Decides* that the Security Council shall, every one hundred and twenty days or sooner, should the situation so require, review the measures imposed by paragraphs 3 to 7 above in the light of the compliance by the Libyan Government with paragraphs 1 and 2 above taking into account, as appropriate, any reports provided by the Secretary-General on his role as set out in paragraph 4 of resolution 731 (1992);

14. *Decides* to remain seized of the matter.

Adopted at the 3063rd meeting by 10 votes to none, with 5 abstentions (Cape Verde, China, India, Morocco, Zimbabwe).

Decisions

On 12 August 1992, following consultations with the members of the Council, the President made the following statement on behalf of the members of the Council:[171]

"The members of the Council held informal consultations on 12 August 1992 pursuant to paragraph 13 of resolution 748 (1992) of 31 March 1992, by which the Council decided to review every 120 days or sooner, should the situation so require, the measures imposed by paragraphs 3 to 7 against the Libyan Arab Jamahiriya.

"After hearing all the opinions expressed in the course of the consultations, the President concluded that there was no agreement among members of the Council that the necessary conditions existed for modification of the measures of sanctions established in paragraphs 3 to 7 of resolution 748 (1992)."

On 9 December 1992, following consultations with the members of the Council, the President made the following statement on behalf of the members of the Council:[172]

"The members of the Council held informal consultations on 9 December 1992 pursuant to paragraph 13 of resolution 748 (1992) of 31 March 1992, by which the Council decided to review every 120 days or sooner, should the situation so require, the measures imposed by paragraphs 3 to 7 against the Libyan Arab Jamahiriya.

"After hearing all the opinions expressed in the course of the consultations, the President of the Council concluded that there was no agreement that the necessary conditions existed for modification of the measures of sanctions established in paragraphs 3 to 7 of resolution 748 (1992)."

Letter dated 2 April 1992 from the Permanent Representative of Venezuela to the United Nations addressed to the President of the Security Council

Decisions

At the 3064th meeting, on 2 April 1992, the Council decided to discuss the item entitled "Letter dated 2 April 1992 from the Permanent Representative of Venezuela to the United Nations addressed to the President of the Security Council (S/23771)".[43]

At the same meeting, following consultations held earlier among members of the Security Council, the President made the following statement on behalf of the Council:[173]

"The Council strongly condemns the violent attacks on and destruction of the premises of the Embassy of Venezuela in Tripoli that took place today. The fact that these intolerable and extremely grave events have been directed not only against the Government of Venezuela but also against and in reaction to Council resolution 748 (1992) of 31 March 1992 underlines the seriousness of the situation.

"The Council demands that the Government of the Libyan Arab Jamahiriya take all necessary measures to honour its international legal obligations to ensure the security of the personnel and to protect the property of the Embassy of Venezuela and of all other diplomatic and consular premises or personnel present in the Libyan Arab Jamahiriya, including those of the United Nations and related organizations, from acts of violence and terrorism.

"The Council further demands that the Libyan Arab Jamahiriya pay to the Government of Venezuela immediate and full compensation for the damage caused.

"Any suggestion that those acts of violence were not directed against the Government of Venezuela but against and in reaction to resolution 748 (1992) is extremely serious and totally unacceptable."

UNITED NATIONS

A

General Assembly

Distr.
GENERAL

A/RES/49/60
17 February 1995

Forty-ninth session
Agenda item 142

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Sixth Committee (A/49/743)]

49/60. Measures to eliminate international terrorism

The General Assembly,

Recalling its resolution 46/51 of 9 December 1991 and its decision 48/411 of 9 December 1993,

Taking note of the report of the Secretary-General, 1/

Having considered in depth the question of measures to eliminate international terrorism,

Convinced that the adoption of the declaration on measures to eliminate international terrorism should contribute to the enhancement of the struggle against international terrorism,

1. Approves the Declaration on Measures to Eliminate International Terrorism, the text of which is annexed to the present resolution;

2. Invites the Secretary-General to inform all States, the Security Council, the International Court of Justice and the relevant specialized agencies, organizations and organisms of the adoption of the Declaration;

3. Urges that every effort be made in order that the Declaration becomes generally known and is observed and implemented in full;

4. Urges States, in accordance with the provisions of the Declaration, to take all appropriate measures at the national and international levels to eliminate terrorism;

1/ A/49/257 and Add.1-3.

5. Invites the Secretary-General to follow up closely the implementation of the present resolution and the Declaration, and to submit to the General Assembly at its fiftieth session a report thereon, relating, in particular, to the modalities of implementation of paragraph 10 of the Declaration;

6. Decides to include in the provisional agenda of its fiftieth session the item entitled "Measures to eliminate international terrorism", in order to examine the report of the Secretary-General requested in paragraph 5 above, without prejudice to the annual or biennial consideration of the item.

84th plenary meeting
9 December 1994

ANNEX

Declaration on Measures to Eliminate International Terrorism

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations,

Recalling the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 2/ the Declaration on the Strengthening of International Security, 3/ the Definition of Aggression, 4/ the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, 5/ the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 6/ the International Covenant on Economic, Social and Cultural Rights 7/ and the International Covenant on Civil and Political Rights, 7/

Deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of States,

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2/ Resolution 2625 (XXV), annex.

3/ Resolution 2734 (XXV).

4/ Resolution 3314 (XXIX), annex.

5/ Resolution 42/22, annex.

6/ Report of the World Conference on Human Rights, Vienna, 14-25 June 1993 (A/CONF.157/24 (Part I)), chap. III.

7/ See resolution 2200 A (XXI), annex.

/...

Deeply concerned by the increase, in many regions of the world, of acts of terrorism based on intolerance or extremism,

Concerned at the growing and dangerous links between terrorist groups and drug traffickers and their paramilitary gangs, which have resorted to all types of violence, thus endangering the constitutional order of States and violating basic human rights,

Convinced of the desirability for closer coordination and cooperation among States in combating crimes closely connected with terrorism, including drug trafficking, unlawful arms trade, money laundering and smuggling of nuclear and other potentially deadly materials, and bearing in mind the role that could be played by both the United Nations and regional organizations in this respect,

Firmly determined to eliminate international terrorism in all its forms and manifestations,

Convinced also that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is an essential element for the maintenance of international peace and security,

Convinced further that those responsible for acts of international terrorism must be brought to justice,

Stressing the imperative need to further strengthen international cooperation between States in order to take and adopt practical and effective measures to prevent, combat and eliminate all forms of terrorism that affect the international community as a whole,

Conscious of the important role that might be played by the United Nations, the relevant specialized agencies and States in fostering widespread cooperation in preventing and combating international terrorism, inter alia, by increasing public awareness of the problem,

Recalling the existing international treaties relating to various aspects of the problem of international terrorism, inter alia, the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, 8/ the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, 9/ the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971, 10/ the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted in New York on 14 December 1973, 11/ the International Convention against the Taking of

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8/ United Nations, Treaty Series, vol. 704, No. 10106.

9/ Ibid., vol. 860, No. 12325.

10/ Ibid., vol. 974, No. 14118.

11/ Ibid., vol. 1035, No. 15410.

Hostages, adopted in New York on 17 December 1979, 12/ the Convention on thePhysical Protection of Nuclear Material, adopted at Vienna on 3 March 1980, 13/ the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988, 14/ the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988, 15/ the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988, 16/ and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, done at Montreal on 1 March 1991, 17/

Welcoming the conclusion of regional agreements and mutually agreed declarations to combat and eliminate terrorism in all its forms and manifestations,

Convinced of the desirability of keeping under review the scope of existing international legal provisions to combat terrorism in all its forms and manifestations, with the aim of ensuring a comprehensive legal framework for the prevention and elimination of terrorism,

Solemnly declares the following:

I

1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States;

2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society;

3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;

12/ Resolution 34/146, annex.

13/ International Atomic Energy Agency, document INFCIRC/225; to be published in United Nations, Treaty Series, vol. 1456, No. 24631.

14/ International Civil Aviation Organization, document DOC 9518.

15/ International Maritime Organization, document SUA/CONF/15/Rev.1.

16/ Ibid., document SUA/CONF/16/Rev.2.

17/ See S/22393 and Corr.1.

II

4. States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts;

5. States must also fulfil their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism, in particular:

(a) To refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens;

(b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law;

(c) To endeavour to conclude special agreements to that effect on a bilateral, regional and multilateral basis, and to prepare, to that effect, model agreements on cooperation;

(d) To cooperate with one another in exchanging relevant information concerning the prevention and combating of terrorism;

(e) To take promptly all steps necessary to implement the existing international conventions on this subject to which they are parties, including the harmonization of their domestic legislation with those conventions;

(f) To take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in subparagraph (a) above;

6. In order to combat effectively the increase in, and the growing international character and effects of, acts of terrorism, States should enhance their cooperation in this area through, in particular, systematizing the exchange of information concerning the prevention and combating of terrorism, as well as by effective implementation of the relevant international conventions and conclusion of mutual judicial assistance and extradition agreements on a bilateral, regional and multilateral basis;

7. In this context, States are encouraged to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter;

8. Furthermore States that have not yet done so are urged to consider, as a matter of priority, becoming parties to the international conventions and protocols relating to various aspects of international terrorism referred to in the preamble to the present Declaration;

III

9. The United Nations, the relevant specialized agencies and intergovernmental organizations and other relevant bodies must make every effort with a view to promoting measures to combat and eliminate acts of terrorism and to strengthening their role in this field;

10. The Secretary-General should assist in the implementation of the present Declaration by taking, within existing resources, the following practical measures to enhance international cooperation:

(a) A collection of data on the status and implementation of existing multilateral, regional and bilateral agreements relating to international terrorism, including information on incidents caused by international terrorism and criminal prosecutions and sentencing, based on information received from the depositaries of those agreements and from Member States;

(b) A compendium of national laws and regulations regarding the prevention and suppression of international terrorism in all its forms and manifestations, based on information received from Member States;

(c) An analytical review of existing international legal instruments relating to international terrorism, in order to assist States in identifying aspects of this matter that have not been covered by such instruments and could be addressed to develop further a comprehensive legal framework of conventions dealing with international terrorism;

(d) A review of existing possibilities within the United Nations system for assisting States in organizing workshops and training courses on combating crimes connected with international terrorism;

IV

11. All States are urged to promote and implement in good faith and effectively the provisions of the present Declaration in all its aspects;

12. Emphasis is placed on the need to pursue efforts aiming at eliminating definitively all acts of terrorism by the strengthening of international cooperation and progressive development of international law and its codification, as well as by enhancement of coordination between, and increase of the efficiency of, the United Nations and the relevant specialized agencies, organizations and bodies.

UNITED
NATIONS

S

Security Council

Distr.
GENERAL

S/RES/1189 (1998)
13 August 1998

RESOLUTION 1189 (1998)

Adopted by the Security Council at its 3915th meeting,
on 13 August 1998

The Security Council,

Deeply disturbed by the indiscriminate and outrageous acts of international terrorism that took place on 7 August 1998 in Nairobi, Kenya and Dar-es-Salaam, Tanzania,

Condemning such acts which have a damaging effect on international relations and jeopardize the security of States,

Convinced that the suppression of acts of international terrorism is essential for the maintenance of international peace and security, and reaffirming the determination of the international community to eliminate international terrorism in all its forms and manifestations,

Also reaffirming the obligations of Member States under the Charter of the United Nations,

Stressing that every Member State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Mindful of General Assembly resolution 52/164 of 15 December 1997 on the International Convention for the Suppression of Terrorist Bombings,

Recalling that, in the statement issued on 31 January 1992 (S/23500) on the occasion of the meeting of the Security Council at the level of Heads of State and Government, the Council expressed its deep concern over acts of international terrorism, and emphasized the need for the international community to deal effectively with all such criminal acts,

Also stressing the need to strengthen international cooperation between States in order to adopt practical and effective measures to prevent, combat and eliminate all forms of terrorism affecting the international community as a whole,

Commending the responses of the Governments of Kenya, Tanzania and the United States of America to the terrorist bomb attacks in Kenya and Tanzania,

Determined to eliminate international terrorism,

1. Strongly condemns the terrorist bomb attacks in Nairobi, Kenya and Dar-es-Salaam, Tanzania on 7 August 1998 which claimed hundreds of innocent lives, injured thousands of people and caused massive destruction to property;

2. Expresses its deep sorrow, sympathy and condolences to the families of the innocent victims of the terrorist bomb attacks during this difficult time;

3. Calls upon all States and international institutions to cooperate with and provide support and assistance to the ongoing investigations in Kenya, Tanzania and the United States to apprehend the perpetrators of these cowardly criminal acts and to bring them swiftly to justice;

4. Expresses its sincere gratitude to all States, international institutions and voluntary organizations for their encouragement and timely response to the requests for assistance from the Governments of Kenya and Tanzania, and urges them to assist the affected countries, especially in the reconstruction of infrastructure and disaster preparedness;

5. Calls upon all States to adopt, in accordance with international law and as a matter of priority, effective and practical measures for security cooperation, for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators;

6. Decides to remain seized of the matter.

General Assembly

Distr.: General
20 September 2006

Sixtieth session
Agenda items 46 and 120

Resolution adopted by the General Assembly on 8 September 2006

[*without reference to a Main Committee (A/60/L.62)*]

60/288. The United Nations Global Counter-Terrorism Strategy

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and reaffirming its role under the Charter, including on questions related to international peace and security,

Reiterating its strong condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security,

Reaffirming the Declaration on Measures to Eliminate International Terrorism, contained in the annex to General Assembly resolution 49/60 of 9 December 1994, the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, contained in the annex to General Assembly resolution 51/210 of 17 December 1996, and the 2005 World Summit Outcome,[1] in particular its section on terrorism,

Recalling all General Assembly resolutions on measures to eliminate international terrorism, including resolution 46/51 of 9 December 1991, and Security Council resolutions on threats to international peace and security caused by terrorist acts, as well as relevant resolutions of the General Assembly on the protection of human rights and fundamental freedoms while countering terrorism,

Recalling also that, in the 2005 World Summit Outcome, world leaders rededicated themselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, to uphold the resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination or foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion, international cooperation in solving international problems of an economic, social, cultural or

[1] See resolution 60/1.

humanitarian character, and the fulfilment in good faith of the obligations assumed in accordance with the Charter,

Recalling further the mandate contained in the 2005 World Summit Outcome that the General Assembly should develop without delay the elements identified by the Secretary-General for a counter-terrorism strategy, with a view to adopting and implementing a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter terrorism, which also takes into account the conditions conducive to the spread of terrorism,

Reaffirming that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments, and that the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism,

Reaffirming also that terrorism cannot and should not be associated with any religion, nationality, civilization or ethnic group,

Reaffirming further Member States' determination to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism, including by resolving the outstanding issues related to the legal definition and scope of the acts covered by the convention, so that it can serve as an effective instrument to counter terrorism,

Continuing to acknowledge that the question of convening a high-level conference under the auspices of the United Nations to formulate an international response to terrorism in all its forms and manifestations could be considered,

Recognizing that development, peace and security, and human rights are interlinked and mutually reinforcing,

Bearing in mind the need to address the conditions conducive to the spread of terrorism,

Affirming Member States' determination to continue to do all they can to resolve conflict, end foreign occupation, confront oppression, eradicate poverty, promote sustained economic growth, sustainable development, global prosperity, good governance, human rights for all and rule of law, improve intercultural understanding and ensure respect for all religions, religious values, beliefs or cultures,

1. *Expresses its appreciation* for the report entitled "Uniting against terrorism: recommendations for a global counter-terrorism strategy" submitted by the Secretary-General to the General Assembly;[2]

2. *Adopts* the present resolution and its annex as the United Nations Global Counter-Terrorism Strategy ("the Strategy");

3. *Decides*, without prejudice to the continuation of the discussion in its relevant committees of all their agenda items related to terrorism and counter-terrorism, to undertake the following steps for the effective follow-up of the Strategy:

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[2] A/60/825.

(*a*) To launch the Strategy at a high-level segment of its sixty-first session;

(*b*) To examine in two years progress made in the implementation of the Strategy, and to consider updating it to respond to changes, recognizing that many of the measures contained in the Strategy can be achieved immediately, some will require sustained work through the coming few years and some should be treated as long-term objectives;

(*c*) To invite the Secretary-General to contribute to the future deliberations of the General Assembly on the review of the implementation and updating of the Strategy;

(*d*) To encourage Member States, the United Nations and other appropriate international, regional and subregional organizations to support the implementation of the Strategy, including through mobilizing resources and expertise;

(*e*) To further encourage non-governmental organizations and civil society to engage, as appropriate, on how to enhance efforts to implement the Strategy;

4. *Decides* to include in the provisional agenda of its sixty-second session an item entitled "The United Nations Global Counter-Terrorism Strategy".

99th plenary meeting
8 September 2006

Annex

Plan of action

We, the States Members of the United Nations, resolve:

1. To consistently, unequivocally and strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security;

2. To take urgent action to prevent and combat terrorism in all its forms and manifestations and, in particular:

(*a*) To consider becoming parties without delay to the existing international conventions and protocols against terrorism, and implementing them, and to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism;

(*b*) To implement all General Assembly resolutions on measures to eliminate international terrorism and relevant General Assembly resolutions on the protection of human rights and fundamental freedoms while countering terrorism;

(*c*) To implement all Security Council resolutions related to international terrorism and to cooperate fully with the counter-terrorism subsidiary bodies of the Security Council in the fulfilment of their tasks, recognizing that many States continue to require assistance in implementing these resolutions;

3. To recognize that international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law.

I. Measures to address the conditions conducive to the spread of terrorism

We resolve to undertake the following measures aimed at addressing the conditions conducive to the spread of terrorism, including but not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance, while recognizing that none of these conditions can excuse or justify acts of terrorism:

1. To continue to strengthen and make best possible use of the capacities of the United Nations in areas such as conflict prevention, negotiation, mediation, conciliation, judicial settlement, rule of law, peacekeeping and peacebuilding, in order to contribute to the successful prevention and peaceful resolution of prolonged unresolved conflicts. We recognize that the peaceful resolution of such conflicts would contribute to strengthening the global fight against terrorism;

2. To continue to arrange under the auspices of the United Nations initiatives and programmes to promote dialogue, tolerance and understanding among civilizations, cultures, peoples and religions, and to promote mutual respect for and prevent the defamation of religions, religious values, beliefs and cultures. In this regard, we welcome the launching by the Secretary-General of the initiative on the Alliance of Civilizations. We also welcome similar initiatives that have been taken in other parts of the world;

3. To promote a culture of peace, justice and human development, ethnic, national and religious tolerance and respect for all religions, religious values, beliefs or cultures by establishing and encouraging, as appropriate, education and public awareness programmes involving all sectors of society. In this regard, we encourage the United Nations Educational, Scientific and Cultural Organization to play a key role, including through inter-faith and intra-faith dialogue and dialogue among civilizations;

4. To continue to work to adopt such measures as may be necessary and appropriate and in accordance with our respective obligations under international law to prohibit by law incitement to commit a terrorist act or acts and prevent such conduct;

5. To reiterate our determination to ensure the timely and full realization of the development goals and objectives agreed at the major United Nations conferences and summits, including the Millennium Development Goals. We reaffirm our commitment to eradicate poverty and promote sustained economic growth, sustainable development and global prosperity for all;

6. To pursue and reinforce development and social inclusion agendas at every level as goals in themselves, recognizing that success in this area, especially on youth unemployment, could reduce marginalization and the subsequent sense of victimization that propels extremism and the recruitment of terrorists;

7. To encourage the United Nations system as a whole to scale up the cooperation and assistance it is already conducting in the fields of rule of law, human rights and good governance to support sustained economic and social development;

8. To consider putting in place, on a voluntary basis, national systems of assistance that would promote the needs of victims of terrorism and their families and facilitate the normalization of their lives. In this regard, we encourage States to request the relevant United Nations entities to help them to develop such national

systems. We will also strive to promote international solidarity in support of victims and foster the involvement of civil society in a global campaign against terrorism and for its condemnation. This could include exploring at the General Assembly the possibility of developing practical mechanisms to provide assistance to victims.

II. Measures to prevent and combat terrorism

We resolve to undertake the following measures to prevent and combat terrorism, in particular by denying terrorists access to the means to carry out their attacks, to their targets and to the desired impact of their attacks:

1. To refrain from organizing, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that our respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens;

2. To cooperate fully in the fight against terrorism, in accordance with our obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe havens;

3. To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of national and international law, in particular human rights law, refugee law and international humanitarian law. We will endeavour to conclude and implement to that effect mutual judicial assistance and extradition agreements and to strengthen cooperation between law enforcement agencies;

4. To intensify cooperation, as appropriate, in exchanging timely and accurate information concerning the prevention and combating of terrorism;

5. To strengthen coordination and cooperation among States in combating crimes that might be connected with terrorism, including drug trafficking in all its aspects, illicit arms trade, in particular of small arms and light weapons, including man-portable air defence systems, money-laundering and smuggling of nuclear, chemical, biological, radiological and other potentially deadly materials;

6. To consider becoming parties without delay to the United Nations Convention against Transnational Organized Crime [3] and to the three protocols supplementing it,[4] and implementing them;

7. To take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum-seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in section II, paragraph 1, above;

8. To encourage relevant regional and subregional organizations to create or strengthen counter-terrorism mechanisms or centres. Should they require cooperation and assistance to this end, we encourage the Counter-Terrorism Committee and its Executive Directorate and, where consistent with their existing

[3] Resolution 55/25, annex I.

[4] Resolution 55/25, annexes II and III; and resolution 55/255, annex.

mandates, the United Nations Office on Drugs and Crime and the International Criminal Police Organization, to facilitate its provision;

9. To acknowledge that the question of creating an international centre to fight terrorism could be considered, as part of international efforts to enhance the fight against terrorism;

10. To encourage States to implement the comprehensive international standards embodied in the Forty Recommendations on Money-Laundering and Nine Special Recommendations on Terrorist Financing of the Financial Action Task Force, recognizing that States may require assistance in implementing them;

11. To invite the United Nations system to develop, together with Member States, a single comprehensive database on biological incidents, ensuring that it is complementary to the biocrimes database contemplated by the International Criminal Police Organization. We also encourage the Secretary-General to update the roster of experts and laboratories, as well as the technical guidelines and procedures, available to him for the timely and efficient investigation of alleged use. In addition, we note the importance of the proposal of the Secretary-General to bring together, within the framework of the United Nations, the major biotechnology stakeholders, including industry, the scientific community, civil society and Governments, into a common programme aimed at ensuring that biotechnology advances are not used for terrorist or other criminal purposes but for the public good, with due respect for the basic international norms on intellectual property rights;

12. To work with the United Nations with due regard to confidentiality, respecting human rights and in compliance with other obligations under international law, to explore ways and means to:

(*a*) Coordinate efforts at the international and regional levels to counter terrorism in all its forms and manifestations on the Internet;

(*b*) Use the Internet as a tool for countering the spread of terrorism, while recognizing that States may require assistance in this regard;

13. To step up national efforts and bilateral, subregional, regional and international cooperation, as appropriate, to improve border and customs controls in order to prevent and detect the movement of terrorists and prevent and detect the illicit traffic in, inter alia, small arms and light weapons, conventional ammunition and explosives, and nuclear, chemical, biological or radiological weapons and materials, while recognizing that States may require assistance to that effect;

14. To encourage the Counter-Terrorism Committee and its Executive Directorate to continue to work with States, at their request, to facilitate the adoption of legislation and administrative measures to implement the terrorist travel-related obligations and to identify best practices in this area, drawing whenever possible on those developed by technical international organizations, such as the International Civil Aviation Organization, the World Customs Organization and the International Criminal Police Organization;

15. To encourage the Committee established pursuant to Security Council resolution 1267 (1999) to continue to work to strengthen the effectiveness of the travel ban under the United Nations sanctions regime against Al-Qaida and the Taliban and associated individuals and entities, as well as to ensure, as a matter of priority, that fair and transparent procedures exist for placing individuals and entities on its lists, for removing them and for granting humanitarian exceptions. In

this regard, we encourage States to share information, including by widely distributing the International Criminal Police Organization/United Nations special notices concerning people subject to this sanctions regime;

16. To step up efforts and cooperation at every level, as appropriate, to improve the security of manufacturing and issuing identity and travel documents and to prevent and detect their alteration or fraudulent use, while recognizing that States may require assistance in doing so. In this regard, we invite the International Criminal Police Organization to enhance its database on stolen and lost travel documents, and we will endeavour to make full use of this tool, as appropriate, in particular by sharing relevant information;

17. To invite the United Nations to improve coordination in planning a response to a terrorist attack using nuclear, chemical, biological or radiological weapons or materials, in particular by reviewing and improving the effectiveness of the existing inter-agency coordination mechanisms for assistance delivery, relief operations and victim support, so that all States can receive adequate assistance. In this regard, we invite the General Assembly and the Security Council to develop guidelines for the necessary cooperation and assistance in the event of a terrorist attack using weapons of mass destruction;

18. To step up all efforts to improve the security and protection of particularly vulnerable targets, such as infrastructure and public places, as well as the response to terrorist attacks and other disasters, in particular in the area of civil protection, while recognizing that States may require assistance to this effect.

III. Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard

We recognize that capacity-building in all States is a core element of the global counter-terrorism effort, and resolve to undertake the following measures to develop State capacity to prevent and combat terrorism and enhance coordination and coherence within the United Nations system in promoting international cooperation in countering terrorism:

1. To encourage Member States to consider making voluntary contributions to United Nations counter-terrorism cooperation and technical assistance projects, and to explore additional sources of funding in this regard. We also encourage the United Nations to consider reaching out to the private sector for contributions to capacity-building programmes, in particular in the areas of port, maritime and civil aviation security;

2. To take advantage of the framework provided by relevant international, regional and subregional organizations to share best practices in counter-terrorism capacity-building, and to facilitate their contributions to the international community's efforts in this area;

3. To consider establishing appropriate mechanisms to rationalize States' reporting requirements in the field of counter-terrorism and eliminate duplication of reporting requests, taking into account and respecting the different mandates of the General Assembly, the Security Council and its subsidiary bodies that deal with counter-terrorism;

4. To encourage measures, including regular informal meetings, to enhance, as appropriate, more frequent exchanges of information on cooperation and technical assistance among Member States, United Nations bodies dealing with counter-terrorism, relevant specialized agencies, relevant international, regional and

subregional organizations and the donor community, to develop States' capacities to implement relevant United Nations resolutions;

5. To welcome the intention of the Secretary-General to institutionalize, within existing resources, the Counter-Terrorism Implementation Task Force within the Secretariat in order to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system;

6. To encourage the Counter-Terrorism Committee and its Executive Directorate to continue to improve the coherence and efficiency of technical assistance delivery in the field of counter-terrorism, in particular by strengthening its dialogue with States and relevant international, regional and subregional organizations and working closely, including by sharing information, with all bilateral and multilateral technical assistance providers;

7. To encourage the United Nations Office on Drugs and Crime, including its Terrorism Prevention Branch, to enhance, in close consultation with the Counter-Terrorism Committee and its Executive Directorate, its provision of technical assistance to States, upon request, to facilitate the implementation of the international conventions and protocols related to the prevention and suppression of terrorism and relevant United Nations resolutions;

8. To encourage the International Monetary Fund, the World Bank, the United Nations Office on Drugs and Crime and the International Criminal Police Organization to enhance cooperation with States to help them to comply fully with international norms and obligations to combat money-laundering and the financing of terrorism;

9. To encourage the International Atomic Energy Agency and the Organization for the Prohibition of Chemical Weapons to continue their efforts, within their respective mandates, in helping States to build capacity to prevent terrorists from accessing nuclear, chemical or radiological materials, to ensure security at related facilities and to respond effectively in the event of an attack using such materials;

10. To encourage the World Health Organization to step up its technical assistance to help States to improve their public health systems to prevent and prepare for biological attacks by terrorists;

11. To continue to work within the United Nations system to support the reform and modernization of border management systems, facilities and institutions at the national, regional and international levels;

12. To encourage the International Maritime Organization, the World Customs Organization and the International Civil Aviation Organization to strengthen their cooperation, work with States to identify any national shortfalls in areas of transport security and provide assistance, upon request, to address them;

13. To encourage the United Nations to work with Member States and relevant international, regional and subregional organizations to identify and share best practices to prevent terrorist attacks on particularly vulnerable targets. We invite the International Criminal Police Organization to work with the Secretary-General so that he can submit proposals to this effect. We also recognize the importance of developing public-private partnerships in this area.

IV. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism

We resolve to undertake the following measures, reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing, and stressing the need to promote and protect the rights of victims of terrorism:

1. To reaffirm that General Assembly resolution 60/158 of 16 December 2005 provides the fundamental framework for the "Protection of human rights and fundamental freedoms while countering terrorism";

2. To reaffirm that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law;

3. To consider becoming parties without delay to the core international instruments on human rights law, refugee law and international humanitarian law, and implementing them, as well as to consider accepting the competence of international and relevant regional human rights monitoring bodies;

4. To make every effort to develop and maintain an effective and rule of law-based national criminal justice system that can ensure, in accordance with our obligations under international law, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or prosecute, with due respect for human rights and fundamental freedoms, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations. We recognize that States may require assistance in developing and maintaining such effective and rule of law-based criminal justice systems, and we encourage them to resort to the technical assistance delivered, inter alia, by the United Nations Office on Drugs and Crime;

5. To reaffirm the important role of the United Nations system in strengthening the international legal architecture by promoting the rule of law, respect for human rights and effective criminal justice systems, which constitute the fundamental basis of our common fight against terrorism;

6. To support the Human Rights Council and to contribute, as it takes shape, to its work on the question of the promotion and protection of human rights for all in the fight against terrorism;

7. To support the strengthening of the operational capacity of the Office of the United Nations High Commissioner for Human Rights, with a particular emphasis on increasing field operations and presences. The Office should continue to play a lead role in examining the question of protecting human rights while countering terrorism, by making general recommendations on the human rights obligations of States and providing them with assistance and advice, in particular in the area of raising awareness of international human rights law among national law-enforcement agencies, at the request of States;

8. To support the role of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The Special Rapporteur should continue to support the efforts of States and offer concrete advice by corresponding with Governments, making country visits, liaising with the United Nations and regional organizations and reporting on these issues.

United Nations S/RES/2253 (2015)

Security Council

Distr.: General
17 December 2015

Resolution 2253 (2015)

Adopted by the Security Council at its 7587th meeting, on 17 December 2015

The Security Council,

Recalling its resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1373 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1624 (2005), 1699 (2006), 1730 (2006), 1735 (2006), 1822 (2008), 1904 (2009), 1988 (2011), 1989 (2011), 2083 (2012), 2133 (2014), 2170 (2014), 2178 (2014), 2195 (2014), 2199 (2015), 2214 (2015), and 2249 (2015),

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever, wherever, and by whomsoever committed, and reiterating its unequivocal condemnation of the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), Al-Qaida, and associated individuals, groups, undertakings, and entities for ongoing and multiple criminal terrorist acts aimed at causing the deaths of innocent civilians and other victims, destruction of property, and greatly undermining stability,

Recognizing that terrorism poses a threat to international peace and security and that countering this threat requires collective efforts on national, regional and international levels on the basis of respect for international law and the Charter of the United Nations,

Reaffirming that terrorism cannot and should not be associated with any religion, nationality, or civilization,

Expressing its gravest concern about the presence, violent extremist ideology and actions of ISIL, Al-Qaida, and their affiliates in the Middle East and North Africa and beyond,

Reaffirming its commitment to sovereignty, territorial integrity and political independence of all States in accordance with the Charter of the United Nations,

Recalling the Presidential Statements of the Security Council on threats to international peace and security caused by terrorist acts of 15 January 2013 (S/PRST/2013/1), of 28 July 2014 (S/PRST/2014/14), of 19 November 2014 (S/PRST/2014/23), of 29 May 2015 (S/PRST/2015/11), and of 28 July 2015 (S/PRST/2015/14),

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Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights law, international refugee law, and international humanitarian law, threats to international peace and security caused by terrorist acts, *stressing* in this regard the important role the United Nations plays in leading and coordinating this effort,

Recognizing that development, security, and human rights are mutually reinforcing and are vital to an effective and comprehensive approach to countering terrorism, and *underlining* that a particular goal of counter-terrorism strategies should be to ensure sustainable peace and security,

Reaffirming its resolution 1373 (2001) and in particular its decisions that all States shall prevent and suppress the financing of terrorist acts and refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists,

Stressing that terrorism can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all States and international and regional organizations to impede, impair, isolate, and incapacitate the terrorist threat,

Emphasizing that sanctions are an important tool under the Charter of the United Nations in the maintenance and restoration of international peace and security, including in support of countering terrorism, and *stressing* in this regard the need for robust implementation of the measures in paragraph 2 of this resolution,

Recalling that ISIL is a splinter group of Al-Qaida, and *recalling* further that any individual, group, undertaking, or entity supporting ISIL or Al-Qaida is eligible for listing,

Condemning the frequent, recent terrorist attacks perpetrated by ISIL around the world resulting in numerous casualties, *recognizing* the need for sanctions to reflect current threats and, in this regard, *recalling* paragraph 7 of resolution 2249,

Reminding all States that they have an obligation to take the measures described in paragraph 2 with respect to all individuals, groups, undertakings, and entities included on the list created pursuant to resolutions 1267 (1999), 1333 (2000), 1989 (2011), 2083 (2012), and 2161 (2014) (now and hereunder referred to as the "ISIL (Da'esh) & Al-Qaida Sanctions List"), regardless of the nationality or residence of such individuals, groups, undertakings, or entities,

Urging all Member States to participate actively in maintaining and updating the ISIL (Da'esh) & Al-Qaida Sanctions List by contributing additional information pertinent to current listings, submitting delisting requests when appropriate, and by identifying and nominating for listing additional individuals, groups, undertakings, and entities which should be subject to the measures referred to in paragraph 2 of this resolution,

Reminding the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) ("the Committee") to remove expeditiously and on a case-by-case basis individuals, groups, undertakings, and entities that no longer meet the criteria for listing outlined in this resolution, *welcoming* improvements to the Committee's

procedures and the format of the ISIL (Da'esh) & Al-Qaida Sanctions List, *expressing* its intent to continue efforts to ensure that procedures are fair and clear, and *recognizing* the challenges, both legal and otherwise, to the measures implemented by Member States under paragraph 2 of this resolution,

Recognizing the importance of building capacities of Member States to counter terrorism and terrorist financing,

Welcoming again the establishment of the Office of the Ombudsperson pursuant to resolution 1904 (2009) and the enhancement of the Ombudsperson's mandate in resolutions 1989 (2011), 2083 (2012), and 2161 (2015), *noting* the Office of the Ombudsperson's significant contribution in providing additional fairness and transparency, and *recalling* the Security Council's firm commitment to ensuring that the Office of the Ombudsperson is able to continue to carry out its role effectively and independently, in accordance with its mandate,

Welcoming the Ombudsperson's biannual reports to the Security Council, including the reports submitted on 21 January 2011, 22 July 2011, 20 January 2012, 30 July 2012, 31 January 2013, 31 July 2013, 31 January 2014, 31 July 2014, and 2 February 2015,

Welcoming the continuing cooperation between the Committee and INTERPOL, the United Nations Office on Drugs and Crime, in particular on technical assistance and capacity-building, and all other United Nations bodies, and *strongly encouraging* further engagement with the United Nations Counter-Terrorism Implementation Task Force (CTITF) to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system,

Recalling its resolutions 2199 (2015) and 2133 (2014) strongly condemning kidnapping and hostage-taking committed by terrorist groups for any purpose, including with the aim of raising funds or gaining political concessions, expressing its determination to prevent kidnapping and hostage-taking committed by terrorist groups and to secure the safe release of hostages without ransom payments or political concessions in accordance with applicable international law, *reiterating its call upon* all Member States to prevent terrorists from benefiting directly or indirectly from ransom payments or from political concessions and to secure the safe release of hostages, and welcoming the endorsement by the Global Counterterrorism Forum (GCTF) in September 2015 of the "Addendum to the Algiers Memorandum on Good Practices on Preventing and Denying the Benefits of Kidnapping for Ransom by Terrorists",

Gravely concerned that in some cases ISIL, Al-Qaida, and associated individuals, groups, undertakings, and entities continue to profit from involvement in transnational organized crime, and *expressing concern* that terrorists benefit from transnational organized crime in some regions, including from the trafficking of arms, persons, drugs, and artefacts, and from the illicit trade in natural resources including gold and other precious metals and stones, minerals, wildlife, charcoal and oil, as well as from kidnapping for ransom and other crimes including extortion and bank robbery,

Recognizing the need to take measures to prevent and suppress the financing of terrorism, terrorist organizations, and individual terrorists even in the absence of a link to a specific terrorist act, including from the proceeds of organized crime,

inter alia, the illicit production and trafficking of drugs and their chemical precursors, and recalling paragraph 5 of resolution 1452,

Recognizing the need for Member States to prevent the abuse of non-governmental, non-profit and charitable organizations by and for terrorists, and *calling upon* non-governmental, non-profit, and charitable organizations to prevent and oppose, as appropriate, attempts by terrorists to abuse their status, while recalling the importance of fully respecting the rights to freedom of expression and association of individuals in civil society and freedom of religion or belief, and *welcoming* the relevant updated Best Practices Paper issued by the Financial Action Task Force for the appropriate, risk-based implementation of the international standard related to preventing terrorist abuse of the non-profit sector,

Recalling its decision that Member States shall eliminate the supply of weapons, including small arms and light weapons, to terrorists, as well as its calls on States to find ways of intensifying and accelerating the exchange of operational information regarding traffic in arms, and to enhance coordination of efforts on national, subregional, regional, and international levels,

Expressing concern at the increased use, in a globalized society, by terrorists and their supporters, of new information and communications technologies, in particular the Internet, to facilitate terrorist acts, and *condemning* their use to incite, recruit, fund, or plan terrorist acts,

Expressing concern at the flow of international recruits to ISIL, Al-Qaida, and associated groups and the scale of this phenomenon, and *recalling* its resolution 2178 (2014) ‹ eciding that Member States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting, or equipping of foreign terrorist fighters and the financing of their travel and of their activities,

Reiterating the obligation of Member States to prevent the entry into or transit through their territories of any individual about whom that State has credible information that provides reasonable grounds to believe that he or she is seeking entry into or transit through their territory for the purpose of participating in the foreign terrorist fighter-related activities described in paragraph 6 of resolution 2178 (2014), and *reiterating* further the obligation of Member States to prevent the movement of terrorist groups, in accordance with applicable international law, by, inter alia, effective border controls, and, in this context, to exchange information expeditiously, improve cooperation among competent authorities to prevent the movement of terrorists and terrorist groups to and from their territories, the supply of weapons for terrorists, and financing that would support terrorists,

Condemning any engagement in direct or indirect trade, in particular of oil and oil products, modular refineries, and related materiel including chemicals and lubricants, with ISIL, ANF, and associated individuals, groups, undertakings, and entities designated by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011), and *reiterating* that such engagement would constitute support for such individuals, groups, undertakings, and entities and may lead to further listings by the Committee,

Condemning the destruction of cultural heritage in Iraq and Syria particularly by ISIL and ANF, including targeted destruction of religious sites and objects; and *recalling its decision* that all Member States shall take appropriate steps to prevent

the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people,

Recalling its resolution 2178 (2014) expressing concern with the continued threat posed to international peace and security by ISIL, Al-Qaida, and associated individuals, groups, undertakings, and entities, and *reaffirming* its resolve to address all aspects of that threat, including terrorist acts perpetrated by foreign terrorist fighters,

Condemning in the strongest terms abductions of women and children by ISIL, ANF, and associated individuals, groups, undertakings, and entities and recalling resolution 2242 (2015), *expressing* outrage at their exploitation and abuse, including rape, sexual violence, forced marriage, and enslavement by these entities, *encouraging* all State and non-state actors with evidence to bring it to the attention of the Council, along with any information that such human trafficking may support the perpetrators financially, *emphasizing* that this resolution requires States to ensure that their nationals and persons within their territory do not make available any funds, financial assets or economic resources for ISIL's benefit, and *noting* that any person or entity who transfers funds to ISIL directly or indirectly in connection with such exploitation and abuse would be eligible for listing by the Committee,

Welcoming the efforts of the Secretariat to standardize the format of all United Nations sanctions lists to facilitate implementation by national authorities, further *welcoming* the Secretariat's efforts to translate all list entries and narrative summaries of reasons for listing available in all official languages of the United Nations, and *encouraging* the Secretariat, with the assistance of the Monitoring Team, as appropriate, to continue its work to implement the data model approved by the Committee,

Acting under Chapter VII of the Charter of the United Nations,

Measures

1. *Decides* that, from the date of adoption of this resolution, the 1267/1989 Al-Qaida Sanctions Committee shall henceforth be known as the "1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee" and the Al-Qaida Sanctions List shall henceforth be known as the "ISIL (Da'esh) and Al-Qaida Sanctions List";

2. *Decides* that all States shall take the following measures as previously imposed by paragraph 8 (c) of resolution 1333 (2000), paragraphs 1 and 2 of resolution 1390 (2002), and paragraphs 1 and 4 of resolution 1989 (2011), with respect to ISIL (also known as Da'esh), Al-Qaida, and associated individuals, groups, undertakings and entities:

Asset Freeze

(a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly

or indirectly for such persons' benefit, by their nationals or by persons within their territory;

Travel Ban

(b) Prevent the entry into or transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Committee determines on a case-by-case basis only that entry or transit is justified;

Arms Embargo

(c) Prevent the direct or indirect supply, sale, or transfer to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical advice, assistance or training related to military activities;

Listing Criteria

3. *Decides* that acts or activities indicating that an individual, group, undertaking or entity is associated with ISIL or Al-Qaida and therefore eligible for inclusion in the ISIL (Da'esh) & Al-Qaida Sanctions List include:

(a) Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;

(b) Supplying, selling or transferring arms and related materiel to;

(c) Recruiting for; or otherwise supporting acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof;

4. *Notes* that such means of financing or support include but are not limited to the use of proceeds derived from crime, including the illicit cultivation, production and trafficking of narcotic drugs and their precursors;

5. *Confirms* that any individual, group, undertaking or entity either owned or controlled, directly or indirectly, by, or otherwise supporting, any individual, group, undertaking or entity associated with Al-Qaida or ISIL, including on the ISIL (Da'esh) & Al-Qaida Sanctions List, shall be eligible for listing;

6. *Confirms* that the requirements in paragraph 2 (a) above apply to financial and economic resources of every kind, including but not limited to those used for the provision of Internet hosting and related services, used for the support of Al-Qaida, ISIL, and other individuals, groups, undertakings or entities included on the ISIL (Da'esh) & Al-Qaida Sanctions List;

7. *Confirms* that the requirements in paragraph 2 (a) above apply to funds, financial assets or economic resources that may be made available, directly or indirectly, to or for the benefit of listed individuals in connection with their travel, including costs incurred with respect to transportation and lodging, and that such

travel-related funds, other financial assets or economic resources may only be provided in accordance with the exemption procedures set out in paragraphs 1 and 2 of resolution 1452 (2002), as amended by resolution 1735 (2006), and in paragraphs 10, 74 and 75 below;

8. *Confirms further* that the requirements in paragraph 2 (a) above shall also apply to the payment of ransoms to individuals, groups, undertakings or entities on the ISIL (Da'esh) & Al-Qaida Sanctions List, regardless of how or by whom the ransom is paid;

9. *Reaffirms* that Member States may permit the addition to accounts frozen pursuant to the provisions of paragraph 2 above of any payment in favour of listed individuals, groups, undertakings or entities, provided that any such payments continue to be subject to the provisions in paragraph 2 above and are frozen;

10. *Encourages* Member States to make use of the provisions regarding available exemptions to the measures in paragraph 2 (a) above, set out in paragraphs 1 and 2 of resolution 1452 (2002), as amended by resolution 1735 (2006), *confirms* that exemptions to the travel ban must be submitted by Member States, individuals or the Ombudsperson, as appropriate, including when listed individuals travel for the purpose of fulfilling religious obligations, and *notes* that the Focal Point mechanism established in resolution 1730 (2006) may receive exemption requests submitted by, or on behalf of, an individual, group, undertaking or entity on the ISIL (Da'esh) & Al-Qaida Sanctions List, or by the legal representative or estate of such individual, group, undertaking or entity, for Committee consideration, as described in paragraph 76 below;

Measures implementation

11. *Reiterates* the importance of all States identifying, and if necessary introducing, adequate procedures to implement fully all aspects of the measures described in paragraph 2 above;

12. *Reaffirms* that those responsible for committing, organizing, or supporting terrorist acts must be held accountable, *recalls* its decision in resolution 1373 (2001) that Member States shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings, *underlines* the importance of fulfilling this obligation with respect to such investigations or proceedings involving ISIL, Al-Qaida and associated individuals, groups, undertakings and entities, and *urges* Member States to provide full coordination in such investigations or proceedings, especially with those States where, or against whose citizens, terrorist acts are committed, in accordance with their obligations under international law, in order to find and bring to justice, extradite, or prosecute any person who supports, facilitates, participates or attempts to participate in the direct or indirect financing of activities conducted by ISIL, Al-Qaida and associated individuals, groups, undertakings and entities;

13. *Reiterates* Member States' obligation to ensure that their nationals and persons in their territory not make available economic resources to ISIL, Al-Qaida, and associated individuals, groups, undertakings, and entities, *recalls also* that this obligation applies to the direct and indirect trade in oil and refined oil products,

modular refineries, and related material including chemicals and lubricants, and other natural resources, and *recalls further* the importance of all Member States complying with their obligation to ensure that their nationals and persons within their territory do not make donations to individuals and entities designated by the Committee or those acting on behalf of or at the direction of designated individuals or entities;

14. *Encourages* all Member States to more actively submit to the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) listing requests of individuals and entities supporting ISIL, Al-Qaida, and associated individuals, groups, undertakings and entities, and directs the Committee to immediately consider, in accordance with its resolution 2199 (2015), designations of individuals and entities engaged in financing, supporting, facilitating acts or activities, including in oil and antiquities trade-related activities with ISIL, Al-Qaida, and associated individuals, groups, undertakings and entities;

15. *Expresses* increasing concern about the lack of implementation of resolutions 1267 (1999), 1989 (2011), and 2199 (2015), including the insufficient level of reporting by Member States to the Committee on the measures they have taken to comply with its provisions and *calls upon* Member States to take the necessary measures to fulfil their obligation under paragraph 12 of resolution 2199 to report to the Committee interdictions in their territory of any oil, oil products, modular refineries, and related material being transferred to or from ISIL or ANF, and *calls upon* Member States to report also such interdictions of antiquities, as well as the outcome of proceedings brought against individuals and entities as a result of any such activity;

16. *Strongly urges* all Member States to implement the comprehensive international standards embodied in the Financial Action Task Force's (FATF) revised Forty Recommendations on Combating Money Laundering and the Financing of Terrorism and Proliferation, particularly Recommendation 6 on targeted financial sanctions related to terrorism and terrorist financing; to apply the elements in FATF's Interpretive Note to Recommendation 6, with the final objective of effectively preventing terrorists from raising, moving and using funds, in line with the objectives of Immediate Outcome 10 of the FATF methodology; to take note of, inter alia, related best practices for effective implementation of targeted financial sanctions related to terrorism and terrorist financing and the need to have appropriate legal authorities and procedures to apply and enforce targeted financial sanctions that are not conditional upon the existence of criminal proceedings; and to apply an evidentiary standard of proof of "reasonable grounds" or "reasonable basis", as well as the ability to collect or solicit as much information as possible from all relevant sources;

17. *Welcomes* the recent FATF reports on the Financing of the Terrorist Organization ISIL (published February 2015) and Emerging Terrorist Financing Risks (published October 2015) that includes discussion of the ISIL threat, *welcomes* further the FATF clarifications to Interpretive Note to Recommendation 5 on the criminalization of terrorist financing to incorporate the relevant element of resolution 2178 (2014), specifically clarifying that terrorist financing includes the financing of the travel of individuals who travel or attempt to travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or

receiving of terrorist training, and *highlights* that FATF Recommendation 5 applies to the financing of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act;

18. *Encourages* FATF to continue its efforts to prioritize countering terrorist financing, in particular identifying and working with Member States with strategic anti-money laundering and countering terrorist financing (AML/CFT) deficiencies that have hindered Member States from effectively countering the financing of terrorism, including by ISIL, Al-Qaida, and associated individuals, group, entities and undertakings, and in this regard, *reiterates* that the provision of economic resources to such groups is a clear violation of this and other relevant resolutions and is not acceptable;

19. *Clarifies* that the obligation in paragraph 1 (d) of resolution 1373 (2001) applies to making funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act;

20. *Calls upon* States to ensure that they have established as a serious criminal offence in their domestic laws and regulations the wilful violation of the prohibition described in paragraph 1 (d) of resolution 1373 (2001);

21. *Calls upon* Member States to move vigorously and decisively to cut the flows of funds and other financial assets and economic resources to individuals and entities on the ISIL (Da'esh) & Al-Qaida Sanctions List, as required by paragraph 2 (a), and *taking into account* relevant FATF Recommendations and international standards designed to prevent the abuse of non-profit organizations, formal as well as informal/alternative remittance systems and the physical trans-border movement of currency, while working to mitigate the impact on legitimate activities through these mediums;

22. *Urges* Member States to act cooperatively to prevent terrorists from recruiting, to counter their violent extremist propaganda and incitement to violence on the Internet and social media, including by developing effective counter narratives, while respecting human rights and fundamental freedoms and in compliance with obligations under international law, and *stresses* the importance of cooperation with civil society and the private sector in this endeavor;

23. *Urges* Member States to promote awareness of the ISIL (Da'esh) & Al-Qaida Sanctions List as widely as possible, including to relevant domestic agencies, the private sector and the general public to ensure effective implementation of the measures in paragraph 2 above and *encourages* Member States to urge that their respective company, property and other relevant public and private registries regularly screen their available databases, including but not limited to those with legal and/or beneficial ownership information, against the ISIL (Da'esh) & Al-Qaida Sanctions List;

24. *Highlights* the importance of strong relationships with the private sector in countering the financing of terrorism and *calls upon* Member States to engage with financial institutions and share information on terrorist financing (TF) risks to provide greater context for their work in identifying potential TF activity related to

ISIL, Al-Qaida, and associated individuals, groups, undertakings and entities, and to promote stronger relationships between governments and the private sector in countering terrorist financing;

25. *Recognizes* the importance of information sharing within and between governments to effectively counter the financing of terrorism, *calls upon* Member States to continue exercising vigilance over relevant financial transactions and improve information-sharing capabilities and practices within and between governments through multiple authorities and channels, including law enforcement, intelligence, security services, and financial intelligence units, and also *calls upon* Member States to improve integration and utilization of financial intelligence with other types of information available to national governments to more effectively counter the terrorist financing threats posed by ISIL, Al-Qaida, and associated individuals, groups, undertakings and entities;

26. *Decides* that Member States, in order to prevent ISIL, Al-Qaida, and associated individuals, groups, undertakings, and entities from obtaining, handling, storing, using or seeking access to all types of explosives, whether military, civilian or improvised explosives, as well as to raw materials and components that can be used to manufacture improvised explosive devices or unconventional weapons, including (but not limited to) chemical components, detonators, detonating cord, or poisons, shall undertake appropriate measures to promote the exercise of enhanced vigilance by their nationals, persons subject to their jurisdiction and entities incorporated in their territory or subject to their jurisdiction that are involved in the production, sale, supply, purchase, transfer and storage of such materials, including through the issuance of good practices, and *further encourages* Member States to share information, establish partnerships, and develop national strategies and capabilities to counter improvised explosive devices;

27. *Encourages* Member States, including through their permanent missions, and relevant international organizations to meet the Committee for in-depth discussion on any relevant issues;

28. *Urges* all Member States, in their implementation of the measures set out in paragraph 2 above, to ensure that fraudulent, counterfeit, stolen and lost passports and other travel documents are invalidated and removed from circulation, in accordance with domestic laws and practices, as soon as possible, and to share information on those documents with other Member States through the INTERPOL database;

29. *Encourages* Member States to share, in accordance with their domestic laws and practices, with the private sector information in their national databases related to fraudulent, counterfeit, stolen and lost identity or travel documents pertaining to their own jurisdictions, and, if a listed party is found to be using a false identity including to secure credit or fraudulent travel documents, to provide the Committee with information in this regard;

30. *Encourages* Member States that issue travel documents to listed individuals to note, as appropriate, that the bearer is subject to the travel ban and corresponding exemption procedures;

31. *Encourages* Member States to consult the ISIL (Da'esh) & Al-Qaida Sanctions List when considering whether to grant travel visa applications, for the purpose of effectively implementing the travel ban;

32. *Encourages* Member States to exchange information expeditiously with other Member States, in particular States of origin, destination and transit, when they detect the travel of individuals on the ISIL (Da'esh) & Al-Qaida Sanctions List;

33. *Encourages* designating States to inform the Monitoring Team whether a national court or other legal authority has reviewed a listed party's case and whether any judicial proceedings have begun, and to include any other relevant information when submitting the standard form for listing;

34. *Encourages* all Member States to designate national focal points in charge of liaising with the Committee and the Monitoring Team on issues related to the implementation of the measures described in paragraph 2 above and the assessment of the threat from ISIL, Al-Qaida, and associated individuals, groups, undertakings, and entities;

35. *Encourages* all Member States to report to the Committee on obstacles to the implementation of the measures described in paragraph 2 above, with a view to facilitating technical assistance;

36. *Calls upon* all States to submit an updated report to the Committee no later than 120 days from the date of adoption of this resolution on their implementation, including relevant enforcement actions as appropriate, of the measures referred to in paragraph 2 of this resolution;

The Committee

37. *Directs* the Committee to continue to ensure that fair and clear procedures exist for placing individuals, groups, undertakings and entities on the ISIL (Da'esh) & Al-Qaida Sanctions List and for removing them as well as for granting exemptions per resolution 1452 (2002), and *directs* the Committee to keep its guidelines under active review in support of these objectives;

38. *Directs* the Committee, as a matter of priority, to review its guidelines with respect to the provisions of this resolution, in particular paragraphs 23, 26, 30, 31, 34, 47, 52, 57, 59, 64, 77, 78, 80 and 81;

39. *Requests* the Committee to report to the Council on its findings regarding Member States' implementation efforts, and identify and recommend steps necessary to improve implementation;

40. *Directs* the Committee to identify possible cases of non-compliance with the measures pursuant to paragraph 2 above and to determine the appropriate course of action on each case, and directs the Chair, in regular reports to the Council pursuant to paragraph 87 below, to provide progress reports on the Committee's work on this issue;

41. *Confirms* that no matter should be left pending before the Committee for a period longer than six months, unless the Committee determines on a case-by-case basis that extraordinary circumstances require additional time for consideration, in accordance with the Committee's guidelines;

42. *Requests* the Committee to facilitate, through the Monitoring Team or specialized United Nations agencies, assistance on capacity-building for enhancing implementation of the measures, upon request by Member States;

Listing

43. *Encourages* all Member States to submit to the Committee for inclusion on the ISIL (Da'esh) & Al-Qaida Sanctions List names of individuals, groups, undertakings and entities participating, by any means, in the financing or support of acts or activities of ISIL, Al-Qaida, and associated individuals, groups, undertakings, and entities;

44. *Reiterates* that the measures referred to in paragraph 2 of this resolution are preventative in nature and are not reliant upon criminal standards set out under national law;

45. *Reaffirms* that, when proposing names to the Committee for inclusion on the ISIL (Da'esh) & Al-Qaida Sanctions List, Member States shall use the standard form for listing and provide a statement of case that should include as detailed and specific reasons as possible describing the proposed basis for the listing, and as much relevant information as possible on the proposed name, in particular sufficient identifying information to allow for the accurate and positive identification of individuals, groups, undertakings, and entities, and to the extent possible, the information required by INTERPOL to issue a Special Notice, and *reaffirms* that the statement of case shall be releasable, upon request, except for the parts a Member State identifies as being confidential to the Committee, and may be used to develop the narrative summary of reasons for listing described in paragraph 49 below;

46. *Reaffirms* that Member States proposing a new listing, as well as Member States that have proposed names for inclusion on the Al-Qaida Sanctions List before the adoption of this resolution, shall specify if the Committee or the Ombudsperson may not make known the Member State's status as a designating State;

47. *Encourages* Member States to submit, where available and in accordance with their national legislation, photographs and other biometric data of individuals for inclusion in INTERPOL-United Nations Security Council Special Notices;

48. *Directs* the Committee to continue to update, as necessary, the standard form for listing in accordance with the provisions of this resolution; further *directs* the Monitoring Team to report to the Committee on further steps that could be taken to improve the quality of the ISIL (Da'esh) & Al-Qaida Sanctions List and Consolidated Sanctions List, including by improving identifying information, as well as steps to ensure that INTERPOL-United Nations Security Council Special Notices exist for all listed individuals, groups, undertakings, and entities; and further *directs* the Secretariat, with the assistance of the Monitoring Team, to build and maintain the data model approved by the Committee, with a view to its completion by June 2017 and *requests* the Secretary-General to provide additional resources in this regard;

49. *Directs* the Committee, with the assistance of the Monitoring Team and in coordination with the relevant designating States, to make accessible on the Committee's website, at the same time a name is added to the ISIL (Da'esh) & Al-Qaida Sanctions List, a narrative summary of reasons for listing that are as detailed and specific as possible, as well as additional relevant information;

50. *Encourages* Member States and relevant international organizations and bodies to inform the Committee of any relevant court decisions and proceedings so

that the Committee can consider them when it reviews a corresponding listing or updates a narrative summary of reasons for listing;

51. *Calls upon* all members of the Committee and the Monitoring Team to share with the Committee any information they may have available regarding a listing request from a Member State so that this information may help inform the Committee's decision on listing and provide additional material for the narrative summary of reasons for listing described in paragraph 49;

52. *Reaffirms* that the Secretariat shall, after publication but within three working days after a name is added to the ISIL (Da'esh) & Al-Qaida Sanctions List, notify the Permanent Mission of the State or States where the individual or entity is believed to be located and, in the case of individuals, the state of which the person is a national (to the extent this information is known), *requests* the Secretariat to publish on the Committee's website all relevant publicly releasable information, including the narrative summary of reasons for listing, immediately after a name is added to the ISIL (Da'esh) & Al-Qaida Sanctions List;

53. *Reaffirms* the requirement that Member States take all possible measures, in accordance with their domestic laws and practices, to notify or inform in a timely manner the listed individual or entity of the listing and to include with this notification the narrative summary of reasons for listing, a description of the effects of listing, as provided in the relevant resolutions, the Committee's procedures for considering delisting requests, including the possibility of submitting such a request to the Ombudsperson in accordance with paragraph 43 of resolution 2083 (2012) and annex II of this resolution, and the provisions of resolution 1452 (2002) regarding available exemptions, including the possibility of submitting such requests through the Focal Point mechanism in accordance with paragraphs 10 and 76 of this resolution;

Review of Delisting Requests — Ombudsperson/Member States

54. *Decides* to extend the mandate of the Office of the Ombudsperson, established by resolution 1904 (2009), as reflected in the procedures outlined in annex II of this resolution, for a period of twenty four months from the date of expiration of the Office of the Ombudsperson's current mandate in December 2017, *affirms* that the Ombudsperson shall continue to receive requests from individuals, groups, undertakings or entities seeking to be removed from the ISIL (Da'esh) & Al-Qaida Sanctions List in an independent and impartial manner and shall neither seek nor receive instructions from any government, and *affirms* that the Ombudsperson shall continue to present to the Committee observations and a recommendation on the delisting of those individuals, groups, undertakings or entities that have requested removal from the ISIL (Da'esh) & Al-Qaida Sanctions List through the Office of the Ombudsperson, either a recommendation to retain the listing or a recommendation that the Committee consider delisting;

55. *Recalls* its decision that the requirement for States to take the measures described in paragraph 2 of this resolution shall remain in place with respect to that individual, group, undertaking or entity, where the Ombudsperson recommends retaining the listing in the Comprehensive Report of the Ombudsperson on a delisting request pursuant to annex II;

56. *Recalls* its decision that the requirement for States to take the measures described in paragraph 2 of this resolution shall terminate with respect to that individual, group, undertaking or entity 60 days after the Committee completes consideration of a Comprehensive Report of the Ombudsperson, in accordance with annex II of this resolution, including paragraph 7 (h) thereof, where the Ombudsperson recommends that the Committee consider delisting, unless the Committee decides by consensus before the end of that 60-day period that the requirement shall remain in place with respect to that individual, group, undertaking or entity; provided that, in cases where consensus does not exist, the Chair shall, on the request of a Committee Member, submit the question of whether to delist that individual, group, undertaking or entity to the Security Council for a decision within a period of 60 days; and provided further that, in the event of such a request, the requirement for States to take the measures described in paragraph 2 of this resolution shall remain in force for that period with respect to that individual, group, undertaking or entity until the question is decided by the Security Council;

57. *Recalls* its decision that the Committee may, by consensus, shorten the 60-day period referred to in paragraph 56 on a case-by-case basis;

58. *Reiterates* that the measures referred to in paragraph 2 of this resolution are preventative in nature and are not reliant upon criminal standards set out under national law;

59. *Underscores* the importance of the Office of the Ombudsperson, and *requests* the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson by providing necessary resources, including for translation services, as appropriate, and to make the necessary arrangements to ensure its continued ability to carry out its mandate in an independent, effective and timely manner, and to provide the Committee an update on actions taken in six months;

60. *Strongly urges* Member States to provide all relevant information to the Ombudsperson, including any relevant confidential information, where appropriate, *encourages* Member States to provide relevant information, including any detailed and specific information, when available and in a timely manner, *welcomes* those national arrangements entered into by Member States with the Office of the Ombudsperson to facilitate the sharing of confidential information, *strongly encourages* Member States' further progress in this regard, including by concluding arrangements with the Office of the Ombudsperson for the sharing of such information, and *confirms* that the Ombudsperson must comply with any confidentiality restrictions that are placed on such information by Member States providing it;

61. *Strongly urges* Member States and relevant international organizations and bodies to encourage individuals and entities that are considering challenging or are already in the process of challenging their listing through national and regional courts to first seek removal from the ISIL (Da'esh) & Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson;

62. *Notes* the Financial Action Task Force (FATF) international standards and, inter alia, best practices relating to targeted financial sanctions, as referenced in paragraph 21 of this resolution;

63. *Recalls* its decision that when the designating State submits a delisting request, the requirement for States to take the measures described in paragraph 2 of

this resolution shall terminate with respect to that individual, group, undertaking or entity after 60 days unless the Committee decides by consensus before the end of that 60-day period that the measures shall remain in place with respect to that individual, group, undertaking or entity; provided that, in cases where consensus does not exist, the Chair shall, on the request of a Committee Member, submit the question of whether to delist that individual, group, undertaking or entity to the Security Council for a decision within a period of 60 days; and provided further that, in the event of such a request, the requirement for States to take the measures described in paragraph 2 of this resolution shall remain in force for that period with respect to that individual, group, undertaking or entity until the question is decided by the Security Council;

64. *Also recalls* its decision that the Committee may, by consensus, shorten the 60-day period referred to in paragraph 63 on a case-by-case basis;

65. *Further recalls* its decision that, for purposes of submitting a delisting request in paragraph 63, consensus must exist between or among all designating States in cases where there are multiple designating States; and further *recalls* its decision that co-sponsors of listing requests shall not be considered designating States for purposes of paragraph 63;

66. *Strongly urges* designating States to allow the Ombudsperson to reveal their identities as designating States to those listed individuals and entities that have submitted delisting petitions to the Ombudsperson;

67. *Directs* the Committee to continue to work, in accordance with its guidelines, to consider delisting requests of Member States for the removal from the ISIL (Da'esh) & Al-Qaida Sanctions List of individuals, groups, undertakings and entities that are alleged to no longer meet the criteria established in the relevant resolutions, and set out in paragraph 2 of this resolution, and *strongly urges* Member States to provide reasons for submitting their delisting requests;

68. *Encourages* States to submit delisting requests for individuals that are officially confirmed to be dead, and for entities reported or confirmed to have ceased to exist, while at the same time taking all reasonable measures to ensure that assets that had belonged to these individuals or entities will not be transferred or distributed to other individuals, groups, undertakings and entities on the ISIL (Da'esh) & Al-Qaida Sanctions List or any other Security Council sanctions list;

69. *Encourages* Member States, when unfreezing the assets of a deceased individual or an entity that is reported or confirmed to have ceased to exist as a result of a delisting, to recall the obligations set forth in resolution 1373 (2001) and, particularly, to prevent unfrozen assets from being used for terrorist purposes;

70. *Reaffirms* that, prior to the unfreezing of any assets that have been frozen as a result of the listing of Usama bin Laden, Member States shall submit to the Committee a request to unfreeze such assets and shall provide assurances to the Committee that the assets will not be transferred, directly or indirectly, to a listed individual, group, undertaking or entity, or otherwise used for terrorist purposes in line with Security Council resolution 1373 (2001), and decides further that such assets may only be unfrozen in the absence of an objection by a Committee member within thirty days of receiving the request, and stresses the exceptional nature of this provision, which shall not be considered as establishing a precedent;

71. *Calls upon* the Committee when considering delisting requests to give due consideration to the opinions of designating State(s), State(s) of residence, nationality, location or incorporation, and other relevant States as determined by the Committee, *directs* Committee members to provide their reasons for objecting to delisting requests at the time the request is objected to, and *requests* the Committee to provide reasons to relevant Member States and national and regional courts and bodies, upon request and where appropriate;

72. *Encourages* all Member States, including designating States and States of residence, nationality, location or incorporation to provide all information to the Committee relevant to the Committee's review of delisting petitions, and to meet with the Committee, if requested, to convey their views on delisting requests, and further *encourages* the Committee, where appropriate, to meet with representatives of national or regional organizations and bodies that have relevant information on delisting petitions;

73. *Confirms* that the Secretariat shall, within three days after a name is removed from the ISIL (Da'esh) & Al-Qaida Sanctions List, notify the Permanent Mission of the State(s) of residence, nationality, location or incorporation (to the extent this information is known), and *recalls* its decision that States receiving such notification shall take measures, in accordance with their domestic laws and practices, to notify or inform the concerned individual, group, undertaking or entity of the delisting in a timely manner;

74. *Reaffirms* that, in cases in which the Ombudsperson is unable to interview a petitioner in his or her state of residence, the Ombudsperson may request, with the agreement of the petitioner, that the Committee consider granting exemptions to the restrictions on assets and travel in paragraphs 2 (a) and (b) of this resolution for the sole purpose of allowing the petitioner to meet travel expenses and travel to another State to be interviewed by the Ombudsperson for a period no longer than necessary to participate in this interview, provided that all States of transit and destination do not object to such travel, and further directs the Committee to notify the Ombudsperson of the Committee's decision;

Exemptions/Focal Point

75. *Recalls* that the assets freeze measures outlined in paragraph 2 above shall not apply to funds and other financial assets or economic resources that the Committee determines to be:

(a) necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources, following notification of intention to authorize access to such funds and in the absence of a negative decision by the Committee within 3 working days of the notification;

(b) necessary for extraordinary expenses, being expenses other than basic expenses, following notification of the intention to authorize release of such funds and approval of the Committee of the request within 5 working days of the notification;

76. *Reaffirms* that the Focal Point mechanism established in resolution 1730 (2006) may:

(a) Receive requests from listed individuals, groups, undertakings, and entities for exemptions to the measures outlined in paragraph 2 (a) of this resolution, as defined in resolution 1452 (2002) provided that the request has first been submitted for the consideration of the State of residence, and *reaffirms* further that the Focal Point shall transmit such requests to the Committee for a decision, directs the Committee to consider such requests, including in consultation with the State of residence and any other relevant States, and further directs the Committee, through the Focal Point, to notify such individuals, groups, undertaking or entities of the Committee's decision;

(b) Receive requests from listed individuals for exemptions to the measures outlined in paragraph 2 (b) of this resolution and transmit these to the Committee to determine, on a case-by-case basis, whether entry or transit is justified, directs the Committee to consider such requests in consultation with States of transit and destination and any other relevant States, and *reaffirms* further that the Committee shall only agree to exemptions to the measures in paragraph 2 (b) of this resolution with the agreement of the States of transit and destination, and further directs the Committee, through the Focal Point, to notify such individuals of the Committee's decision;

77. *Reaffirms* that the Focal Point may receive, and transmit to the Committee for its consideration, communications from:

(a) individuals who have been removed from the ISIL (Da'esh) & Al-Qaida Sanctions List;

(b) individuals claiming to have been subjected to the measures outlined in paragraph 2 above as a result of false or mistaken identification or confusion with individuals included on the ISIL (Da'esh) & Al-Qaida Sanctions List;

78. *Directs* the Committee, with the assistance of the Monitoring Team and in consultation with relevant States, to carefully consider such communications and to respond, through the Focal Point, to such communications referred to in paragraph 77 (b), as may be appropriate, within 60 days, and *further directs* the Committee, in consultation with INTERPOL as may be appropriate, to communicate with Member States as may be appropriate to address possible or confirmed cases of false or mistaken identity or confusion with individuals included on the ISIL (Da'esh) & Al-Qaida Sanctions List;

Review and maintenance of the ISIL (Da'esh) & Al-Qaida Sanctions List

79. *Encourages* all Member States, in particular designating States and States of residence, nationality, location or incorporation, to submit to the Committee additional identifying and other information, including where possible and in accordance with their national legislation, photographs and other biometric data of individuals along with supporting documentation, on listed individuals, groups, undertakings and entities, including updates on the operating status of listed entities, groups and undertakings, the movement, incarceration or death of listed individuals and other significant events, as such information becomes available;

80. *Requests* the Monitoring Team to circulate to the Committee every twelve months a list compiled in consultation with the respective designating States and States of residence, nationality, location or incorporation, where known, of:

(a) individuals and entities on the ISIL (Da'esh) & Al-Qaida Sanctions List whose entries lack identifiers necessary to ensure effective implementation of the measures imposed upon them;

(b) individuals on the ISIL (Da'esh) & Al-Qaida Sanctions List who are reportedly deceased, along with an assessment of relevant information such as the certification of death, and to the extent possible, the status and location of frozen assets and the names of any individuals or entities who would be in a position to receive any unfrozen assets;

(c) entities on the ISIL (Da'esh) & Al-Qaida Sanctions List that are reported or confirmed to have ceased to exist, along with an assessment of any relevant information;

(d) any other names on the ISIL (Da'esh) & Al-Qaida Sanctions List that have not been reviewed in three or more years ("the triennial review");

81. *Directs* the Committee to review whether these listings remain appropriate, and *further directs* the Committee to remove listings if it decides they are no longer appropriate;

82. *Directs* the Monitoring Team to refer to the Chair for review listings for which, after three years, no relevant State has responded in writing to the Committee's requests for information, and in this regard, *reminds* the Committee that its Chair, acting in his or her capacity as Chair, may submit names for removal from the ISIL (Da'esh) & Al-Qaida Sanctions List, as appropriate and subject to the Committee's normal decision-making procedures;

Coordination and outreach

83. *Directs* the Committee to continue to cooperate with other relevant Security Council Sanctions Committees, in particular those established pursuant to resolutions 751 (1992) and 1907 (2009), 1988 (2011), 1970 (2011) and 2140 (2014);

84. *Reiterates* the need to enhance ongoing cooperation among the Committee and United Nations counter-terrorism bodies, including the Counter-Terrorism Committee (CTC) and the Committee established pursuant to resolution 1540 (2004), as well as their respective groups of experts, including through, as appropriate, enhanced information-sharing, coordination on visits to countries within their respective mandates, on facilitating and monitoring technical assistance, on relations with international and regional organizations and agencies and on other issues of relevance to these bodies;

85. *Encourages* the Monitoring Team and the United Nations Office on Drugs and Crime, to continue their joint activities, in cooperation with the Counter-Terrorism Executive Directorate (CTED) and 1540 Committee experts to assist Member States in their efforts to comply with their obligations under the relevant resolutions, including through organizing regional and subregional workshops;

86. *Requests* the Committee to consider, where and when appropriate, visits to selected countries by the Chair and/or Committee members to enhance the full

and effective implementation of the measures referred to in paragraph 2 above, with a view to encouraging States to comply fully with this resolution and resolutions 1267 (1999), 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009) 1989 (2011), 2082 (2012), 2083 (2012), and 2133 (2014), 2178 (2014), 2195 (2014), 2199 (2015), and 2214 (2015);

87. *Requests* the Committee to report orally, through its Chair, at least once per year, to the Council on the state of the overall work of the Committee and the Monitoring Team, and, as appropriate, in conjunction with other Committee Chairs, expresses its intention to hold informal consultations at least once per year on the work of the Committee, on the basis of reports from the Chair to the Council, and *further requests* the Chair to hold regular briefings for all interested Member States;

88. *Directs* the Committee to consider requests for information from States and international organizations with ongoing judicial proceedings concerning implementation of the measures imposed in paragraph 2 above, and to respond as appropriate with additional information available to the Committee and the Monitoring Team;

Monitoring Team

89. *Decides*, in order to assist the Committee in fulfilling its mandate, as well as to support the Ombudsperson, to extend the mandate of the current New York-based Monitoring Team and its members, established pursuant to paragraph 7 of resolution 1526 (2004), for a further period of twenty four months from the expiration of its current mandate in December 2017, under the direction of the Committee with the responsibilities outlined in annex I, and *requests* the Secretary-General to make the necessary arrangements to this effect, and *highlights the importance* of ensuring that the Monitoring Team receives the necessary administrative, security, and substantive support, to effectively, safely, and in a timely manner fulfil its mandate, including with regard to duty of care in high-risk environments, under the direction of the Committee, a subsidiary organ of the Security Council;

90. *Requests* the Secretary-General to add up to two new experts on the Monitoring Team along with the additional administrative and analytical support resources needed to increase its capacity and strengthen its ability to analyze ISIL's financing, radicalization and recruitment, and attack planning activities, as well as support the resulting increased activities of the Committee by the Secretariat, and *notes* that the selection process of these experts should prioritize appointing individuals with the strongest qualifications to fulfil the duties described above while paying due regard to the importance of regional and gender representation in the recruitment process;

91. *Directs* the Monitoring Team, in its comprehensive, independent reports to the Committee referred to in paragraph (a) of annex 1, to report on relevant thematic and regional topics and developing trends as may be requested by the Security Council or the Committee following the adoption of this resolution;

92. *Encourages* relevant United Nations Missions, within their existing mandates, resources, and capabilities, to assist the Committee and the Monitoring Team, such as through logistical support, security assistance, and exchange of

information in their work relevant to the threat by ISIL, Al-Qaida, and associated groups and individuals in their respective areas of deployment;

93. *Directs* the Monitoring Team to identify, gather information on, and keep the Committee informed of instances and common patterns of non-compliance with the measures imposed in this resolution, as well as to facilitate, upon request by Member States, assistance on capacity-building, requests the Monitoring Team to work closely with State(s) of residence, nationality, location or incorporation, designating States, other relevant States, and relevant United Nations Missions, and further directs the Monitoring Team to provide recommendations to the Committee on actions taken to respond to non-compliance;

94. *Directs* the Committee, with the assistance of its Monitoring Team, to hold special meetings on important thematic or regional topics and Member States' capacity challenges, in consultation, as appropriate, with the Counter Terrorism Committee and CTED, CTITF, and with the Financial Action Task Force to identify and prioritize areas for the provision of technical assistance to enable more effective implementation by Member States;

95. *Requests* the Analytical Support and Sanctions Monitoring Team to submit, in close collaboration with the CTED, to the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) in 30 days recommendations to the Committee on measures that can be taken to strengthen monitoring of global implementation of resolutions 2199 (2015) and 2178 (2014) and additional steps that could be taken by the Committee to improve global compliance with these resolutions;

96. *Requests* the Analytical Support and Sanctions Monitoring Team to provide the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) on a quarterly basis oral briefings on its analysis of global implementation of resolutions 2199 (2015) and 2178 (2014) including gathered information and analysis relevant to potential sanctions designations by Member States or Committee actions that could be taken;

ISIL Reporting

97. *Recalling* the threat posed to international peace and security by ISIL and associated individuals, groups, undertakings, and entities, *requests* the Secretary-General to provide an initial strategic-level report that demonstrates and reflects the gravity of the aforementioned threat, including foreign terrorist fighters joining ISIL and associated groups and entities, and the sources of financing of these groups including through illicit trade in oil, antiquities, and other natural resources, as well as their planning and facilitation of attacks, and reflects the range of United Nations efforts in support of Member States in countering this threat, in 45 days and provide updates every four months thereafter, with the input of CTED, in close collaboration with the Monitoring Team, as well as other relevant United Nations actors;

Reviews

98. *Decides* to review the measures described in paragraph 2 above with a view to their possible further strengthening in eighteen months or sooner if necessary;

99. *Decides* to remain actively seized of the matter.

Annex I

In accordance with paragraph 73 of this resolution, the Monitoring Team shall operate under the direction of the Committee and shall have the following mandates and responsibilities:

(a) To submit, in writing, comprehensive, independent reports to the Committee, every six months, the first by 30 June 2016, on the following issues:

(i) implementation by Member States of the measures referred to in paragraph 2 of this resolution;

(ii) the global threat posed by ISIL, Al-Qaida, and associated individuals, groups, undertakings, and entities, including (but not limited to) the threat posed by the presence of ISIL and its affiliates in Iraq, the Syrian Arab Republic, Libya, and Afghanistan and the threats presented by the presence of Boko Haram;

(iii) the impact of the measures in resolution 2199 (2015), including progress on implementation of these measures, unintended consequences and unexpected challenges, as mandated in that resolution in the form of updates on each of the following subjects: oil trade; trade in cultural property; kidnapping for ransom and external donations; direct or indirect supply; sale or transfer of arms and related material of all types; as part of the impact assessment, pursuant to paragraph 30 of resolution 2199 (2015);

(iv) the threat posed by foreign terrorist fighters recruited by or joining Al-Qaida, ISIL, and all other associated groups, undertakings;

(v) any other issues that the Security Council or the Committee requests the Monitoring Team to include in its comprehensive reports as set forth in paragraph 91 of this resolution; and

(vi) specific recommendations related to improved implementation of relevant sanctions measures, including those referred to in paragraph 2 of this resolution, resolution 2178 (2014) and resolution 2199 (2015), and possible new measures;

(b) To assist the Ombudsperson in carrying out his or her mandate as specified in annex II of this resolution, including by providing updated information on those individuals, groups, undertakings or entities seeking their removal from the ISIL (Da'esh) & Al-Qaida Sanctions List;

(c) To assist the Committee in regularly reviewing names on the ISIL (Da'esh) & Al-Qaida Sanctions List, including by undertaking travel on behalf of the Committee, as a subsidiary organ of the Security Council and contact with Member States, with a view to developing the Committee's record of the facts and circumstances relating to a listing;

(d) To assist the Committee in following up on requests to Member States for information, including with respect to implementation of the measures referred to in paragraph 2 of this resolution;

(e) To submit a comprehensive programme of work to the Committee for its review and approval, as necessary, in which the Monitoring Team should detail the activities envisaged in order to fulfil its responsibilities, including proposed travel,

based on close coordination with CTED and the 1540 Committee's group of experts to avoid duplication and reinforce synergies;

(f) To work closely and share information with CTED and the 1540 Committee's group of experts to identify areas of convergence and overlap and to help facilitate concrete coordination, including in the area of reporting, among the three Committees;

(g) To participate actively in and support all relevant activities under the United Nations Global Counter-Terrorism Strategy including within the Counter-Terrorism Implementation Task Force, established to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system, in particular through its relevant working groups;

(h) To gather information, on behalf of the Committee, on instances of reported non-compliance with the measures referred to in paragraph 2 of this resolution, including by collating information from all relevant sources, including Member States, and engaging with related parties, pursuing case studies, both on its own initiative and upon the Committee's request, and to provide cases of non-compliance and recommendations to the Committee on actions to respond to such cases of non-compliance for its review;

(i) To present to the Committee recommendations, which could be used by Member States to assist them with the implementation of the measures referred to in paragraph 2 of this resolution and in preparing proposed additions to the ISIL (Da'esh) & Al-Qaida Sanctions List;

(j) To assist the Committee in its consideration of proposals for listing, including by compiling and circulating to the Committee information relevant to the proposed listing, and preparing a draft narrative summary referred to in paragraph 36 of this resolution;

(k) To consult with the Committee or any relevant Member States, as appropriate, when identifying that certain individuals or entities should be added to, or removed from, the ISIL (Da'esh) & Al-Qaida Sanctions List;

(l) To bring to the Committee's attention new or noteworthy circumstances that may warrant a delisting, such as publicly reported information on a deceased individual;

(m) To consult with Member States in advance of travel to selected Member States, based on its programme of work as approved by the Committee;

(n) To coordinate and cooperate with the national counter-terrorism focal point or similar coordinating body in the state of visit where appropriate;

(o) To cooperate closely with relevant United Nations counter-terrorism bodies in providing information on the measures taken by Member States on kidnapping and hostage-taking for ransom by Al-Qaida, ISIL, and associated individuals, groups, undertakings, and entities, and on relevant trends and developments in this area;

(p) To encourage Member States to submit names and additional identifying information for inclusion on the ISIL (Da'esh) & Al-Qaida Sanctions List, as instructed by the Committee;

(q) To present to the Committee additional identifying and other information to assist the Committee in its efforts to keep the ISIL (Da'esh) & Al-Qaida Sanctions List as updated and accurate as possible;

(r) To encourage Member States to provide information to the Monitoring Team that is relevant to the fulfilment of its mandate, as appropriate;

(s) To study and report to the Committee on the changing nature of the threat of Al-Qaida and ISIL, and the best measures to confront them, including by developing, within existing resources, a dialogue with relevant scholars, academic bodies and experts through an annual workshop and/or other appropriate means, in consultation with the Committee;

(t) To collate, assess, monitor, report on, and make recommendations regarding implementation of the measures, including implementation of the measure in paragraph 2 (a) of this resolution as it pertains to preventing the criminal misuse of the Internet by ISIL, Al-Qaida, and associated individuals, groups, undertakings and entities, which shall be included in the Monitoring Team's regular report as outlined in section (a) of this annex; to pursue case studies, as appropriate; and to explore in depth any other relevant issues as directed by the Committee;

(u) To consult with Member States and other relevant organizations, including the International Air Transport Association (IATA), the International Civil Aviation Organization (ICAO), the World Customs Organization (WCO), INTERPOL, the Financial Action Task Force (FATF) and its regional bodies as well as the United Nations Educational, Scientific and Cultural Organization (UNESCO), including regular dialogue with representatives in New York and in capitals, taking into account their comments, especially regarding any issues that might be reflected in the Monitoring Team's reports referred to in paragraph (a) of this annex, such as gaps and challenges in States' implementation of the measures in this resolution;

(v) To consult, in confidence, with Member States' intelligence and security services, including through regional forums, in order to facilitate the sharing of information and to strengthen implementation of the measures;

(w) To consult with Member States, relevant representatives of the private sector, including financial institutions and relevant non-financial businesses and professions, and international and regional organizations, including FATF and its regional bodies, to promote awareness of, and enhanced compliance with, and to learn about the practical implementation of the asset freeze and to develop recommendations for the strengthening of the implementation of that measure;

(x) To consult with Member States, relevant representatives of the private sector and international and regional organizations, including ICAO, IATA, WCO and INTERPOL, to promote awareness of, and enhanced compliance with, and to learn about the practical implementation of the travel ban, including the use of advanced passenger information provided by civil aircraft operators to Member States, and to develop recommendations for the strengthening of the implementation of that measure;

(y) To consult with Member States, relevant representatives of international and regional organizations and the private sector, in coordination with national authorities, as appropriate, to promote awareness of, enhance compliance with, and to learn about the practical implementation of the arms embargo, with a particular

emphasis on measures to counter the use of improvised explosive devices (IEDs) by listed individuals, groups, undertakings and entities and the procurement of related components used to construct IEDs, in particular (but not limited to) trigger mechanisms, explosive precursors, commercial grade explosives, detonators, detonating cords, or poisons;

(z) To assist the Committee in facilitating assistance on capacity-building for enhancing implementation of the measures, upon request by Member States;

(aa) To work with INTERPOL and Member States to obtain photographs and, in accordance with their national legislation, biometric information of listed individuals for possible inclusion in INTERPOL-United Nations Security Council Special Notices, to work with INTERPOL to ensure that INTERPOL-United Nations Security Council Special Notices exist for all listed individuals, groups, undertakings, and entities; and to further work with INTERPOL, as appropriate, to address possible or confirmed cases of false or mistaken identify, with a view to reporting to the Committee on such instances and proposing any recommendations;

(bb) To assist other subsidiary bodies of the Security Council, and their expert panels, upon request, with enhancing their cooperation with INTERPOL, referred to in resolution 1699 (2006), and to work, in consultation with the Secretariat, to standardize the format of all United Nations sanctions lists and the Consolidated Sanctions List so as to facilitate implementation by national authorities;

(cc) To report to the Committee, on a regular basis or when the Committee so requests, through oral and/or written briefings on the work of the Monitoring Team, including its visits to Member States and its activities;

(dd) Any other responsibility identified by the Committee.

Annex II

In accordance with paragraph 54 of this resolution, the Office of the Ombudsperson shall be authorized to carry out the following tasks upon receipt of a delisting request submitted by, or on behalf of, an individual, group, undertaking or entity on the ISIL (Da'esh) & Al-Qaida Sanctions List or by the legal representative or estate of such individual, group, undertaking or entity ("the petitioner").

The Council recalls that Member States are not permitted to submit delisting petitions on behalf of an individual, group, undertaking or entity to the Office of the Ombudsperson.

Information gathering (four months)

1. Upon receipt of a delisting request, the Ombudsperson shall:

(a) Acknowledge to the petitioner the receipt of the delisting request;

(b) Inform the petitioner of the general procedure for processing delisting requests;

(c) Answer specific questions from the petitioner about Committee procedures;

(d) Inform the petitioner in case the petition fails to properly address the original listing criteria, as set forth in paragraph 2 of this resolution, and return it to the petitioner for his or her consideration; and

(e) Verify if the request is a new request or a repeated request and, if it is a repeated request to the Ombudsperson and it does not contain relevant additional information, return it to the petitioner, with an appropriate explanation, for his or her consideration.

2. For delisting petitions not returned to the petitioner, the Ombudsperson shall immediately forward the delisting request to the members of the Committee, designating State(s), State(s) of residence and nationality or incorporation, relevant United Nations bodies, and any other States deemed relevant by the Ombudsperson. The Ombudsperson shall ask these States or relevant United Nations bodies to provide, within four months, any appropriate additional information relevant to the delisting request. The Ombudsperson may engage in dialogue with these States to determine:

(a) These States' opinions on whether the delisting request should be granted; and

(b) Information, questions or requests for clarifications that these States would like to be communicated to the petitioner regarding the delisting request, including any information or steps that might be taken by a petitioner to clarify the delisting request.

3. Where all designating States consulted by the Ombudsperson do not object to the petitioner's delisting, the Ombudsperson may shorten the information gathering period, as appropriate.

4. The Ombudsperson shall also immediately forward the delisting request to the Monitoring Team, which shall provide to the Ombudsperson, within four months:

(a) All information available to the Monitoring Team that is relevant to the delisting request, including court decisions and proceedings, news reports, and information that States or relevant international organizations have previously shared with the Committee or the Monitoring Team;

(b) Fact-based assessments of the information provided by the petitioner that is relevant to the delisting request; and

(c) Questions or requests for clarifications that the Monitoring Team would like asked of the petitioner regarding the delisting request.

5. At the end of this four-month period of information gathering, the Ombudsperson shall present a written update to the Committee on progress to date, including details regarding which States have supplied information, and any significant challenges encountered therein. The Ombudsperson may extend this period once for up to two months if he or she assesses that more time is required for information gathering, giving due consideration to requests by Member States for additional time to provide information.

Dialogue (two months)

6. Upon completion of the information gathering period, the Ombudsperson shall facilitate a two-month period of engagement, which may include dialogue with the

petitioner. Giving due consideration to requests for additional time, the Ombudsperson may extend this period once for up to two months if he or she assesses that more time is required for engagement and the drafting of the Comprehensive Report described in paragraph 8 below. The Ombudsperson may shorten this time period if he or she assesses less time is required.

7. During this period of engagement, the Ombudsperson:

(a) May submit questions, either orally or in writing, to the petitioner, or request additional information or clarifications that may help the Committee's consideration of the request, including any questions or information requests received from relevant States, the Committee and the Monitoring Team;

(b) Should request from the petitioner a signed statement in which the petitioner declares that they have no ongoing association with Al-Qaida, ISIL, or any cell, affiliate, splinter group, or derivative thereof, and undertakes not to associate with Al-Qaida or ISIL in the future;

(c) Should meet with the petitioner, to the extent possible;

(d) Shall forward replies from the petitioner back to relevant States, the Committee and the Monitoring Team and follow up with the petitioner in connection with incomplete responses by the petitioner;

(e) Shall coordinate with States, the Committee and the Monitoring Team regarding any further inquiries of, or response to, the petitioner;

(f) During the information gathering or dialogue phase, the Ombudsperson may share with relevant States information provided by a State, including that State's position on the delisting request, if the State which provided the information consents;

(g) In the course of the information gathering and dialogue phases and in the preparation of the report, the Ombudsperson shall not disclose any information shared by a state on a confidential basis, without the express written consent of that state; and

(h) During the dialogue phase, the Ombudsperson shall give serious consideration to the opinions of designating States, as well as other Member States that come forward with relevant information, in particular those Member States most affected by acts or associations that led to the original listing.

8. Upon completion of the period of engagement described above, the Ombudsperson, with the help of the Monitoring Team, as appropriate, shall draft and circulate to the Committee a Comprehensive Report that will exclusively:

(a) Summarize and, as appropriate, specify the sources of, all information available to the Ombudsperson that is relevant to the delisting request. The report shall respect confidential elements of Member States' communications with the Ombudsperson;

(b) Describe the Ombudsperson's activities with respect to this delisting request, including dialogue with the petitioner; and

(c) Based on an analysis of all the information available to the Ombudsperson and the Ombudsperson's recommendation, lay out for the Committee the principal arguments concerning the delisting request. The recommendation should state the

Ombudsperson's views with respect to the listing as of the time of the examination of the delisting request.

Committee discussion

9. After the Committee has had fifteen days to review the Comprehensive Report in all official languages of the United Nations, the Chair of the Committee shall place the delisting request on the Committee's agenda for consideration.

10. When the Committee considers the delisting request, the Ombudsperson, shall present the Comprehensive Report in person and answer Committee members' questions regarding the request.

11. Committee consideration of the Comprehensive Report shall be completed no later than thirty days from the date the Comprehensive Report is submitted to the Committee for its review.

12. After the Committee has completed its consideration of the Comprehensive Report, the Ombudsperson may notify all relevant States of the recommendation.

13. Upon the request of a designating State, State of nationality, residence, or incorporation, and with the approval of the Committee, the Ombudsperson may provide a copy of the Comprehensive Report, with any redactions deemed necessary by the Committee, to such States, along with a notification to such States confirming that:

(a) All decisions to release information from the Ombudsperson's Comprehensive Reports, including the scope of information, are made by the Committee at its discretion and on a case-by-case basis;

(b) The Comprehensive Report reflects the basis for the Ombudsperson's recommendation and is not attributable to any individual Committee member; and

(c) The Comprehensive Report, and any information contained therein, should be treated as strictly confidential and not shared with the petitioner or any other Member State without the approval of the Committee.

14. In cases where the Ombudsperson recommends retaining the listing, the requirement for States to take the measures in paragraph 2 of this resolution shall remain in place with respect to that individual, group, undertaking or entity, unless a Committee member submits a delisting request, which the Committee shall consider under its normal consensus procedures.

15. In cases where the Ombudsperson recommends that the Committee consider delisting, the requirement for States to take the measures described in paragraph 2 of this resolution shall terminate with respect to that individual, group, undertaking or entity 60 days after the Committee completes consideration of a Comprehensive Report of the Ombudsperson, in accordance with this annex II, including paragraph 7 (h), unless the Committee decides by consensus before the end of that 60-day period that the requirement shall remain in place with respect to that individual, group, undertaking or entity; provided that, in cases where consensus does not exist, the Chair shall, on the request of a Committee Member, submit the question of whether to delist that individual, group, undertaking or entity to the Security Council for a decision within a period of 60 days; and provided further that, in the event of such a request, the requirement for States to take the measures

described in paragraph 2 of this resolution shall remain in force for that period with respect to that individual, group, undertaking or entity until the question is decided by the Security Council.

16. Following the conclusion of the process described in paragraphs 55 and 56 of this resolution, the Committee shall convey to the Ombudsperson, within 60 days, whether the measures described in paragraph 2 are to be retained or terminated, setting out reasons and including any further relevant information, and an updated narrative summary of reasons for listing, where appropriate, for the Ombudsperson to transmit to the petitioner. The 60-day deadline applies to outstanding matters before the Ombudsperson or the Committee and will take effect from the adoption of this resolution.

17. After the Ombudsperson receives the communication from the committee under paragraph 28, if the measures in paragraph 2 are to be retained, the Ombudsperson shall send to the petitioner, with an advance copy sent to the Committee, a letter that:

(a) Communicates the outcome of the petition;

(b) Describes, to the extent possible and drawing upon the Ombudsperson's Comprehensive Report, the process and publicly releasable factual information gathered by the Ombudsperson; and

(c) Forwards from the Committee all information about the decision provided to the Ombudsperson pursuant to paragraph 28 above.

18. In all communications with the petitioner, the Ombudsperson shall respect the confidentiality of Committee deliberations and confidential communications between the Ombudsperson and Member States.

19. The Ombudsperson may notify the petitioner, as well as those States relevant to a case but which are not members of the Committee, of the stage at which the process has reached.

Other Office of the Ombudsperson Tasks

20. In addition to the tasks specified above, the Ombudsperson shall:

(a) Distribute publicly releasable information about Committee procedures, including Committee Guidelines, fact sheets and other Committee-prepared documents;

(b) Where address is known, notify individuals or entities about the status of their listing, after the Secretariat has officially notified the Permanent Mission of the State or States, pursuant to paragraph 53 of this resolution; and

(c) Submit biannual reports summarizing the activities of the Ombudsperson to the Security Council.

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Annex 183

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I

Treaties and international agreements
registered in May 2001
Nos. 37501 to 37541

No. 37517

Multilateral

International Convention for the Suppression of Terrorist Bombings. New York, 15 December 1997

Entry into force: *23 May 2001, in accordance with article 22 which reads as follows: "1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. 2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession. 2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession." (see following page)*

Authentic texts: *Arabic, Chinese, English, French, Russian and Spanish*

Registration with the Secretariat of the United Nations: *ex officio, 23 May 2001*

No. 37517

Multilatéral

Convention internationale pour la répression des attentats terroristes à l'explosif. New York, 15 décembre 1997

Eutrée en vigueur : *23 mai 2001, conformément à l'article 22 qui se lit comme suit : "La présente Convention entrera en vigueur le trentième jour qui suivra la date de dépôt aurpès du Secrétaire général de l'Organisation des Nations Unies du vingt-deuxième instrument de ratification, d'acceptation, d'approbation ou d'adhésion. 2. Pour chacun des États qui ratifieront, accepteront ou approuveront la Convention ou y adhéreront après le dépôt du vingt-deuxième instrument de ratification, d'acceptation ou d'adhésion, la Convention entrera en vigueur le trentième jour après le dépôt par cet État de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion. 2. Pour chacun des États qui ratifieront, accepteront ou approuveront la Convention ou y adhéreront après le dépôt du vingt-deuxième instrument de ratification, d'acceptation, d'approbation ou d'adhésion, la Convention entrera en vigueur le trentième jour après le dépôt par cet État de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion." (voir la page suivante)*

Textes authentiques : *arabe, chinois, anglais, français, russe et espagnol*

Enregistrement auprès du Secrétariat des Natious Uuies : *d'office, 23 mai 2001*

Participant[1]	Ratification and Accession (a)
Austria	6 Sep 2000
Azerbaijan	2 Apr 2001 a
Botswana	8 Sep 2000 a
Cyprus with declaration	24 Jan 2001
Czech Republic	6 Sep 2000
France	19 Aug 1999
Guinea	7 Sep 2000 a
India with reservation	22 Sep 1999
Libyan Arab Jamahiriya	22 Sep 2000 a
Maldives	7 Sep 2000 a
Mongolia	7 Sep 2000 a
Norway	20 Sep 1999
Panama	5 Mar 1999
Slovakia	8 Dec 2000
Spain	30 Apr 1999
Sri Lanka	23 Mar 1999
Sudan with declarations and reservation	8 Sep 2000
Trinidad and Tobago	2 Apr 2001 a
Turkmenistan	25 Jun 1999
United Kingdom of Great Britain and Northern Ireland	7 Mar 2001
Uzbekistan	30 Nov 1998
Yemen	23 Apr 2001 a

[1] See the English texts of the declarations and of the reservation after the Spanish text

Participant[1]	**Ratification et Adhésion (a)**
Autriche	6 sept 2000
Azerbaïdjan	2 avr 2001 a
Botswana	8 sept 2000 a
Chypre avec déclaration	24 janv 2001
Espagne	30 avr 1999
France	19 août 1999
Guinée	7 sept 2000 a
Inde avec réserve	22 sept 1999
Jamahiriya arabe libyenne	22 sept 2000 a
Maldives	7 sept 2000 a
Mongolie	7 sept 2000 a
Norvège	20 sept 1999
Ouzbékistan	30 nov 1998
Panama	5 mars 1999
Royaume-Uni de Grande-Bretagne et d'Irlande du Nord	7 mars 2001
République tchèque	6 sept 2000
Slovaquie	8 déc 2000
Soudan avec déclarations et réserve	8 sept 2000
Sri Lanka	23 mars 1999
Trinité-et-Tobago	2 avr 2001 a
Turkménistan	25 juin 1999
Yémen	23 avr 2001 a

[1] Voir les textes français des déclarations et de la réserve après le texte espagnol

[ENGLISH TEXT — TEXTE ANGLAIS]

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS

The States Parties to this Convention,

Having in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States,

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,

Recalling the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations of 24 October 1995,

Recalling also the Declaration on Measures to Eliminate International Terrorism, annexed to General Assembly resolution 49/60 of 9 December 1994, in which, inter alia, "the States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States",

Noting that the Declaration also encouraged States "to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter",

Recalling further General Assembly resolution 51/210 of 17 December 1996 and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, annexed thereto,

Noting also that terrorist attacks by means of explosives or other lethal devices have become increasingly widespread,

Noting further that existing multilateral legal provisions do not adequately address these attacks,

Being convinced of the urgent need to enhance international cooperation between States in devising and adopting effective and practical measures for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators,

Considering that the occurrence of such acts is a matter of grave concern to the international community as a whole,

Noting that the activities of military forces of States are governed by rules of international law outside the framework of this Convention and that the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws,

Have agreed as follows:

Article 1

For the purposes of this Convention:

1. "State or government facility" includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.

2. "Infrastructure facility" means any publicly or privately owned facility providing or distributing services for the benefit of the public, such as water, sewage, energy, fuel or communications.

3. "Explosive or other lethal device" means:

(a) An explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or

(b) A weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.

4. "Military forces of a State" means the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security, and persons acting in support of those armed forces who are under their formal command, control and responsibility.

5. "Place of public use" means those parts of any building, land, street, waterway or other location that are accessible or open to members of the public, whether continuously, periodically or occasionally, and encompasses any commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational or similar place that is so accessible or open to the public.

6. "Public transportation system" means all facilities, conveyances and instrumentalities, whether publicly or privately owned, that are used in or for publicly available services for the transportation of persons or cargo.

Article 2

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

(a) With the intent to cause death or serious bodily injury; or

(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1.

3. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 2; or

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2; or

(c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

Article 3

This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under article 6, paragraph 1, or article 6, paragraph 2, of this Convention to exercise jurisdiction, except that the provisions of articles 10 to 15 shall, as appropriate, apply in those cases.

Article 4

Each State Party shall adopt such measures as may be necessary:

(a) To establish as criminal offences under its domestic law the offences set forth in article 2 of this Convention;

(b) To make those offences punishable by appropriate penalties which take into account the grave nature of those offences.

Article 5

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.

Article 6

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

(a) The offence is committed in the territory of that State; or

(b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or

(c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State; or

(b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or

(c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or

(d) The offence is committed in an attempt to compel that State to do or abstain from doing any act; or

(e) The offence is committed on board an aircraft which is operated by the Government of that State.

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2 under its domestic law. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.

5. This Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 7

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence as set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

(a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

(b) Be visited by a representative of that State;

(c) Be informed of that person's rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is

present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 6, subparagraph 1 (c) or 2 (c), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

6. When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 6, paragraphs 1 and 2, and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 8

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

2. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

Article 9

1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 6, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between State Parties to the extent that they are incompatible with this Convention.

Article 10

1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

Article 11

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 12

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Article 13

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of testimony, identi-

fication or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences under this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent; and

(b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

2. For the purposes of the present article:

(a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he was transferred for time spent in the custody of the State to which he was transferred.

3. Unless the State Party from which a person is to be transferred in accordance with this article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred.

Article 14

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.

Article 15

States Parties shall cooperate in the prevention of the offences set forth in article 2, particularly:

(a) By taking all practicable measures, including, if necessary, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or engage in the perpetration of offences as set forth in article 2;

(b) By exchanging accurate and verified information in accordance with their national law, and coordinating administrative and other measures taken as appropriate to prevent the commission of offences as set forth in article 2;

(c) Where appropriate, through research and development regarding methods of detection of explosives and other harmful substances that can cause death or bodily injury, consultations on the development of standards for marking explosives in order to identify their origin in post-blast investigations, exchange of information on preventive measures, cooperation and transfer of technology, equipment and related materials.

Article 16

The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.

Article 17

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

Article 18

Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.

Article 19

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

Article 20

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the

organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 21

1. This Convention shall be open for signature by all States from 12 January 1998 until 31 December 1999 at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 22

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-sccond instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 23

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 24

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

In witness whereof, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at New York on 12 January 1998.

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

UNITED NATIONS
1999

International Convention for the Suppression of the Financing of Terrorism

Preamble

The States Parties to this Convention,

Bearing in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States,

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,

Recalling the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, contained in General Assembly resolution 50/6 of 24 October 1995,

Recalling also all the relevant General Assembly resolutions on the matter, including resolution 49/60 of 9 December 1994 and its annex on the Declaration on Measures to Eliminate International Terrorism, in which the States Members of the United Nations solemnly reaffirmed their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States,

Noting that the Declaration on Measures to Eliminate International Terrorism also encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter,

Recalling General Assembly resolution 51/210 of 17 December 1996, paragraph 3, subparagraph (f), in which the Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds,

Recalling also General Assembly resolution 52/165 of 15 December 1997, in which the Assembly called upon States to consider, in particular, the implementation

of the measures set out in paragraphs 3 (a) to (f) of its resolution 51/210 of 17 December 1996,

Recalling further General Assembly resolution 53/108 of 8 December 1998, in which the Assembly decided that the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 should elaborate a draft international convention for the suppression of terrorist financing to supplement related existing international instruments,

Considering that the financing of terrorism is a matter of grave concern to the international community as a whole,

Noting that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain,

Noting also that existing multilateral legal instruments do not expressly address such financing,

Being convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators,

Have agreed as follows:

Article 1

For the purposes of this Convention:

1. AFunds@ means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

2. AA State or governmental facility@ means any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.

3. AProceeds@ means any funds derived from or obtained, directly or indirectly, through the commission of an offence set forth in article 2.

Article 2

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

2. (a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;

(b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

5. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;

(c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

Article 3

This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction, except that the provisions of articles 12 to 18 shall, as appropriate, apply in those cases.

Article 4

Each State Party shall adopt such measures as may be necessary:

(a) To establish as criminal offences under its domestic law the offences set forth in article 2;

(b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

Article 5

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.

2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.

3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

Article 6

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

Article 7

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

(a) The offence is committed in the territory of that State;

(b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;

(c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State;

(b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State;

(c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act;

(d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;

(e) The offence is committed on board an aircraft which is operated by the Government of that State.

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is

present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2.

5. When more than one State Party claims jurisdiction over the offences set forth in article 2, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.

6. Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 8

1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.

3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.

4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families.

5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith.

Article 9

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person=s presence for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

(a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person=s rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

(b) Be visited by a representative of that State;

(c) Be informed of that person=s rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 7, paragraph 1, subparagraph (b), or paragraph 2, subparagraph (b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 7, paragraph 1 or 2, and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person=s detention. The State which makes the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 10

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

2. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate,

such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

Article 11

1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 7, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this Convention.

Article 12

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings.

2. States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy.

3. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

4. Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 5.

5. States Parties shall carry out their obligations under paragraphs 1 and 2 in conformity with any treaties or other arrangements on mutual legal assistance or information exchange that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

Article 13

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence.

Article 14

None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 15

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person=s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person=s position for any of these reasons.

Article 16

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences set forth in article 2 may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

2. For the purposes of the present article:

(a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

3. Unless the State Party from which a person is to be transferred in accordance with the present article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred.

Article 17

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.

Article 18

1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:

(a) Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;

(b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

(i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;

(ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity;

(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international.

2. States Parties shall further cooperate in the prevention of offences set forth in article 2 by considering:

(a) Measures for the supervision, including, for example, the licensing, of all money-transmission agencies;

(b) Feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

3. States Parties shall further cooperate in the prevention of the offences set forth in article 2 by exchanging accurate and verified information in accordance with their domestic law and coordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in article 2, in particular by:

(a) Establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in article 2;

(b) Cooperating with one another in conducting inquiries, with respect to the offences set forth in article 2, concerning:

(i) The identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences;

(ii) The movement of funds relating to the commission of such offences.

4. States Parties may exchange information through the International Criminal Police Organization (Interpol).

Article 19

The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.

Article 20

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

Article 21

Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.

Article 22

Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction or performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.

Article 23

1. The annex may be amended by the addition of relevant treaties that:

(a) Are open to the participation of all States;

(b) Have entered into force;

(c) Have been ratified, accepted, approved or acceded to by at least twenty-two States Parties to the present Convention.

2. After the entry into force of this Convention, any State Party may propose such an amendment. Any proposal for an amendment shall be communicated to the depositary in written form. The depositary shall notify proposals that meet the requirements of paragraph 1 to all States Parties and seek their views on whether the proposed amendment should be adopted.

3. The proposed amendment shall be deemed adopted unless one third of the States Parties object to it by a written notification not later than 180 days after its circulation.

4. The adopted amendment to the annex shall enter into force 30 days after the deposit of the twenty-second instrument of ratification, acceptance or approval of such amendment for all those States Parties having deposited such an instrument. For each State Party ratifying, accepting or approving the amendment after the deposit of the twenty-second instrument, the amendment shall enter into force on the thirtieth day after deposit by such State Party of its instrument of ratification, acceptance or approval.

Article 24

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 25

1. This Convention shall be open for signature by all States from 10 January 2000 to 31 December 2001 at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 26

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 27

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 28

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations Headquarters in New York on 10 January 2000.

Annex

1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.

2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.

3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.

4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.

5. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.

6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.

7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.

8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.

9. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

INF

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22 April 1970

International Atomic Energy Agency
INFORMATION CIRCULAR

GENERAL Distr.
ENGLISH

TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS

Notification of the entry into force

1. By letters addressed to the Director General on 5, 6 and 20 March 1970 respectively, the Governments of the United Kingdom of Great Britain and Northern Ireland, the United States of America and the Union of Soviet Socialist Republics, which are designated as the Depositary Governments in Article IX. 2 of the Treaty on the Non-Proliferation of Nuclear Weapons, informed the Agency that the Treaty had entered into force on 5 March 1970.

2. The text of the Treaty, taken from a certified true copy provided by one of the Depositary Governments, is reproduced below for the convenience of all Members.

TREATY

ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS

The States concluding this Treaty, hereinafter referred to as the "Parties to the Treaty",

Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples,

Believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war,

In conformity with resolutions of the United Nations General Assembly calling for the conclusion of an agreement on the prevention of wider dis semination of nuclear weapons,

Undertaking to co-operate in facilitating the application of International Atomic Energy Agency safeguards on peaceful nuclear activities,

Expressing their support for research, development and other efforts to further the application, within the framework of the International Atomic Energy Agency safeguards system, of the principle of safeguarding effectively the flow of source and special fissionable materials by use of instruments and other techniques at certain strategic points,

Affirming the principle that the benefits of peaceful applications of nuclear technology, including any technological by-products which may be derived by nuclear-weapon States from the development of nuclear explosive devices, should be available for peaceful purposes to all Parties to the Treaty, whether nuclear-weapon or non-nuclear-weapon States,

Convinced that, in furtherance of this principle, all Parties to the Treaty are entitled to participate in the fullest possible exchange of scientific information for, and to contribute alone or in co-operation with other States to, the further development of the applications of atomic energy for peaceful purposes,

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament,

Urging the co-operation of all States in the attainment of this objective,

Recalling the determination expressed by the Parties to the 1963 Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water in its Preamble to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end,

Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control,

Recalling that, in accordance with the Charter of the United Nations, States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources,

Have agreed as follows:

ARTICLE I

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

ARTICLE II

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

ARTICLE III

1. Each Non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfilment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this Article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this Article shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.

2. Each State Party to the Treaty undertakes not to provide: *(a)* source or special fissionable material, or *(b)* equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article.

3. The safeguards required by this Article shall be implemented in a manner designed to comply with Article IV of this Treaty, and to avoid hampering the economic or technological development of the Parties or international co-operation in the field of peaceful nuclear activities, including the international exchange of nuclear material and equipment for the processing, use or production of nuclear material for peaceful purposes in accordance with the provisions of this Article and the principle of safeguarding set forth in the Preamble of the Treaty.

4. Non-nuclear-weapon States Party to the Treaty shall conclude agreements with the International Atomic Energy Agency to meet the requirements of this Article either individually or together with other States in accordance with the Statute of the International Atomic Energy Agency. Negotiation of such agreements shall commence within 180 days from the original entry into force of this Treaty. For States depositing their instruments of ratification or accession after the 180-day period, negotiation of such agreements shall commence not later than the date of such deposit. Such agreements shall enter into force not later than eighteen months after the date of initiation of negotiations.

ARTICLE IV

1. Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.

2. All the Parties to the Treaty undertake to facilitate, and have the right to participate in. the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy. Parties to the Treaty in a position to do so shall also co-operate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world.

ARTICLE V

Each Party to the Treaty undertakes to take appropriate measures to ensure that, in accordance with this Treaty, under appropriate international observation and through appropriate international procedures, potential benefits from any peaceful applications of nuclear explosions will be made available to non-nuclear-weapon States Party to the Treaty on a non-discriminatory basis and that the charge to such Parties for the explosive devices used will be as low as possible and exclude any charge for research and development. Non-nuclear-weapon States Party to the Treaty shall be able to obtain such benefits, pursuant to a special international agreement or agreements, through an appropriate international body with adequate representation of non-nuclear-weapon States. Negotiations on this subject shall commence as soon as possible after the Treaty enters into force. Non-nuclear-weapon States Party to the Treaty so desiring may also obtain such benefits pursuant to bilateral agreements.

ARTICLE VI

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

ARTICLE VII

Nothing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories.

ARTICLE VIII

1. Any Party to the Treaty may propose amendments to this Treaty. The text of any proposed amendment shall be submitted to the Depositary Governments which shall circulate it to all Parties to the Treaty. Thereupon, if requested to do so by one-third or more of the Parties to the Treaty, the Depositary Governments shall convene a conference, to which they shall invite all the Parties to the Treaty, to consider such an amendment.

2. Any amendment to this Treaty must be approved by a majority of the votes of all the Parties to the Treaty, including the votes of all nuclear-weapon States Party to the Treaty and all other Parties which, on the date the amendment is circulated, are members of the Board of Governors of the International Atomic Energy Agency. The amendment shall enter into force for each Party that deposits its instrument of ratification of the amendment upon the deposit of such instruments of ratification by a majority of all the Parties, including the instruments of ratification of all nuclear-weapon States Party to the Treaty and all other Parties which, on the date the amendment is circulated, are members of the Board of Governors of the International Atomic Energy Agency. Thereafter, it shall enter into force for any other Party upon the deposit of its instrument of ratification of the amendment.

3. Five years after the entry into force of this Treaty, a conference of Parties to the Treaty shall be held in Geneva, Switzerland, in order to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realised. At intervals of five years thereafter. a majority of the Parties to the Treaty may obtain, by submitting a proposal to this effect to the Depositary Governments, the convening of further conferences with the same objective of reviewing the operation of the Treaty.

ARTICLE IX

1. This Treaty shall be open to all States for signature. Any State which does not sign the Treaty before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.

2. This Treaty shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America, which are hereby designated the Depositary Governments.

3. This Treaty shall enter into force after its ratification by the States, the Governments of which are designated Depositaries of the Treaty, and forty other States signatory to this Treaty and the deposit of their instruments of ratification. For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January, 1967.

4. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Treaty, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or of accession, the date of the entry into force of this Treaty, and the date of receipt of any requests for convening a conference or other notices.

6. This Treaty shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.

ARTICLE X

1. Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

2. Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty.

ARTICLE XI

This Treaty, the English, Russian, French, Spanish and Chinese texts of which are equally authentic, shall be deposited in the archives of the Depositary Governments. Duly certified copies of this Treaty shall be transmitted by the Depositary Governments to the Governments of the signatory and acceding States.

IN WITNESS WHEREOF the undersigned, duly authorised, have signed this Treaty.

DONE in triplicate, at the cities of London, Moscow and Washington, the first day of July, one thousand nine hundred and sixty-eight.

EQUITY – A GENERAL PRINCIPLE OF LAW RECOGNISED BY CIVILISED NATIONS?

JUSTICE MARGARET WHITE*

I have chosen as my text Article 38 of the Statute of the International Court of Justice which sets out what the Court needs to have regard to when deciding disputes submitted to it. One source set out in Article 38 is the 'general principles of law recognised by civilised nations'.

In this paper I will explore whether 'equity' is such a general principle. The International Court of Justice has decided or given Advisory Opinions in over 130 matters since its inception after World War II as the principal judicial organ of the United Nations. It is the successor to the Permanent Court of International Justice established in the early 1920s by the League of Nations. Its caseload is now as great as it has ever been and the number of international courts and tribunals is growing steadily. Even to embark on the topic I have chosen is to invite disputation. The scholarly literature is replete with analyses of what 'equity' means in international law but I think the subject is of some interest to common lawyers and may be worth a brisk walk through an obstacle-strewn path.

At the outset it is as well to be clear that neither the concept nor the role of equity in international law is co-terminus with equity's characteristics in municipal or domestic law be it the common, Roman, civil or Germanic law variety. In general terms it tends to suggest justice attained through what is fair.[1]

This idea has long been developed in legal systems. One of the characteristics of any society is to be found in its own conception of justice and how to achieve it, of right and wrong, of what the law is and what it is intended to do and why. Those conceptions and their rationale do not necessarily coincide with corresponding concepts and their rationale in other societies or the legal systems of other societies.[2]

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* Justice of the Supreme Court of Queensland. This article is based on a paper presented at the W A Lee Equity Lecture 2003, Faculty of Law, Queensland University of Technology. I wish to thank my associate, Ms Kylie-Maree Weston-Scheuber BMus (QUT) BA/LLB (Hons) (UQ) for her research assistance and interest in the preparation of this paper.

1 D Walker, *The Oxford Companion to Law* (Clarendon Press, 1980) 424 discussed by S Rosenne 'The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law' in Bloed & Van Dijk (eds) *Forty Years of the International Court of Justice* (Europa Instituut, 1988) 85.

2 Rosenne, above n 1, 89.

Of even greater relevance to my topic is that in any given society, the judges themselves are an integral part of that society. It is not surprising, indeed it would be surprising if were not so, that judges are directly influenced by tendencies prevailing in their own societies. Domestic judges are shaped by, and in turn help to shape, the society in which they live and which they serve.[3] That cannot be true for judges of the International Court. They represent, by virtue of Article 9 of the Statute of the Court, the main forms of civilization and the principal legal systems of the world. Although there will be many shared values the paths to the desired curial outcome will be various.

On the other hand the impulse which has driven the very idea of equity must have been much the same whatever the society which gave rise to it and it was, no doubt, this commonality which permitted its development in the law of nations in Western Europe from the 17th century.

Elements of what we would identify as broadly equitable concepts can be found in the earliest extant records, for example, Hittite treaties with their neighbours in the 14th and 13th centuries BC which attempted to pre-empt dishonesty in carrying out the strict terms of the treaty by specifying acts of bad faith which would be incompatible with the oaths and treaty obligations of the parties.[4]

Equity can be identified in many societies and religions even if in different forms. The Greeks called it clemency. The Romans termed it *aequitas* or equality. Ancient Chinese law described it as compassion and in Hindu philosophy is found the doctrine of righteousness.[5] In some Islamic schools *istihsan* is employed to avoid undue hardship from the application of the law.[6]

Equity as it has been recognised and developed in international law is most closely related to Western legal traditions. This is no doubt because the body of international law rules were developed in Europe after the Peace of Westphalia in 1648 and the rise of statecraft in Europe in the 19th century.[7]

The profound influence of Aristotle on the Western legal tradition is well known. His articulation of the universality and completeness of the law which necessarily includes broad concepts of justice and equity and, at the same time, recognition of the

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3 J Martinez, 'Towards an International Judicial System' (2003) 56 *Stanford Law Review* 429, 461.

4 Discussed in G Scharzenberger, 'Equity in International Law' (1972) *The Year Book of World Affairs* 348-50. See also S E Finer, *The History of Government Vol 1*: *Ancient Monarchies and Empires* (Oxford University Press, 1997). Psalm 98 praises the Lord because 'You have established equity, justice and right': J Gelineau, 'Introduction' in *The Psalms: A New Translation* (Collins, 1963) 171.

5 R Newman, 'The Principles of Equity as a Source of World Law' (1966) 1 *Israel Law Review* 616-7 cited in C Rossi, *Equity in International Law: A Legal Realist Approach to International Decision Making* (Transitional Publishers, 1993) 22.

6 Although there are many texts on the principles of Islamic jurisprudence, I am indebted to Ms Susan Anderson BA Int'l Affairs (GWU) JD (UQ) former associate to the Hon Mr Justice B H McPherson CBE of the Supreme Court of Queensland for allowing me to read her research paper 'Equity in International Law: Is it Comparable to Common Law Equity?' and her discussion of sources of Islamic Law at 11-14.

7 D P O'Connell, *International Law* (Stevens, 1965) Vol 1, 5. See also Y Makonnen, 'Western Attitudes to International Equity' (1972-3) 42-43 *Annuaire de l'Association des Auditeurs de l'Academie de Droit International de la Haye* 82.

need for systemic correction of shortcomings in the law due, in effect, to that very generality or universality provides equity's roots.[8] Equity, so understood, entailed and entails discretionary characteristics both as to its application and its extent – an enduring issue both in domestic and international law.

Gradually equitable principles emerged as an adjunct to both Roman law and to the English common law based on the need to ameliorate or correct the body of civil law. In Roman law it was contained in the *jus honorarium* through which the magistrates (praetors), advised by the judges, issued edicts aiding, supplementing or correcting the civil law. It aided by offering more convenient remedies to persons who already held rights of action at civil law such as the interdict by which an heir at civil law could obtain possession of the deceased's goods. It supplemented by granting remedies to persons who did not have rights of action at civil law, for example, a widow of a man who dies intestate leaving no blood relatives was allowed by the praetor to claim her late husband's property although not his heir. The praetor also corrected the law by giving a person a remedy where someone else was entitled at law, for example, where the formal requirements for a valid will were not satisfied the *jus honorarium* might recognise the nominated heir.[9]

Sir Peter Stein, the eminent Roman law scholar, has noted that by the beginning of the 3rd century AD Roman jurists probably realised that there was little more they could do by way of introducing fresh equitable principles or standards into Roman law. They knew, he said, when to call a halt[10] and the codification began.

Unlike the Roman jurists who advised the praetors, the Chancellors of England, once embarked on the great journey, never called it a day, joining the separate stream of the common law via the Judicature Acts, and continuing afresh.

There is little that I would wish or have the temerity to say to an audience which includes so many equity scholars about the history and development of equity in the common law system but I have borrowed the elegant foreword by Sir Frank Kitto to Meagher, Gummow and Lehane's *Equity Doctrines and Remedies.*[11] Sir Frank gives an answer to the layman who asks 'What is Equity?':

> He must learn how Equity emerged from the mists of the Middle Ages an amorphous and unruly thing, and how it gradually took shape as a coherent body of law, albeit upon many disparate topics. He must be made to see the single bright thread running through the whole of Equity's dealing with the topics, and for that purpose he must be taken back ... to the time when the Chancellors of England found themselves entrusted with a wider power of exercising the King's prerogative of administering justice between subjects than was enjoyed by the King's Judges. On the one hand the Chancellors might proceed, like the Judges, according to the Common Law, according ... "to the right of the laws and statues of the realm" ... but on the other hand they might proceed "according to the rule of

8 Aristotle, *Nicomachean Ethics* (WD Ross trans, Oxford University Press, 1980) Book 5 Chapter 10. This has given rise to the fundamental debate whether equity is of the law or outside the law.

9 P G Stein, 'Equitable Principles in Roman Law' in P G Stein (ed) *The Character and Influence of Roman Civil Law: Historical Essays* (Hambledon and London Ltd, 1998) 19 ff.

10 Ibid 36.

11 R P Meagher, J D Heydon & M J Leeming (eds) *Meagher, Gummow and Lehane Equity Doctrines and Remedies* (Butterworths, 4th ed, 2002) v.

> equity" ... wherever the Common Law might seem to fall short of that ideal in either the rights it conceded or the remedies it gave. For the exercise of the latter power they had no guidance or point of reference save in their own opinions as to the standards of conscientiousness to which the conduct of other people should be required to conform; for "equity" was as vague as *aequum et bonum*. The inquirer must be told how this extraordinary power to prevent the injustices and supply the deficiencies that were perceived in the operation of the Common Law attracted a swelling volume of business the pressure of which, together no doubt with a lively appreciation of the advantages of consistency, led the Chancellors to an increasing adherence to precedent; and how in consequence principles became established, determining when the Chancery would intervene and what it would do.

Sir Frank, in the course of his summary, quoted with approval from Maitland comparing the development of English equity with law on the continent:

> But if we look abroad we shall find good reason for thinking that but for these institutions (the Star Chamber and the Chancery) our old-fashioned national law, unable out of its own resources to meet the requirements of a new age, would have utterly broken down, and the 'ungodly jumble' would have made way for Roman jurisprudence and for despotism. Were we to say that equity saved the common law, and that the Star Chamber saved the constitution, even in this paradox there would be some truth.[12]

Two great legal theorists of the 17th century who greatly influenced the emerging law of nations, Grotius and Pufendorf, included an important place for equity in dealings between nations. Grotius referred to the Aristotelian idea of equity as twofold – being an understanding of what was right and just as well as in its corrective capacity to moderate the general law.[13]

Both Grotius and Pufendorf and later writers recognised the tension in the judge exercising discretion against the letter of the law. Grotius said that equity must be applied with an abundance of circumspection and Pufendorf – to a standard of prudence – sentiments echoed in modern international law jurisprudence.

It was an unease at the role of judicial discretion which lay at the heart of the lengthy debates at The Hague in 1920 by a number of jurists, famous in their day, meeting to advise the Council of the League of Nations on the creation of a Permanent Court of International Justice.

Before turning to those interesting discussions let me say something very briefly about equity in civil law systems. In a word, the codification of the law in the several continental systems tended against the development of a separate stream of equitable principles. Instead, certain general clauses, designed to ensure an equitable interpretation of statutory provisions against a too strict or formalistic interpretation,

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12 Ibid vi.

13 Hugo de Groot (Grotius), *Of the Rights of War and Peace, In Which are Explained the Laws and Claims of Nature and Nations, and the Principle Points That Relate either to Publick Government or the Conduct of Private Life* (1715); Grotius, *De Jure Belli ac Pacis, libri tres* (1735); Grotius, *The Law of War and Peace, Book Three* (William Whewell trans, 1853) [trans of: *De Jure Belli et Pacis, libri tres*]. S Von Pufendorf, *The Law of Nature and Nations, or, a General System of the Most Important Principles of Morality, Jurisprudence and Politics. To which is prefix'd M Barbeyrac's prefactory discourse containing an historical and critical account of the science of morality* (Basil Kennett trans 1749).

were inserted into the various codes[14] making those systems rather closer to the Aristotelian idea of equity.

It is now time to turn to the sources of international law and see if equity has a role to play.

Article 38 of the Statue of the International Court of Justice which mandates the sources of law to be applied by the Court had its genesis in Article 35 of the Statute of the Permanent Court of International Justice which was incorporated without relevant change into the Statute of the International Court of Justice. It provides:

> 1. The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

As is plain, there is no express reference to equity and there is no agreement amongst commentators that deciding a case *ex aequo et bono*, as Article 38(2) allows, imports principles of equity. A decision *ex aequo et bono* would be against the law. It implies law creation by the Court and no party to a dispute before the International Court has, so far, agreed that the Court may proceed in that way. It is with the third source of law – "the general principles of law recognised by civilized nations" – that I am principally concerned. I should mention that this has given rise to an enormous literature by international scholars, impossible to summarise, if I could, in a brief lecture.

The working papers of the Advisory Committee make clear that although equity was proposed for express inclusion as a source of law it was ultimately rejected. The members of the Advisory Committee included the great names of international law of the day from continental Europe, Latin America and distinguished common law jurists. Of interest to this audience were the United Kingdom representative, Lord Phillimore PC, an important maritime jurist and Mr Elihu Root, former Secretary of State of the United States and one of the best known international lawyers of the day. He was the American delegate to the 1907 Hague Peace Conference, the first President of the Carnegie Endowment for International Peace, a member of the Permanent Court

14 W G Friedmann, *Legal Theory* (Stevens, 5th ed, 1967) 543-5.

of Arbitration, former United States Secretary of State for War, the Republican Senator for New York and the winner of the Nobel Peace Prize in 1912.

The expression in Article 38(1)(c) referring to "general principles of law recognised by civilised nations" had meaning *then* so far as it referred to "civilised nations" which need not be spelt out here. It bears no real meaning in international law today. There are now 189 members States of the United Nations. A far cry from the few who were represented by the Advisory Committee (which did include the Japanese Ambassador to Belgium). Rather, the general principles which the International Court may take into account will be those generally recognised across a range of different legal systems.

The term 'general principles' in Article 38(1)(c), it seems to be generally agreed, refers to both principles of international law and principles common to international law and various municipal systems of law.[15] The inclusion of this provision was controversial and gave rise to conflict between the common law representatives on the one hand and the continental European and some Latin American representatives on the other. The common lawyers, Phillimore and Root, wanted the sources of law restricted to conventions (treaties) and custom in order to induce as many countries as possible to accept the jurisdiction of the court, as well as to avoid reposing unconstrained power in the judges. The continental representatives were anxious to avoid the possibility of *non liquet* – a situation in which a court declares itself unable to resolve a dispute due to an absence of applicable law on the subject – anathema to those from code systems – by extending the sources of law which the court could take into account.[16] In over-simplified terms, it was a struggle between legal positivism and natural law theorists although Lord Phillimore suggested that the serious differences arose from profoundly different views about the role of the judge between common lawyers and civilians.

In order to reach an agreement the Belgian representative, Baron Descamps, emphasised that the principles referred to in Article 38(1)(c) should be restricted to those common to all states — the "fundamental laws of justice and injustice".[17] This, he thought, would limit the liberty of judges and prevent them from relying on subjective considerations.[18] Within such principles he included 'objective justice' which he would have referred to as equity, were it not for the potential for misunderstanding.[19] Signor Ricci-Busatti, the legal adviser to the Italian Foreign Ministry in support pointed out that judges applying general principles of law would not be creating new rules, but applying general rules already in existence.[20] Lord Phillimore pointed out that all the principles of the common law were part of international law.[21] The framers intended that only those principles generally accepted across different legal systems could be taken into consideration as a source of law.

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15 M O Hudson, *The Permanent Court of International Justice: a Treatise* (The Macmillan Company, 1934) 528.

16 Permanent Court of International Justice Advisory Committee of Jurists, *Procés-Verbaux of the Proceedings of the Committee* (1920) 293-297.

17 Ibid 310.

18 Ibid 311.

19 Ibid 324.

20 Ibid 315. The Brazilian representative was of a similar view: at 346.

21 Ibid 316. See Rossi, above n 5, 112.

Although the majority of the Advisory Committee was prepared to accept that equity would play a role in the new Court's decisions, they were not prepared to accept equity as an independent source of international law because of the different understandings accorded to it in different systems.[22] They were also mindful of its sometimes disastrous inclusion in the terms establishing numerous important arbitrations as an undefined standard, such as the *Venezuelan Preferential Claims*[23] and the *Jay Treaty Arbitrations*.[24] So, although some would have preferred an express reference to equity,[25] there was concern that it was too vague and, necessarily, too fraught, a term to be included.[26] Lord Phillimore, although content to see the expression "maxims of equity" employed, opposed the inclusion of equity generally as a source of law, on the basis that it would give the judge too much liberty, unless the technical meaning equity bore in England were adopted.[27] He did accept that general principles accepted by States in a domestic context included the principles of good faith and *res judicata*,[28] indicating that equity might well be taken into consideration by judges under the umbrella of "general principles".

The general understanding of the drafters of Article 38 appears to have been that equity itself was not an independent source of law, since it was too vague a concept to command universal acceptance but that particular equitable principles, as recognised within the various legal systems of the world, might play a role as 'general principles' of international law. There was, however, a failure to 'colour in' the words, so that the framers offered no content to the 'general principles'. What emerged accommodated the common lawyers' concern (shared by many civilians) that the judge should not have a law creating role and the civil lawyers' concern that there might occur a denial of justice because of a declaration *non liquet* – no law to apply. What the framers seemed concerned to exclude was "pure" equity which might operate against the law.

New life was breathed into the dispute when Judge Manley Hudson pointed out in the case of the *Diversion of Waters from the River Meuse*[29] that 'under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply'.[30]

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22 P van Dijk, 'Equity: a Recognized Manifestation of International Law?' in M Bos and W Heere (eds) *International Law and its Sources* (Kluwer Law and Taxation, 1989) 1, 11.

23 (1904) UN Reports Vol ix 99.

24 (1794) 1 *British and Foreign State Papers* 784 and see generally Moore, *International Arbitrations International Adjudications* where they are reported.

25 Above n 16, 295 (de Lapradelle); 332 (Ricci-Busatti).

26 Ibid 296-7 (Hagerup); 335 (de Lapradelle, resiling from his earlier position).

27 Ibid 333.

28 Ibid 335.

29 (*Netherlands v Belgium)* [1937] PCIJ (ser A/B) No 70, 4.

30 *Diversion of Waters from the River Meuse (Netherlands v Belgium)* (1937) PCIJ Ser A/B No 70, 4. This statement has given rise to a vigorous debate amongst international scholars some of whom see this as an impermissible empowerment to judges to depart from recognised principles, see R Lapidoth, 'Equity in International Law' (1987) 22 *Israel Law Review* 161; E McWhinney, 'Equity in International Law' in R A Newman (ed) *Equity in the World's Legal Systems: A Comparative Study* (Etablissements Emile Bruylant, 1973); E Lauterpacht, 'Equity, Evasion, Equivocation and Evolution in International Law' in *Proceedings and Commentaries, Report of the American Branch of the International Law Association* (1977-8).

Confirming the understanding of the Advisory Committee in 1920, the arbitrators in the *Norwegian Ship Owners' Claims*[31] (between the U.S. and Norway) who were to decide the claims by applying 'law and equity' said:

> The words 'law and equity' … can not be understood here in the traditional sense in which these words are used in Anglo-Saxon jurisprudence. The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state.[32]

Two commentators have described equity in this sense as 'the spirit of the law'.[33]

An international tribunal may apply equity within the law. That is, if a law can be interpreted in more than one way, then equity may be applied in order to ascertain the interpretation that would best serve the purposes of the law. In another sense equity may be used where the law is silent to bring the case within the law so that the intention of the states can be implemented. This is different from equity *contra legem*, that is, where the text of the law goes against what is said to be its real intention or purpose. It is generally recognised that an international court or tribunal would need explicit powers before it could modify the law in that fashion.[34]

When equity is applied as a 'general principle', judges of the International Court rarely express it in that way. Rather, it seems to be taken for granted that various equitable rules, such as estoppel and the principle that 's/he who comes to equity must come with clean hands' are part of international law and require no further explanation than their relevance to the case at hand. This is consistent with an approach to equity that seeks to draw upon aspects of equitable doctrine common to 'civilised nations' without resorting to technicalities specific to particular legal systems.

Despite evidence that equity is applied broadly, nonetheless its characterisation as a 'general principle' of law places certain constraints on its operation. Professor Rosenne points out that equity does not automatically work to correct a decision where the strict application of law results in an unsatisfactory conclusion.[35] A principle of equity can only come into play when it is recognised generally by the laws of 'civilised nations'. In the *Frontier Dispute*[36] case, for example, between Mali and Upper Volta, the Court stated that it would be unjustified in resorting to equity to modify an established frontier inherited from the colonial powers. Equity as a legal concept was said by the Court to be a direct emanation of the idea of justice – but it was not simply an arbitrary concept of 'fairness' (something which resonates with Australian lawyers) which could be interposed at will by a court or tribunal. The Court declined to alter the frontier to reflect some argued concept of equity. Where the boundary did not delimit in any

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31 (1922) 1 *Reports of International Arbitral Awards* 307.

32 Ibid 331.

33 W E Holder and G A Brennan, *The International Legal System* (Butterworths, 1972) 97. See also L D M Nelson, 'The Roles of Equity in the Delimitation of Maritime Boundaries' (1990) *American Journal of International Law* 837, 839-40.

34 For example, the special agreement between Canada and the Cayuga Indians, (1926) 6 *Reports of International Arbitral Awards* 173.

35 Above n 1.

36 [1986] ICJ Rep 554.

precise manner an important water pool the Court said 'the [boundary] line should divide the pool … in two, in an equitable manner. Although "equity does not necessarily imply equality" where there are no special circumstances the latter is generally the best expression of the former'.[37]

In many of its decisions the International Court has applied equitable principles familiar to but not identical with, equity as it operates within the common law system. Might I offer three examples: (i) estoppel or acquiescence; (ii) "unclean hands" and (iii) the maxim that "equity will not suffer a wrong to be without a remedy"?

The application of estoppel appears in the *Serbian Loans*[38] case in 1929. Serbia had an agreement with French bondholders under which the bondholders were to be repaid in gold francs. For some time the bondholders had been accepting depreciated paper francs. Serbia claimed that this amounted to estoppel and that the bondholders by accepting the paper francs had impaired their rights. The Permanent Court found that there was no basis for an estoppel, applying the principle in much the same way as at common law. The Court said that there had been 'no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied' and that there had been 'no change in position on the part of the debtor State'.[39]

The *Fisheries*[40] case provides another example of estoppel or acquiescence, although not so expressed and with no reference being made to 'general principles'. The British had refrained for almost 300 years from fishing in Norwegian coastal waters until 1906 when a few British vessels started doing so. Trouble began in 1911 when a British trawler was seized for violating Norwegian regulations as to permissible fishing zones. The United Kingdom complained that the Norwegian government had made use of unjustifiable straight base-lines across the fjords in delineating its sea-boundaries.[41] The Court found that the boundaries imposed by Norway were not contrary to international law. As part of its finding, the Court considered it significant that Norway had applied its method of delimitation consistently over a very long period, that this was well-known to the United Kingdom, and, with this knowledge, it had abstained from making any complaint.[42]

In 1962, the International Court of Justice applied the concept of estoppel or, as some have characterised it, acquiescence, in the *Temple of Preah Vihear*[43] case. This case concerned a dispute over the ownership of a temple located close to the border between Thailand and Cambodia. In 1908 Thailand had accepted as accurate a map placing the temple within Cambodian territory drawn as a consequence of an agreement entered into between Thailand (Siam) and French Indochina in 1904.

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37 *Frontier Dispute* [1986] ICJ Rep 554, [149].

38 [1929] PCIJ (ser A) Nos 20/21, 5.

39 *Serbian Laws* [1929] PCIJ Ser A Nos 20/21, 5, 38-9..

40 *(United Kingdom v Norway)* [1951] ICJ Rep 116. Sometimes estoppel in this sense is characterised as acquiescence, see separate opinion of Judge Ajibola in *Territorial Dispute (Libya/Chad)* (1994) ICJ Rep 6.

41 *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116, 124.

42 *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116, 139.

43 *(Thailand v Cambodia)* [1962] ICJ Rep 6.

By its subsequent conduct it was found to have accepted Cambodian ownership of the temple, for example, by a member of the Thai Royal Family visiting the temple where the French flag was flying (Cambodia was then a French colony).[44] The Court found that Cambodia had relied upon Thailand's acceptance of its ownership of the temple[45] and that for 50 years Thailand had accepted the benefit of, at the least, a stable frontier based on the treaty. Thailand was thereby precluded from asserting that it had not accepted the boundary as drawn and Cambodian ownership of the temple.

Estoppel may have played a role in the decision of the International Court in the *Nuclear Tests*[46] case. Australia and New Zealand both brought proceedings against France seeking a declaration that France's activities testing nuclear devices in the Pacific were unlawful. The Court found it unnecessary to decide the case on the merits because prior to the hearing the French President, Foreign Minister and other officials had made statements that France had 'finished' atmospheric testing. The Court considered the status of these unilateral declarations made not only to Australia and New Zealand, but also to the world at large in deciding not to proceed to judgment. The Court said:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.[47]

Detriment, a necessary aspect of estoppel on *Walton Stores*[48] principles, was not a determining factor although detriment to Australia and New Zealand could be identified as not pressing the litigation in the Court relying on the French representations.

An express reference to estoppel can be found in the separate opinion of Vice-President Weeramantry in the *Gabcikovo-Nagymaros Project*[49] case. Hungary and Czechoslovakia entered into a treaty in 1977 to implement a joint investment project on the River Danube which also involved arrangements for navigability improvement and flood control. Neither party fully performed its obligations under the treaty. Judge Weeramantry found Hungary's conduct precluded it from asserting that the treaty obligations were no longer binding. Hungary had allowed Czechoslovakia (Slovakia inherited the treaty regime) to believe it (Hungary) intended to fulfil the terms of the project.[50]

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44 *Temple of Preah Vihear (Thailand v Cambodia)* [1962] ICJ Rep 6, 30.

45 *Temple of Preah Vihear (Thailand v Cambodia)* [1962] ICJ Rep 6, 32-3.

46 *(Australia v France)* [1974] ICJ Rep 253.

47 *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, [46].

48 *Walton Stores (Intestate) v Maher* (1988) 164 CLR 387.

49 *(Hungary v Slovakia)* [1997] ICJ Rep 7.

50 *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1977] ICJ Rep 7, separate opinion of Vice-President Weeramantry Part C.

An important case applying the doctrine of 'clean hands' is the judgment of the Permanent Court of International Justice in *Diversion of Water from the River Meuse*.[51] This is a rare example of judges applying equitable principles expressly as 'general principles' of international law. The Netherlands complained that Belgium by constructing a lock in Belgian territory had violated an agreement between the two States that they would both take water from the River Meuse only at a certain point. However, the Netherlands had also constructed and operated for a period of time a similar 'unlawful' lock in its own territory. Judge Hudson said that one 'unlawful' lock could not be treated more favourably than the other. He said:

> It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are, "Equality is equity"; "He who seeks equity must do equity". … A very similar principle was received into Roman Law. [52]

Judge Hudson denied the relief sought by the Netherlands on the basis that it was itself guilty of the same breaches which were alleged against Belgium.

An interesting application of the clean hands doctrine can be seen in the dissenting opinion of Judge Morozov in the *Tehran Hostages*[53] case. Following the 1979 occupation of the United States embassy in Tehran by militants, the United States brought a claim against Iran before the International Court pursuant to the Treaty of Amity, Economic Relations and Consular Rights of 1955. While the Court was deliberating the United States launched a military operation inside Iran in an attempt to rescue the hostages, as well as initiating economic sanctions. The Court, by majority, found in favour of the United States. Judge Morozov found against the United States because, by invading Iran and imposing sanctions, it had, in his view, deprived itself of the right to rely upon treaty obligations to bring its claim.[54] He did not refer expressly to 'clean hands' but said that in light of military invasion of the territory of Iran and a series of economic sanctions and other coercive measures which were incompatible with a treaty of amity, it was clear:

> that the United States of America, according to commonly recognized principles of international law, has now deprived itself of any right to refer to the treaty of 1955 in its relations with the Islamic Republic of Iran.[55]

The majority concluded that since the legality of the United States rescue operation and sanctions were not before the Court the Court should not rule upon them.[56]

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51 *(Netherlands v Belgium)* [1937] PCIJ (ser A/B) No 70, 4.

52 *Diversion of Water from the River Meuse (Netherlands v Belgium)* [1937] PCIJ (ser A/B) No 70, 4, 77.

53 *(United States v Iran)* [1980] ICJ Rep 3.

54 *Tehran Hostages (United States v Iran)* [1980] ICJ Rep 3, [3] (Morozov J).

55 *Tehran Hostages (United States v Iran)* [1980] ICJ Rep 3, [3] (Morozov J).

56 *Tehran Hostages (United States v Iran)* [1980] ICJ Rep 3, [94].

The doctrine of clean hands was also relied upon by Judge Schwebel in the *Nicaragua*[57] case. Nicaragua brought a claim against the United States alleging that by its financial and logistical support for rebel groups in Nicaragua it had unlawfully intervened in Nicaragua's affairs. Judge Schwebel would have disallowed Nicaragua's claim due to a combination of what he found to be Nicaragua's support to rebels in El Salvador predating the United States' assistance to the Contras in Nicaragua, and Nicaragua's subsequent misrepresentation of the facts about its El Salvador involvement before the International Court.[58] He referred to *River Meuse, Tehran Hostages* and other cases to declare that the doctrine of clean hands was a general principle of law.[59] He found that Nicaragua had deprived itself of standing to bring the claim against the United States because the conduct of the latter was consequential upon Nicaragua's own illegality.[60] A more recent application of the clean hands doctrine can be seen in the dissenting opinion of Judge *ad hoc* Van den Wyngaert in the *Arrest Warrant*[61] case. The Democratic Republic of the Congo brought proceedings against Belgium, who had issued an arrest warrant *in absentia* in respect of its Foreign Minister, Mr Yerodia, alleging that Belgium was precluded from doing so on the basis of diplomatic immunity. Judge Van den Wyngaert found that the Congo was precluded from bringing its claim: because of its own failure to investigate and prosecute Mr Yerodia it did not come to the Court with clean hands.[62]

In the *Barcelona Traction*[63] case the International Court considered inferentially, in the context of diplomatic protection, the application of the equitable principle that equity will not suffer a wrong to be without a remedy. Belgium claimed that Spain was responsible for a denial of justice to Barcelona Traction, a Canadian company with more than 80 per cent of Belgian shareholders. Under ordinary rules of international law Canada as the state of nationality of the company had standing to bring a claim on behalf of the company but had chosen not to do so. Belgium attempted to bring a claim on behalf of shareholders of the company. The question was whether, on the basis of equity, it was entitled to do so as an exception to this general rule. The Court held that 'for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law'.[64] But in declining standing to Belgium the Court took into account practical difficulties in allowing equity to operate to give the state of nationality of shareholders an automatic right of diplomatic protection and considered that to allow such a claim could create 'an atmosphere of confusion and insecurity in international economic relations'.[65]

It has been suggested that the reasoning of the International Court in *Barcelona Traction* on this point is evidence that equitable considerations cannot be brought in

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57 *(Nicaragua v United States of America)* [1986] ICJ Rep 14.

58 *Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, [268] (Schwebel J).

59 *Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, [269] (Schwebel J).

60 *Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, [272] (Schwebel J).

61 *(The Congo v Belgium)* [2002] ICJ Rep 2.

62 *Arrest Warrant (The Congo v Belgium)* [2002[ICJ Rep 2, [35] (Van den Wyngaert J).

63 *(Belgium v Spain)* [1970] ICJ Rep 3.

64 *Barcelona Traction (Belgium v Spain)* [1970] ICJ Rep 3, [92].

65 *Barcelona Traction (Belgium v Spain)* [1970] ICJ Rep 3, [96].

opposition to the law: here because application of equitable principles would have 'opened the door to legal anarchy'.[66]

A rather different approach to equity has been taken in the sphere of maritime boundary disputes where a more liberal application has occurred. In the first of the important continental shelf cases decided by the International Court of Justice — *North Sea Continental Shelf* [67] cases in 1969 — the Court noted that there were two basic legal notions which reflected *opinio juris*[68] in the area, one being that delimitation must be the subject of agreement between the States concerned and the second, that agreement must be arrived at in accordance with equitable principles.[69] This suggests that, in relation to the delimitation of maritime boundaries, the notion of equity as a guiding principle had been accepted by States as a rule of customary international law. In the same case, the Court also noted that the acceptance of equity rested on a broader basis, namely, that the decisions of a court of justice must be just, and in that sense equitable.[70] However the equitable idea of equality which found its expression and application in the equidistance principle in that case soon ceased to be anything more than one method amongst others for ascertaining a disputed maritime boundary.

In the *Continental Shelf* (*Tunisia/Libya*)[71] case, the Court stated, '[Equity] was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law'.[72] The Court added:

> The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal.[73]

The proposition came to be widely accepted that each maritime boundary was unique and therefore not susceptible to the development and application of general rules of delimitation. The result has been that many decisions of the Court and arbitral tribunals do not demonstrate any systematic definition of the equitable criteria that may be taken into consideration for an international maritime delimitation.[74] The comment has been well made that '[l]aw is valuable only if it guides the behaviour of its subjects in the real

66 Above n 1, 102. See Rossi above n 5, 175.

67 *(Denmark v Germany), (Netherlands v Germany)* [1969] ICJ Rep 3.

68 A sense of legal obligation on the part of States: this is one of the requirements for the existence of a rule of customary international law, the other being general and consistent practice by States.

69 *North Sea Continental Shelf (Denmark v Germany), (Netherlands v Germany)* [1969] ICJ Rep 3, [85].

70 *North Sea Continental Shelf (Denmark v Germany), (Netherlands v Germany)* [1969] ICJ Rep 3, [88].

71 [1982] ICJ Rep 18.

72 *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, [71].

73 *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, [70].

74 *Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)* [1984] ICJ Rep 246 [157].

world – a task that is particularly delicate in public international law. If the law is so flexible that any result is possible it fails to fulfil that essential function'.[75]

As Judge D'Oliver Nelson, now the President of the United Nations Tribunal on the Law of the Sea, has commented,[76] the uniqueness of each maritime boundary has rendered inadequate the application of a global or general rule such as is embodied in the equitable principle of equidistance. This 'infinite variety' of maritime situations prevented the United Nations Conference on the Law of the Sea from producing any definitive rules on maritime boundary delimitation thereby investing tribunals dealing with such disputes with wide powers of discretion and, according to Nelson, 'creating a situation that is closely akin to a grant of *ex aequo et bono* jurisdiction'.[77]

To conclude, there is deep unease amongst international scholars both from the common law tradition and the civil law tradition at the unconfined discretion which would repose in judges were they permitted to have recourse to equity as an unstructured concept. Nonetheless, when considered in the context of specific cases, equity has wide acceptance and is part of the general stock of legal norms of the international order. To return to the *Diversion of Water from the River Meuse*[78]case, when Judge Hudson identified two maxims of equity to express his approach to the Netherlands' complaint about Belgium's breach of the Treaty of 1863 – namely that equality exists between parties and a party who seeks equity must do equity – he was articulating a common understanding of what comprised general principles of equity in international law. Although dissenting, Judge Anzilotti, the Italian jurist who had been the rapporteur of the 1920 Advisory Committee to draft the Statute of the Permanent Court of International Justice, agreed, describing the maxim 'one who seeks equity must do equity' as:

> so just, so equitable, so universally recognised, that it must be applied in international relations. [It is one of the] general principles of law recognised by civilized nations.[79]

It can not be surprising that the Court has avoided discussing equity as an abstract idea. The discussions in the Advisory Committee demonstrate quite profound differences between the representatives of the different legal systems about the content of equity and the work it can do. Since then the number of independent states has more than doubled and they all wish to join in the economic wealth of the world. The Court has achieved surprising unanimity in cases which have, at heart, an equity issue. It has tended to achieve this by 'connecting elements of equity with very concrete circumstances'.[80] To this extent equity is a general principle of law recognised by civilised nations.

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75 J I Charney, 'Book Review' (1995) 89 *American Journal of International Law* 458, 459.

76 Above n 33.

77 Ibid 11.

78 *Diversion of Waters from the River Meuse (Netherlands v Belgium)* [1937] PCIJ (ser A/B) No 70, 4.

79 *Diversion of Waters from the River Meuse (Netherlands v Belgium)* [1937] PCIJ (ser A/B) No 70, 4, 50.

80 A Wasilkowski *Comments* on Professor Rosenne's paper, above n 1.

EXHIBIT C.

2- Under the Doctrine of "Clean Hands" Claimant Cannot Bring the Claims Against Iran

It has just been demonstrated that Iran is not internationally responsible regardint the claims brought by the Claimant. The doctrine of "clean hands", which will be elaborated below, is another ground barring the Claimant from asserting the claims against Iran.

The scope of the doctrine can be appreciated in this quotation from the American authority on the matter, E.M. Borchard: "It is an established maxim of all laws, municipal and international, that no one can profit by his own wrong, and that a plaintiff or a Claimant must come into court with clean hands" (E.M. Borchard, The diplomatic protection of citizens abroad or the law of international claims, 1915, p. 713; emphasis added).

One of the consequences of this principle is that a Claimant must not have acted contrary to the law of the State against which a claim is brought before an international court, and, generally, must not have behaved improperly in order for his claim to be deemed valid. This doctrine is applicable to the present case where the Claimant behaved contrary to the Iranian legislations firstly by acquiring a foreign nationality namely that of the United States, without relinquishing his Iranian nationality and secondly by concealing his American nationality in his native country in order to pass off as an exclusively Iranian nationality whereby to evade the Iranian laws which would have disallowed the acquisition of such rights. Though to the Responden's mind there is no need to elaborate the applicability of the theory in question to the present case, it would be helpful to address briefly the international legal literature on this topic and then to review State practice and intenational case law relating thereto.

A. The international legal literature relating to the doctrine of "clean hands".

The first author to develop a comprhensive theory of the doctrine of "clean hands" is the Spanish professor L.Garcia-Arias. In a learned

article ("La doctrine des 'clean hands' en droit international public", in Annuaire de l'Association des Anciens Auditeurs de l'Academie de La Haye, 1960, Vol. 30, pp. 14-22) he concludes that "Un Etat ne peut pas présenter une reclamation en faveur d'une personne physique ou juridique, qu'il ait (sic) le droit de protéger diplomatiquement face à un autre Etat, si cette personne n'a pas observé une conduite correcte envers cet autre Etat" (ibidem, p. 17 (A State cannot submit a claim on behalf of a physical or juridical person, to whom it is entitled to grant diplomatic protection vis-a-vis another State, if this person has not behaved in a proper way towards this other State)). Garcia-Arias explains that proper conduct on the part of the claimant means that he must have complied with the law of the defendant State and must have refrained from meddling in its domestic affiars (ibidem).

Another author who deals with the doctrine is L-Delbez (Les principes generaux de droit international public, 3rd ed., 1964, pp. 379-380). He points out the following: "Il semble que l'Etat national ne soit en droit d'endosser la réclamation de son ressortissant que si ce dernier a eu une conduite correcte, les mains propres (clean hands), disent les Anglo-saxons. La demande du particulier serait donc irrecevable quand il a violé la loi interne du pays de résidence ou quand il a manifesté une activité contraire au droit international". (p. 379).

> "It appears that the national State is not entitled to endorse the claim of one of its nationals unless the latter has behaved correctly, with clean hands, as the Anglo-saxons say. The claim of the individual would therefore be inadmissible when he has breached the domestic law of the country where he is residing or when he has carried out an activity contrary to international law).

A similar view is taken by Cavaré and Queneudec (Le droit international public positif, Vol. I, 3rd ed., 1967, pp. 287-290). They state that "L'étranger résidant dans un pays est tenu à une certaine attitude faite de discrétion, de loyauté envers l'Etat sur le territoire duquel il se trouve. S'il ne reste pas fidele à cette ligne de conduite et à la reserve que sa situation speciale lui impose, il ne peut en vouloir

à l'autorite de l'Etat des mesures dommageables que celle-ci prend ou laisse prendre à son egard. Il ne saurait alors invoquer la protection de l'Etat dont il est le National, à condition toutefois que l'incorrection de son attitude, de sa conduite ait été volontaire; il faut qu'il ait agi en pleine connaissance de cause.

> (A foreigner living in a country is duty-bound to behave in such a manner as to be discreet and loyal to the country on whose territory he finds himself. If he does not stick to this standard of behaviour and to the discretion needed by his special situatiion, he cannot then hold against the State the harmful measures that the State takes or allows to be taken against him. He can not rely on the protection of his national State, on condition, to be sure, that his improper attitude and conduct were voluntary; in other words, it is necessary for him to have acted with full knowledge and awareness of his action).

Another author who deals with the matter is P. Reuter (Droit international public, 5th ed., 1976, p. 234), who states that "La plupart des Etats et notamment les Etats-Unis ne presentent pas de reclamations diplomatiques concernant des particuliers qui n'auraient pas eu une conduite correcte (clean hands) a l'egard de l'Etat incrimine" (The majority of States and in particular the United States do not bring diplomatic claims on behalf of individuals who have not taken a correct attitude (clean hands) vis-a-vis the States complained of).

It should be emphasized that the view in question has been advanced not only by Spanish or French authorities, but also by British and American ones.

Some authorities are quoted below.

First, from the book by Borchard (The diplomatic protection of citizens abroad or the law of international claims, 1915 p. 713 ff.), in addition to the general proposition quoted above ("It is an established maxim of all law, municipal and international, than no one can profit by his own wrong, and that a plaintiff or a claimant must come into court with clean hands", p. 713), mention should be made of another general proposition:

> "Numerous claims have been disallowed (by international courts) on the equitable maxim that a claimant must come into court with clean hands, thus barring recovery by a claimant who was himself a wrongdoer" (p. 718; and Borchard quotes various cases to this effect).

Another leading author, of American nationality, is G.H. Hackworth, who states the following (Digest of International Law, Vol. V, 1943, p. 709):

> "In numerous instances the Department of State has declined to espouse claims against foreign governments on account of the nature of the conduct of the claimant or the nature of the activities in which he was engaged at the time the loss was incurred. The conduct of the claimant may also constitute ground for rejection of a claim by an arbitral tribunal".

A similar view is expressed by the distinguished American author C.C. Hyde (International Law chiefly as interpreted and applied by the United States, Vol. II, 1947, p. 891-892. He writes that:

> "A national, in consequence of the character of his own acts, may, according to the judgment of the government of his country, lose what may be described in a domestic sense as a right of protection, and thus inspire it to withhold the preferment of a claim in his behalf against a foreign State. The censurable conduct of the national may produce such a result.

B. State Practice

State practice in respect of the theory in question is in tune with legal literature. The Respondent will confine itself to the American practice which happens to be particularly abundant and significant.

Over the years three major trends have emerged each of which focuses on a different means by which an international claim can be considered legitimate.

1) The claimant must have respected his own national law and behaved correctly;

2) The claimant must have respected the domestic law of the respondent State;

3) Dual national claimants must not have concealed their claimant State nationality from the respondent State.

As we shall see, the practice involving these three trends is substantially inspired and motivated by the doctrine of "clean hands", i.e. that a claimant must behave in a proper way with respect to his national law and the law of the respondent States.

i) The requirement that the national law of the Claimant be respected

In a note of the U.S. Secretary of State to the British authorities, of May 30, 1962, it is stated that:

> "Nations cannot afford to have the intercourse which the interests of their citizens require to be kept open, subjected to the annoyances and risks which would result from the admission of fraud or duplicity into such intercourse. It has therefore become a usage, having the authority of a principle, in the correspondence between enlightened governments, in relation to the claims of citizens or subjects, that any deception practised by a claimant upon his own government in regard to a controversy with a foreign government, for the purpose of enhancing his claim, or influencing the proceedings of his government, forfeits all titles of the party attempting such deception to the protection and aid of his government in the controversy in question, because an honorable government cannot consent to implicate itself in a matter in which it has itself been made or attempted to be made the victim of a fraud, for the benefit of the dishonest party" (in J.B. Moore, A Digest of international law Vol. VI, 1906, p. 622; emphasis added).

Admittedly, the above statement refers to a specific case of refusal by the U.S. State Department to take up a case on behalf of an American citizen on account of his improer behaviour vis-a-vis the U.S. authorities.

But what matters here is the general philosophy and the legal rationale behind the above statement: an individual is not entitled to international protection when he engages in deception for the purpose of enhancing his international claim. This general concept can easily be applied to cases where a dual national deceives the respondent State for the purpose of enhancing or indeed creating an international claim. If the national State of a claimant refuses, or should refuse, international protection in cases of deception practiced by the claimant to the detriment of that very State, a fortiori protection must be refused where the individual has violated the law of the respondent State. In any event an international court is bound to dismiss such a claim even though the national State of the Claimant has neglected to apply the above requirement.

ii) The requirement that the claimant respect the laws of the respondent State

In a note sent in 1866 by the U.S. Secretary of State Seward to the British authorities it was stated that:

> "Americans, whether native born or naturalized, owe submission to the same laws in Great Britian as British subejcts, while residing there and enjoying the protection of that government" (quoted by E.M. Borchard, The diplomatic protection of citizens abroad, cit., p. 734.

In a report sent in 1887 by the U.S. State Secretary to the U.S. President, it is stated among other things that

> "Ex dole malo non oritur actio. No court will lend its aid to a man who founds his cause upon an immoral or an illegal act". (J.B. Moore, A digest of international law, Vol. VI, 1906, p. 623; emphasis added).

In a note of 1924, the U.S. State Departemnt stated that:

> "The assistance of the Department of State with respect to claims has been withdrawn or refused in particular cases

> on account of the speculative, exaggerated, or exorbitant amount of the claim, the discovery of fraud, collusion, misrepresentation, or illegal transactions, the refusal to produce proper evidence, and generally when the claim is contrary to public policy or international law" (G.H. Hackworth, Digest of international law, Vol. V, 1943, p. 710; emphasis added).

It is apparent from the above pronouncements that behaviour by a claimant designed to bypass, elude or break the national law of the respondent State, results in his forfeiting the right to bring an international action against that State.

iii) The requirement that a dual national not conceal his dual nationality

The U.S. practice in this matter has been aptly summarized by Borchard in the following way:

> "Citizenship represents not only a legal relation but a patriotic one and the Department of State in extending protection may take into account the censurable conduct of the claimant in denying or concealing his citizenship. Thus, it has frequently happened that naturalized citizens have returned to their native country and there, conceling their naturalization, pass themselves off as citizens of the native country until occasion makes it their interest to ask the intervention of the country of their adoption. Mr. Fish and other secretaries of State have considered that such concealment of citizenship absolves the government of the United States from the obligation to protect the offenders as citizens, at least while they remain in their native country (Borcard quotes here a list of U.S. sources on this matter).
>
> Natives of Russia and Turkey who become naturalized in the United States, often return to their native countries, conceling their American naturalization because of their liability to punishment for expatriation. In the Notices issued to former subjects of those countries, the Department of State holds that a naturalized American citizen of Russian (Turkish) origin who returns to his native country as a Russian (Turkish) subject, concealing the fact of his naturalization in order to evade Russian (Turkish) law, thereby so far relinquishes the rights conferred upon him by his American naturalization as to

> absolve this Government from the obligation to protect him as a citizen while he remains in his native land. It naturally follows that the Secretary of State, in the exercise of his discretion, may refuse to issue a passport to a man admittedly an American citizen who has concealed or denies his American citizenship." (E.M. Borchard, The diplomatic protection of citizens abroad. cit, pp. 720-721; emphasis added).

It would of course be fallacious to object that the above practice confines itself to stating that the U.S. authorites deny diplomatic protection to dual nationals in case of concealment of the nationality of the claimant States. For, if the principle proclaimed and acted upon by the U.S. authorities relates to their granting or withholding diplomatic protection, the same principle cannot but be upheld by international courts before which an international claim is brought by the U.S. on behalf of a dual national. In other words, the pronouncements of the U.S. authorities mentioned above are based on a general assumption or principle: whenever a dual national conceals or does not disclose, in his native country, his foreign (American) naturalization and this concealment or lack of disclosure is designed to evade the legislation of the native country, the State of naturalization is not entitled to bring an international scliam on behalf of that individual. The universally accepted, equitable principle of "clean hands" demands that such dual nationals be barred from asserting their claims.

C) International case-law

International case-law on this matter can be divided into three groups:

1) general;

2) Cases of non-compliance with the legislation of the claiming States;

3) Cases of concealment or failure to disclose the dual nationality.

All the cases that we will encounter in this section are grounded in the "clean hands" doctrine.

i) General

In the Friedman case the German-U.S. Mixed Claims Commission held in 1925 that:

> "Any State is entitled to expect from another that "no claim will be put forward that does not bear the impress of good faith and fair dealing on the part of the claimant" (in Administrative Decisions and Opinions of a general nature, and opinions in individual isitania and other cases to October 1, 1926, Washington 1928, p. 613.

ii) Cases of disrespect for the national law of the Claimant

In a case brought in 1862 before the Ecuadorian-United States Claims Commission, in his opinion, the American Commissioner pointed out that the American claimant, Captain Clark, had violated both United States municipal law, international law and the law of the respondent State, Spain. He then went on to ask:

> "What right, under these circumstances, has Captain Clark, or his representatives, to call upon the United States to enforce his claim on the Colombian Republic? Can he be allowed, as far as the United States are concerned, to profit by his own wrong? Nemo ex suo delicto meliorem suam conditionem facit. He has violated the laws of our land. He has disregarded solemn treaty stipulations... I hold it to be the duty of the American Government and my own duty as commissioner to state that in this case Mr. Clark has no standing as an American citizen. A party who asks for redress must present himself with clean hands" (J.B. Moore, History and digest of the international arbitrations to which the United States has been a party, 1898, Vol. 3, pp. 2738-2739; emphasis added).

Though in the case just mentioned reference is primarily made to violations of the national legislation of the claiming State and of international law, as pointed out with respect to State practice what matters, is the basis underlying principle: no individual is entitled to international protection if he has engaged in improper

conduct. The impropriety of conduct can consist of violating the national law of the claiming State, the national law of the respondent State, or international treaties.

iii) Cases of concealment of a nationality by a dual national

The case-law on this matter has been summarized very clearly by Borchard, who points out the following:

> "In the case of Casanova before the United States-Spanish Mixed Commission of 1871, Lowndes, arbitrator, expressed the opinion that if a person desired to protect himself by his citizenship, he must give notice of it and claim the rights he may possess by virtue of his nationality. This was a dictum in connection with the agreement made between the United States and Spain, February 12, 1871, to cover the case of the many Cubans who had gone to the United States, remained just long enough to secure American naturalization, and then returned to Cuba. Spain thus obtained recognition for her contention that such an individual should, in order to claim rights as an American citizen, have given notice of his American citizenship to the Spanish authorities. under penalty of estoppel.... The representation by a naturalized American citizen abroad that he is not an American operates as a bar to recovery upon a claim before a commission having jurisdiction of claims of American citizens" (E.M. Borchard, The diplomatic protection of citizens abroad, cit., pp. 721-722; emphasis added).

This case-law summary supports the conclusion drawn from the examination of State practice above: that a dual national cannot benefit from the nationality of the State where he was naturalized, if he has not disclosed his foreign nationality to the authorities of his native State. If he tries to obtain the support of the State of naturalization vis-a-vis the native State he runs afoul of the principle of "clean hands". The State that granted him naturalization is therefore barred from bringing any international claim on his behalf against the native State.

The main conclusions of this sections are:

(1) The claim should be dismissed under the universal, equitable doctrine of "clean hands". The doctrine, which is supported by a vast and diverse body of international legal literature, State practice and international case-law, states that anybody wishing to bring a claim before an international court, must have acted properly and correctly prior to the claim, particularly with respect to the laws of the respondent State. Equity demands that one who has behaved illegally in a particular State not then be allowed to sit in judgment of that State's allegedly illegal actions.

(2) The Claimant who violated Iranian law by acquiring the U.S. nationality without relinquishing his Iranian's and by concealing his foreign nationality has acted as an exclusively Iranian national drawing all the benefits from this nationality does not come into the Tribunal with "clean hands" and cannot subsequently seek to use his foreign nationality as a means of having access to this international tribunal.

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B. The Principle of Good Faith

That good faith constitutes a general principle of international law, is now generally admitted both in international case-law, in multilateral treaties and in the legal literature (for refernces, see Research Opinion on "Legal Issues Relating to Dual Nationality", pp. 5-7. Adde M. Virally, "The Sources of International Law").

An authoritative definition of good faith has been recently advanced by a distinguished American scholar: Anthony D'Amato. According to him "the principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage that might result from a literal and unintended interpretation of the agreement between them ... (T)he substance of the principle of good faith is the negation of unintended and

literal interpretations of words that might result in one of the parties gaining an unfair or unjust advantage over another party." (A.D'Amato, "Good Faith", in Encyclopedia of Public International Law, Vol. 7, 1984, p. 107; emphasis added).

The application of this definition of good faith to the cases of dual nationals under discussion leads to the following conclusions: a dual national whose American nationality is dominant and effective must be deemed to behave contrary to good faith in at least three cases: (1) when he resorts to fraud, i.e. wilful and deceitful use of legal devices for the purpose of evading the legal prescriptions of Iranian legilsation and thereby acquiring undue advantage; (2) when he uses the Iranian nationality to acquire rights to obtain benefits exclusively reserved to Iranian nationals, and not available to foreigners; (3) when the Iranian legislation imposes limitations on foreigners for carrying out certain activities, and the dual national does not disclose his foreign (dominant and effective) nationality but takes advantage of his Iranian nationality to elude those limitations.

If certain Iranian laws require foreigners to obtain special permits for entry or staying in the country, or impose limitations on foreigners wishing to undertake certain activities (e.g., working activities, ownership in banking corporations) this means that Iranian legislation intends to establish a marked differentiation between Iranian nationals and foreigners. As a result, Iranians are put in a better position, in that they do not need entry

or residence permits, do not need special authorization for the carrying out of working activities, are totally free to own capital stock in banking corporations and so on. For Iranian legislation there should be no doubt and no ambiguity: an individual is either Iranian or a foreigner; tertium non datur (there is no third solution). If he is Iranian, he can benefit from a whole body of legislative provisions; if by contrast he is vested with a foreign nationality, he is put at a disadvantage, in that he is either excluded from some activities, rights and benefits, or he can respectively carry them out or enjoy them but then only subject to certain well-specified conditions.

The case of a dual national who refrains from disclosing his dual nationality to the Iranian authorities and thereby draws all the benefits provided for Iranians is clearly a case of breach of good faith: that individual plainly takes unfair and unjust advantage by simply omitting to state that -- contrary to the explicit dictates of Iranian legislation prohibiting dual nationality -- he is vested with both the Iranian nationality and a foreign nationality.

It should be pointed out that this breach of good faith is all the more serious when the dominant and effective nationality of the dual national is the foreign one. For, this means that that individual has much closer links with the foreign country (in our case: the United States), to which he owes allegiance, to which his loyality and devotion go in preference to the other country (in our case: Iran). If the individual has much closer attachments to the foreign country -- to the extent that an

international tribunal regards that country as entitled to exercise diplomatic and judicial protection on behalf of the individauls at issue -- one cannot escape the following conclusion: when he gained benefits of the type referred to above, by relying on the nationality of the country to which he had decided not to owe allegiance any longer, he patently acted against good faith.

The concept just set out was tellingly illustrated by Professor Henry Rolin in his pleadings before the International Court of Justice in the Nottebom case. In dealing with the legislation of Liechtenstein on nationality, he pointed out that this legislation provided for naturalization of foreigners but posed the condition that they should have lost their original nationality. He went on to ask himself about the rationale of this legislation and stressed that to some extent it should be found in the intent to avoid dual nationality; this consideration was however not decisive: the decisive factor, that prompted a number of States in 1920 and in the following years to provide for a similar condition (relinquishment of the original nationality for the purpose of acquiring another nationality by naturalization) was to be found in the intent to prevent individuals from profiting from two nationalities, from gainging advantages from both of them. As Professor Rolin put it: "Ce que l'on avait en vue [when those national statues were passed, in 1920 and in the years thereafter, in various countries], c'est une garantie de sincerité du requérant (i.e. the person that had applied for a second nationality), de la loyauté et du loyalisme du requérant, une assurance que le requérant n'allait pas jouer sur deux tableaux, qu'il n'allait pas acquerir une nationalité comme une nationalité de rechange, une nationalité accessoire dont il se servirait pour les besoins de la cause, lorsqu'il y aurait intérêt, sauf a reprendre et à conserver ce qui au fond de lui-meme demeurait, bien entendu, sa nationalite d'hier, d'aujourd'hui et de demain, sa nationalité définitive", International Court of Justice, Pleadings, Nottebohm case, Vol. II, pp. 198-199; the passage quoted is at p. 199; emphasis added).

The English translation of the French original is:

> "What States had in mind /when they passed, in 1920, and in the following years, statutes requesting that an individual acquiring a foreign nationality by naturalization should previously relinquish his original nationality/ was to ensure that the applicant was sincere and loyal, that he would not play at two tables, that he would not acquire a nationality as a spare nationality, as an accessory nationality to be used as he might deem fit, whenever this proved to be in his interest, whilst, however, reverting to and using the previous nationality -- his nationality of yesterday, of today and tomorrow, in short his definitive nationality."

It seems useful at this juncture to quote the words of one of the leading European Professor of Civil Law, Professor F. Santoro Passarelli.

He states the following:

> "Consistently with the general principle of solidarity, legal rules relating to private transactions lay down a principle whereby a subject making a declaration takes a risk as a result of reliance (without negligence) by the addressee on the content of that declaration. This protection of 'reliance without negligence' goes well beyond the realm of private transactions. We can therefore speak of an objective liability whenever the subject making the declaration subsequently undertakes in his own interest (cujus commoda ejus incommoda) an activity causing damage to the addressee of his declaration: this objective liability can be also conceived of as a 'risk'. This 'risk' however does not arise from the declaration made, but rather from the expectation created in the other subject". (tranlsated from Italian).

If this brilliant interpretation of the principle of good faith is applied to our cases, it would become apparent that dual nationals who use their Iranian nationality in the way referred to above, act contrary to the legitimate expectation of Iranian authorities.

Since the latter cannot be accused of negligence,* they are entitled to rely on the fact that dual nationals, when undertaking the activities of the kind mentioned above, acted as Iranian nationals. On the other hand, those dual nationals took a 'legal risk' in that they forfeited the right to subsequently take advantage of another nationality, for the sole purpose of bringing a claim against Iran.

For the foregoing, the claims brought by dual nationals before the Tribunal are contrary to the all-pervading principle of good faith, and should therefore be rejected out of hand.

C- The Doctrine of Abuse of Rights

There is broad agreement in the international legal literature that abuse of rights constitutes a general principle of law applicable in international relations. See to this effect: N. Politis, "Le problème des limitations de la souveraineté et la théorie de 'abus des droits dans les rapports internationaux", in Recueil des Copurs de l'Académie de La Haye, Vol. 6, 1925-I, p. 1 ff.; G. Scelle, Précis du droit des gens, vol. 2, 1934, p. 38; B. Cheng, General Principles of Law as Applied by International Courts and Tribunals, 1953, p. 121 ff.; G. Schwarzenberger, "Uses and Abuses of the 'Abuse of Rights' in International Law", in Tranactions of the Grotius Society, vol. 42, 1956, p.147 ff.; M. Virally, "The Sources of International Law", in M. Sorensen (ed.), Manual of Public International Law, 1968, p. 148; Taylor, "The Content of the Rule Against Abuses of Rights in International Law"., in British Yearbook of International Law, Vol. 46, 1972-73,

* The only possible way to accuse Iran of negligence in this context is to maintain, ludicruous, as it is, that any State, whenever legislating or acting in respec to its own nationals, is under an international obligation to investigage the possibility of their having a foreign nationality, even though they, themselves have never made such a claim.

p. 323 ff.; B.O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law" in Harvard International Law Journal Vol. 16, 1975, p. 47 ff.; V. Paul, "The Abuse of Rights and Bona Fides in International Law", in Oesterreichisches Zeitschrift feur oeffentliches Recht und Voelkerrecht, Vol. 28, 1977, p. 107 ff.; A.C. Kiss, "Abuse of Rights", in Encyclopedia of Public International Law, Vol. 7, 1984, p. 1 ff.; A. Verdrosse-B. Simma, Universelles Voelkerrecht, 3rd ed., 1984, p. 281; D. Nguyen Quoc, P. Daillier, A. Pellet, Droit international public, 3rd ed., 1987, p. 321; D. Carreau, Droit international, 2nd ed., 1988, pp. 167 and 286.

Probably, the most comprehensive definition of abuse of rights has been propounded by Professor Anthony D'Amato, for whom the doctrine at issue "holds that a State may not exercise its international rights for the sole purpose of causing injury, nor fictitiously to mask an illegal act or to evade an obligation" ("Good Faith", in Encyclopedia of Public International Law", vol. 7, 1984, p.10); emphasis added).

According to one of the authorities in the matter, Professor A.C. Kiss, the concept of abuse of rights may arise in three distinct legal situations (op. cit., p. 1). For our purposes, the third of the three legal situations identified by Kiss is relevant, namely the one described by Kiss as follows: "The arbitrary exercise of its rights by a State, causing injury to other States but without clearly violating their rights, can also amount to an abuse of rights. In contrast to the preceding situation (where a right is exercised intentionally for an end which is different from that for which the right has been created, with the result that injury is caused), bad faith or an intention to cause harm need not necessarily take this form. Broader objectives concerning the social function of the right which has been exercised are at stake here."

If this concept is applied to the questions under consideration, it becomes apparent that dual natioanls exercising -- under the circumtance set out above -- the rights provided by Iranian legislation perpetrate an abuse of rights. For, as already stressed, the social function of Iranian legislation on nationality as well as the Iranian legislation on foreigners is to draw a clear distinction between Iranians and foreigners by privileging the former. A dual national (whose dominant and effective nationality is the foreign one), who works in Iran without requesting the work permit necessary for foreigners, who in setting up a company states that he is Iranian and refrains from disclosing his foreign nationality, who in acquiring capital stock in banking corproations again declares that he is Iranian and conceals his foreign dominant nationality -- this dual national does not undertake all these legal actions for the primary purpose of causing harm to the Iranian authorities. He abuses his rights by acting contrary to the social ends of the Iranian legislation creating those rights. He sidesteps the Iranian legislation, thwarts its main goal (to establish a differentiation between Iranians and foreigners) and acquires rights and benefits by devious means, which run counter to the whole spirit and social function of that legislation.

نقل از مدرک شماره ۵۴، پرونده شماره ۸۲۷:
دستهای پاک : صفحات ۵۸-۴۳ ،
حسن نیت : صفحات ۸۰-۷۵،
سوء استفاده از حق : صفحات ۸۲-۸۰

۲ - برطبق نظریه "دست های پاک"، خواهان نمی‌تواند علیه ایران طرح دعوی کند.

در بخش قبل نشان داده شد که ایران در خصوص دعاوی اقامه شده، خواهان از لحاظ بین المللی مسؤول نیست. نظریه "دست های پاک" که در زیر مورد بحث قرار می‌گیرد، مبنای دیگری است که خواهان را از اقامه دعوی علیه ایران باز می‌دارد.

حد و حدود این نظریه را می‌توان با این نقل قول از مرجع بزرگ امریکایی، ای. ام. بورچارد (E.M. Borchard)، در این زمینه درک کرد: "در همه نظامهای حقوقی، چه داخلی و چه بین المللی، این یک اصل است که هیچکس نمی‌تواند از عمل نادرست خود سود ببرد و این که شاکی یا خواهان باید با دست های پاک به دادگاه بیاید".

E.M.Borchard,The Diplomatic protection of Citizens abroad or the law of international Claims, 1915 , p.713

(تاکید افزوده شده است). یکی از پی‌آمدهای این اصل این است که خواهان نباید خلاف قانون دولتی عمل کرده باشد که در دادگاه بین المللی علیه آن اقامه دعوی کرده است ، و، کلا"، برای معتبر تلقی شدن ادعایش به صورت نادرستی عمل کرده باشد. این نظریه در مورد این دعوی قابل اعمال است که در آن خواهان برخلاف قوانین ایران رفتار نموده است ، زیرا اولا" بدون ترک تابعیت ایرانی خود تابعیت خارجی، مخصوصا" تابعیت امریکایی، کسب کرده و ثانیا" تابعیت امریکایی خود را در برابر کشور مادری خود کتمان کرده. برای اینکه منحصرا" ایرانی فرض شود تا از مقررات قانون ایران بگریزد که اجازه تحصیل چنین حقوقی را نمی‌دهد. هرچند خوانده نیازی نمی‌بیند که قابل اعمال بودن نظریه فوق را در دعوی حاضر مورد بحث قرار دهد اما بیان اختصاری ادبیات حقوقی بین المللی در این خصوص و همچنین بررسی عملکرد دولت و رویه بین المللی در این مورد مفید خواهد بود.

الف ـ ادبیات حقوق بین الملل درخصوص نظریه "دست های پاک"

پروفسور ال، گارسیا آریاس (L.Garcia- Arias) اسپانیایی نخستین حقوقدانی است که تئوری جامعی در مورد نظریه "دست های پاک" تنظیم کرده است. وی در مقاله‌ٔ آموزنده‌ٔ زیر:

"La doctrine des clean hands en droit international Public" Annuaire de l'Association des Anciens Auditeurs de l'Académie de la Haye, 1960, Vol.30,pp.14-22.

نتیجه‌گیری می‌کند که "یک دولت نمی‌تواند چنانچه شخص حقیقی یا حقوقی تبعه دولتی دیگر به صورتی درست رفتار نکرده باشد دعوایی را از جانب آن شخص حقیقی یا حقوقی که باید در مقابل آن دولت،وی را مورد حمایت دیپلماتیک قرار دهد، اقامه کند. "همان منبع، صفح ۱۷. گارسیا ـ آریاس توضیح می‌دهد که رفتار درست از جانب خواهان به این معنی است که وی باید قانون کشور خوانده را رعایت‌کرده و از دخالت در امور داخلی آن کشور اجتناب کرده باشد (همان منبع).

نویسنده دیگری که در این نظریه بحث‌کرده لوئی دلبز (L.Delbez) است.

Les principes généraux du droit international public, 3ème. éd., 1964, pp.379-380.

وی چنین خاطر نشان می‌کند:

> "به نظر می‌رسد که دولت متبوع محق نیست که ادعای تبعه‌ٔ خود را مورد حمایت قرار دهد مگر این که تبعه‌ٔ مزبور به‌طور صحیح،با "دست‌های پاک"، همچنانکه انگلوساکسونها می‌گویند، رفتار کرده باشد. بنابراین چنانکه فرد مزبور قانون داخلی کشوری را که در آن اقامت دارد نقض کرده باشد یا فعالیتی را برخلاف قوانین بین المللی انجام داده باشد ادعای آن فرد غیرقابل استماع خواهد بود."

نظر مشابهی توسط کاوارہ (Cavaré) و کنـــودک (Queneudec)
(Le droit international public positif, Vol.1, 3ème.éd., 1967, pp.287-290)

مطرح شده است . آنها میگویند:

"یک تبعهٔ بیگانه که در کشوری زندگی میکنـــد ملزم و موظف است به شیوه‌ای رفتار کند کـــه حاکی از این باشد که به قوانین و مقـــررات آن کشور احترام میگذارد. چنانچه به این ضوابط رفتاری و شرط عدم مداخله‌ای که موقعیت خـــاص او بر او تحمیل میکند پایبند نباشد، دیگـــر نمی‌تواند مقامات این کشور را که اقدامـــات زیان بخشی علیه او انجام داده یا اجـــازهٔ انجام آن را داده‌اند، مسؤول بشناسد. به‌حمایت کشوری که او تبعه‌اش محسوب میشود به شرطـــی نمی‌تواند تکیه کند که نادرستی رفتار و کردارش از روی اراده باشد؛ به‌عبارت دیگر بایستـــی با دانش وآگاهی تمام رفتار کرده‌باشد".

حقوقدان دیگری که به این مسأله پرداختـــه پل روتر (P.Reuter) اســـت (Droit international Public, 5ème. éd., 1976, p.234) وی میگوید "اکثریت کشورها، به ویژه ایالات متحده، از جانب افرادی که در قبـــال کشورهای متبوعشان خلافکاری/رفتاری درست نداشته‌اند ادعاهای دیپلماتیک عنوان نمی‌نمایند".

باید تأکید کرد که نظر مورد بحث نه تنها از طرف صاحب‌نظران ایتالیایـــی و فرانسوی بلکه توسط مراجع انگلیسی و امریکایی نیز مطرح شده است. در زیر به نقل نظرهایی از آنان میپردازم.

نخست ، علاوه بر مطلب کلی که در بالا از کتاب بورچارد

The diplomatic protection of Citizens abroad or the law of international claims, 1915,p.713

نقل شد ("در همه نظامهای حقوقی، چه داخلی و چه بین المللی این یک اصل است که هیچ کس نمی‌تواند از عمل نادرست خود سود ببرد و این که شاکی یا خواهان باید با دست های پاک به دادگاه بیاید"، صفحه ۷۱۳)، باید مطلب کلی دیگری را نیز در اینجا ذکر کرد:

> "دعاوی زیادی (توسط مراجع بین المللی) برمبنای این اصل منصفانه که خواهان باید با دست های پاک به‌دادگاه بیاید رد شده و در نتیجه ازجبران خسارت خواهانهایی که خود متخلف بوده‌اند جلوگیری به عمل آمده است" (صفحه ۷۱۸، و بورچارد در این خصوص دعاوی گوناگونی را نقل کرده است)."

"جی. اچ. هاکورث (G.H.Hackworth) حقوقدان برجسته امریکایی دیگری است که اظهار می‌دارد:

(Digest of international Law , Vol.V, 1943, p.709)

> "در موارد متعددی وزارت خارجه (ایالات متحده) به دلیل ماهیت رفتار خواهان یا ماهیت فعالیت هایی که وی در زمان ایجاد خسارت به آن اشتغال داشته است از حمایت دعاوی علیه دولت های خارجی سرباز زده است. همچنین رفتار خواهان ممکن است زمینه‌هایی را برای رد ادعا توسط یک محکمه داوری ایجاد کند."

سی . سی . هاید (C.C.Hyde) حقوقدان معروف آمریکایی نظر مشابهی را اعلام داشته است .

International Law chiefly as interpreted and applied by the United States, Vol.II ,1947,p.891-892.

وی می‌نویسد :

" یک دعوی ممکن است در نتیجهٔ رفتار خود، به تشخیص دولت متبوع آنچه را که ممکن است در حقوق داخلی، حق مورد حمایت قرار گرفتن نامیده شود از دست بدهد، و در نتیجه دولت را ترغیب کند که از اقامهٔ دعوی از جانب وی علیه دولت خارجی خودداری کند. رفتار قابل انتقاد تبعه ممکن است به چنین نتیجه‌ای منجر شود."

ب - رویهٔ دولت

رویهٔ دولت در زمینهٔ نظریهٔ مورد بحث با ادبیات حقوقی تطبیق می‌کند. خوانندهٔ خود را محدود به رویهٔ دولت آمریکا در این خصوص می‌نماید که به ویژه فراوان و گویاست . در طول سالها سه جریان عمده ایجاد شده است که هر یک از آنها در جهت یافتن مفاهیم مختلفی که یک دعوای بین المللی می‌تواند مشروع فرض شود متمرکز شده است :

۱) خواهان باید قانون داخلی خود را رعایت کرده و به طور صحیحی رفتار نموده باشد؛

۲) خواهان باید قانون داخلی کشور خوانده را رعایت کرده باشد؛

۳) خواهان دارای تابعیت دوگانه نباید تابعیت خود به کشور خواهان را از کشور خوانده پنهان کرده باشد .

به طوری که خواهیم دید رویهٔ مربوط به این سه جریان به صورتی اساسی متأثر از نظریهٔ "دست های پاک" است ، یعنی خواهان باید به طریقی درست و با رعایت قوانین کشور خود و کشور خوانده رفتار کرده باشد .

۱)- شرط این که خواهان قوانین داخلی خود را رعایت کرده باشد

در یادداشت مورخ ۳۰ مه ۱۹۶۲ وزارت امور خارجه امریکا به مقامات انگلیس چنین آمده است :

"دولت ها نمی‌توانند روابطی را که منافع شهروندانشان ایجاب می‌کند که با آن مفتوح باشد، حفظ کنند ؛ روابطی که به خاطر ورود تقلب یا تزویر در آن می‌تواند رنجش زا و خطرآفرین باشد. بنابراین، به عنوان رسمی که اعتبار یک اصل را پیدا کرده، پذیرفته شده است که در مراودات بین دولتها ، درخصوص دعاوی شهروندان یا اتباعشان، هرگونه فریبکاری از ناحیهٔ یک خواهان نسبت به دولت متبوعش ، در رابطه با اختلاف با یک کشور خارجی، به منظور افزایش اعتبار آن ادعا یا تحت تاثیر قرار دادن جریان دادرسی دولت خود ،کلیه حقوق طرف تزویرکننده را بلحاظ حمایت و کمک دولتش در اختلاف موردبحث از بین می‌برد ، زیرا یک دولت شایان احترام نمی‌تواند در گیری در امری را بپذیرد که در آن به خاطر منافع طرف تزویرکننده،خود قربانی خدعه او شده است یا تلاش شده است که وی قربانی آن بشود".

(J.B.Moore, A Digest of international Law , Vol.VI, 1906, p.622.)

(تاکید افزوده شده است).

اظهاریه فوق به مورد خاصی اشاره می‌کند که وزارت امور خارجه ایالات متحده از به عهده گرفتن دعوای یک تبعه امریکایی، به دلیل رفتار نادرست آن تبعه نسبت به مقامات ایالات متحده، سرباز زده بود. اما در اینجا مساله فلسفه کلی و مبنای حقوقی اظهاریه فوق مطرح است: چنانچه فرد به منظور افزایش اعتبار ادعایش به تزویر دست بزند استحقاق برخورداری از حمایت بین المللی را ندارد. این مفهوم کلی به آسانی می‌تواند در مورد دعاویی به کار رود که در آنها تبعه دوگانه به منظور افزایش اعتبار یا در واقع ایجاد یک دعوای بین المللی دولت خوانده را فریب می‌دهد. اگر دولت خواهان از حمایت بین المللی در دعاویی که خواهان به زبان آن دولت دست به فریب زده است خودداری می‌کند، یا بایستی خودداری کند، به طریق اولی این حمایت باید از فردی نیز دریغ شود که قانون کشور خوانده را زیر پا گذاشته است. درهرحال یک دادگاه بین المللی مکلف است چنین دعوایی را رد کند حتی اگر دولت متبوع خواهان اعمال چنین الزامی را ازیاد برده باشد.

۲)- شرط این که خواهان قوانین کشور خوانده را رعایت کرده باشد

در یادداشتی که سوارد (Seward) وزیر خارجه ایالات متحده در سال ۱۸۶۶ برای مقامات انگلیس فرستاده چنین آمده است.

"امریکاییان چه بومی و چه تحصیل کننده تابعیت هنگام اقامت در انگلیس و برخورداری از حمایت آن دولت، باید همچون اتباع آن کشور به قوانین جاری انگلستان گردن نهند:

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(به نقل از ای. ام. بورچارد، مذکور در فوق، صفحه ۷۳۴).

در گزارشی که وزیر امورخارجه ایالات متحده در سال ۱۸۸۷ برای رئیس جمهور فرستاده ضمن مطالب دیگر چنین آمده است :

" Ex dolo malo non oritur actio هیچ دادگاهی از فردی که دعوای خود را برمبنای عمل غیراخلاقی یا غیرقانونی گذاشته است حمایت نمیکند".

(J.B.Moore , A Digest of International Law, Vol. VI,1906,p.623)

(تاکید افزوده شده است).

وزارت امورخارجه ایالات متحده طی یادداشتی در ۱۹۳۴ اظهار کرده است :

"وزارت امورخارجه از همکاری یا ادامه همکاری در دعاویی خاص به دلیل مبلغ سوال برانگیز، اغراق آمیز یا خیلی گزاف دعوی، کشف تقلب، تبانی، سوءارائه، یا معاملات غیرقانونی، خودداری از تهیه مدارک صحیح، و به طور کلی زمانی که دعوی برخلاف نظم عمومی یا حقوق بین الملل است ، خودداری میکند".

(G.H.Hackworth, A Digest of International Law, Vol.V,1943,p.710)

(تاکید افزودهٔ شده است).

اظهارات فوق به خوبی آشکار میکنند که رفتار خواهان در جهت میان بر زدن، با شکستن قوانین داخلی کشور خوانده موجب اسقاط حق وی برای اقامه دعوی علیه آن کشور میشود.

۳)- شرط این که دارنده تابعیت مضاعف دوگانگی تابعیت خود را پنهان نکرده باشد.

رویه ایالات متحده در این مورد به نحو شایسته‌ای توسط سورچارد به شرح زیر خلاصه شده است:

"تابعیت نه تنها نمایانگر روابطی حقوقی بلکه روابطی میهن دوستانه است و وزارت امورخارجه در نظری حمایت خود می‌تواند روابط قابل انتقاد خواهان را در انکار یا پنهان کردن تابعیتش به حساب بیاورد. از این رو، مکرر اتفاق افتاده است که شهروندان کسب کننده تابعیت به کشور اصلی خود بازگشته‌اند و در آنجا با پنهان کردن تابعیت جدیدشان، خود را به عنوان اتباع کشور اصلیشان جا زده‌اند تا زمانی که با پیش آمدن وضعیتی، منافع آنان ایجاب کرده که دخالت کشور انتخابیشان را طلب کنند. آقای فیش (Fish) و سایر وزارای امورخارجه توجه کرده‌اند که چنین پنهان کردن تابعیتی دولت ایالات متحده را از تعهد حمایت از متخلفان به عنوان اتباع خود دست کم زمانی که در کشور مادری خود هستند، معاف می‌کند (سورچارد در اینجا فهرستی از ماخذ ایالات متحده را در این مورد ذکر می‌کند).
افراد سومی روسیه و ترکیه که به تابعیت ایالات متحده درمی‌آمدند، اغلب به کشور مادری خود بازمی‌گشتند و به خاطر در معرض مجازات بودن به علت جلای وطن تابعیت امریکایی خود را پنهان می‌کردند. وزارت امورخارجه ایالات متحده در اطلاعیه‌های صادره برای اتباع پیشین آن کشورها مقرر داشت که افراد دارای اصلیت روسی (ترک) که به تابعیت ایالات متحده درآمده‌اند و یا

> پنهان کردن تابعیت جدیدشان به منظور گریز از قوانین روسی (ترکی) به عنوان اتباع روسیه (ترکیه) به‌کشور مادری خود بازگشته‌اند، با این کار خود از حقوق اعطایی ناشی از تابعیت امریکایی‌شان اعراض می‌کنند. به این ترتیب که این عمل آنان این دولت را از تعهد حمایت از آنان در زمانی که در سرزمین مادری خود باقی هستند معاف می‌کند. این امر طبعاً" این نتیجه را به دست می‌دهد که وزیر امورخارجه در اعمال حق صلاحدید خود، می‌تواند از صدور گذرنامه برای اتباع امریکایی که تابعیت امریکایی خود را پنهان یا انکار کرده باشند خودداری کند."

(ماخذ اشاره شده در فوق، صفحات ۷۲۱ - ۷۲۰ ؛ تاکید افزوده شده است).

البته این مغلطه کردن است که بگوییم رویّهٔ فوق محدود می‌شود به خودداری مقامات ایالات متحده از حمایت دیپلماتیک از دارندگان تابعیت مضاعفی که تابعیت کشورهای خواهان را پنهان کرده باشد؛ زیرا چنانچه اصل اعلام و اعمال شده توسط مقامات ایالات متحده به اعطاء یا عدم اعطای حمایت دیپلماتیک آنان مربوط شود، همین اصل باید توسط دادگاههای بین المللی نیز که به دعاوی بین المللی مطروحه توسط ایالات متحده از جانب اتباع دوگانه رسیدگی می‌کنند اعمال گردد. به عبارت دیگر اعلام رسمی مقامات ایالات متحده به شرح فوق برمبنای این قاعده یا اصل کلی قرار دارد: چنانچه یک تبعه دوگانه در کشور مادریش تابعیت خارجی (امریکایی) خود را پنهان کند یا از آشکار کردن آن خودداری کند و این پنهان کردن یا عدم افشاء به‌منظور اجتناب از قوانین کشور مادری صورت گرفته باشد، دولت جدید تابعیت دهنده حق نیست که از جانب آن فرد یک دعوی بین المللی را اقامه کند. اصل منصفانه "دست های پاک" که در همه جا پذیرفته شده ایجاب می‌کند که خواهان پرونده حاضر از اقامه دعاوی کنونی ممنوع شود.

ـ رویه قضایی بین المللی

رویه بین المللی را در این زمینه می‌توان به سه گروه تقسیم کرد:

۱ ـ دعاوی کلی؛
۲ ـ دعاوی مربوط به عدم رعایت قوانین کشور خواهان؛
۳ ـ دعاوی مربوط به پنهان کردن یا خودداری از آشکارکردن تابعیت دوگانه.

کلیه دعاوی که در این بخش مورد بحث قرار می‌گیرند برمبنای نظریه "دست‌های پاک" است.

۱) ـ دعاوی کلی

در دعوای فریدمن (Friedman)، کمیسیون دعاوی مختلط آلمان ـ ایالات متحده در ۱۹۲۵ اعلام داشت که:

هر دولتی حق دارد از دولت دیگر انتظار داشته باشد که "هیچ ادعایی را اقامه نکند که نشان حسن نیت و معامله عادلانه از جانب خواهان را نداشته باشد".
(Administrative Decisions and opinions of a general nature, and opinions in individual Isitania and other cases to October 1, 1926 , Washington 1928, p.613)

۲) ـ دعاوی مربوط به عدم رعایت قوانین کشور خواهان

در دعوایی که در ۱۸۶۲ در کمیسیون دعاوی اکوادور ـ ایالات متحده مطرح شد،

داور امریکایی در اظهار عقیده خود اعلام کرد که خواهان امریکایی، کاپیتان کلارک (Captain Clark)، هم قوانین داخلی ایالات متحده هم قوانین بین المللی و هم قوانین کشور خوانده، یعنی اسپانیا را نقض کرده است. وی در ادامه اظهارات این سؤال را مطرح میکند:

"در چنین اوضاع و احوالی کاپیتان کلارک یا نمایندگانش، چه حقی دارند که از ایالات متحده بخواهند ادعای او را در مورد جمهوریهای کلمبیا به اجراء در بیاورد؟ تا آنجا که به ایالات متحده مربوط است، آیا وی میتواند از عمل نادرست خود سود ببرد؟

Nemo es suo dilicto meliorem suam conditionem facit

او قانون کشور ما را نقض کرده است. او مصرحات عهدنامه رسمی را نادیده گرفته است... من اعلام میکنم که وظیفه دولت ایالات متحده و وظیفه خود من به عنوان داور ایجاب میکند که اعلام کنم آقای کلارک به عنوان یک تبعهٔ ایالات متحده هیچ سمتی در این دعوی ندارد. طرفی که درخواست دادرسی و جبران خسارت میکند باید با دست های پاک در دادگاه حضور یافته باشد."

J.B.Moore, History and digest of the international arbitrations to which the United States has been a Party 1898, Vol.3, pp.2738-2739.

(تاکید افزوده شده است).

با این که در دعوایی که پیش از این مورد اشاره قرار گرفت به تخلفاتی از قوانین داخلی دولت مدعی و حقوق بین الملل اشاره شد، همچنان که در خصوص رویه

دولت اشاره شد، چیزی که مطرح است این اصل اساسی است که کسی که عمل نادرستی انجام داده است استحقاق حمایت بین المللی را ندارد. نادرستی عمل می‌تواند شامل نقض قوانین ملی کشور خواهان، قوانین داخلی کشور خوانده، یا عهدنامه‌های بین المللی باشد.

۳- دعاوی مربوط به پنهان کردن یکی از دو تابعیت توسط دارنده تابعیت مضاعف

رویه قضایی در این زمینه به روشنی توسط بورچارد خلاصه شده است. وی مطالب زیر را خاطرنشان می‌کند:

"در دعوای کازانوا (Casanova) که در کمیسیون مختلط اسپانیا ایالات متحده ۱۸۷۱ مطرح شده بود لوندز (Lowndes) داور اعلام کرد که چنانچه فردی مایل باشد از طریق تابعیتش مورد حمایت قرار گیرد، باید آن تابعیت را اعلام کند و حقوقی را که می‌تواند به موجب آن تابعیت داشته باشد مطالبه کند. این یک اظهارنظر قضایی در ارتباط با توافق به عمل آمده در ۱۲ فوریه ۱۸۷۱ بین ایالات متحده و اسپانیا در مورد دعاوی بسیاری از کوبائیانی بود که به ایالات متحده رفته بودند و در آنجا آنقدر مانده بودند که بتوانند تابعیت امریکایی تحصیل کنند و سپس به کوبا برگشته بودند. سپس نظر اسپانیا مبنی براین که برطبق قاعده استایل چنین فردی برای مطالبه حقوقش به عنوان یک تبعه امریکا، باید مراتب تابعیت امریکایی خود را به مقامات اسپانیا اعلام می‌داد .... پذیرفته شد. عمل یک شهروند کب کننده

تابعیت امریکایی موقع معرفی خود در خـــــارج
از امریکا به عنوان غیرامریکایی مانع از جبران
خسارت در دعوای مطروحه در کمیسیونی می شود کـه
نسبت به دعاوی اتباع امریکایی صلاحیـــــــــت
دارد."

E.M.Borchard, The diplomatic protection
of citizens abroad

(نقل شده در قبل، صفحات ۷۲۲ - ۷۲۱، تاءکید افزوده شده است).

بطورخلاصه این رویه موءید نتیجه‌ای است که از بررسی عملکرد دولت (که فوقا" ذکـر شد) برداشت می‌توان کرد. دارندهٔ تابعیت مضاعف چنانچه تابعیت خارجی خود را بـــرای مقامات کشور مادری‌اش آشکار نکرده باشد، نمی‌تواند از تابعیت کشوری که به تابعیـت آن درآمده است بهره‌برداری کند؛ چنانچه وی بگوشد حمایت کشور تابعیت دهنـــده را در مقابل کشور مادری خود به دست بیاورد در آنصورت اصل "دست های پاک" را نقض می‌کنـد. نتیجتا" کشوری که به وی تابعیت اعطاء کرده است از اقامه هرگونه دعوای بین المللی از جانب وی علیه کشور مادری‌اش ممنوع می‌شود.

نتایج اطلی این بخش به قرار زیر است:

(۱) - ادعا باید برمبنای نظریه جهانشمول و منصفانه "دست های پاک" رد شود. ایـــن نظریه که مورد تاءیید بخش وسیع و مختلفی از ادبیات حقوق بین المللـــــــل، عملکرد دولت ونصریحات رایج بین المللی است می‌گوید که کسی که می‌خواهد ادعایـــــی را در یک دادگاه بین المللی اقامه کند باید پیش از ادعا، به ویژه نسبت بـــه قوانین دولت خوانده، به نحو صحیح و درستی رفتار کرده باشد. انصاف حکـــــم می‌کند که کسی که به صورت غیرقانونی در کشوری رفتار کرده باشد نتـــوانـــــد

در مورد اعمال غیرقانونی ادعایی آن کشور اقامه دعوی کند.

(۲) - خواهان که با تحصیل تابعیت ایالات متحده بدون این که تابعیت ایرانی خود را ترک کرده باشد قوانین ایران را نقض نموده و با کتمان تابعیت خارجی خود به عنوان یک تبعه انحصاری ایران عمل کرده و از کلیه مزایای این تابعیت استفاده کرده است، با "دست های پاک" به دیوان نیامده و درنتیجه نمی‌تواند از تابعیت خارجی خود به عنوان وسیله‌ای برای دستیابی به این دیوان بین المللی استفاده کند.

* * *

ب - اصل حسن نیت

حسن نیت که یک اصل کلی حقوقی بین الملل را تشکیل می‌دهد، اکنون به طور کلی هم در رویهٔ بین المللی، در معاهدات چند جانبه، و هم در ادبیات حقوقی پذیرفته شده است.

M.Virally, " The Sources of International Law".

یک تعریف معتبر از حسن نیت اخیرا" توسط آنتونی دامانو (Anthony D'Amato) حقوقدان برجستهٔ آمریکایی ارائه شده است. بر طبق نظر وی " اصل حسن نیت مستلزم این است که طرفین یک معامله بر اساس صداقت و انصاف با یکدیگر معامله نمایند، انگیزه‌ها و مقاصدشان را به درستی مطرح سازند، و از کسب منافع غیر منصفانه که امکان دارد از تفسیر صوری و ناخواسته توافق بین آنان ناشی شود امتناع کنند... جوهر اصلی حسن نیت در نفی تفسیر ناخواسته و صوری، کلماتی است که ممکن است کسب منافع غیر منصفانه یا نادرست یکی از طرفین نسبت به طرف دیگر منجر شود."

A.D'Amato, " Good Faith ", in Encyclopedia of Public International Law , Vol.7,1984,p.107 (emphasis added).

کاربرد این تعریف حسن نیت در دعاوی اتباع مضاعف مورد بحث به نتیجه‌گیری های زیر منجر می‌شود : رفتار اتباع مضاعف را که دارای تابعیت مؤثر و غالب ایالات متحده هستند دست‌کم در سه مورد باید خلاف حسن نیت تلقی کرد : (۱) در مورد تقلب ، یعنی استفادهٔ آگاهانه و متقلبانه تبعهٔ آمریکایی از ابزار قانونی به منظور فرار از محدودیت های قوانین ایران و در نتیجه کسب منافع ناحق ؛ (۲) در موردی که وی از تابعیت ایرانی خود برای کسب حقوق یا به دست‌آوردن منافعی استفاده می‌کند که منحصرا" به اتباع ایران اختصاص دارد و برای اتباع بیگانه قابل حصول نیست ؛ (۳) در موردی که قوانین ایران برای اتباع بیگانه به لحاظ فعالیت های خاص محدودیت هایی در نظر گرفته است و در آن امور، دارندهٔ تابعیت مضاعف تابعیت (غالب و مؤثر) خود را افشاء نمی‌کند، بلکه برای اجتناب از آن محدودیت ها ، از تابعیت ایرانی خود سودجویی می‌کند .

اگر برخی قوانین ایران از اتباع بیگانه می‌خواهد که جهت ورود به ایران و اقامت در آنجا اجازهٔ مخصوص دریافت کنند ، یا محدودیت هایی برای انجام فعالیت های خاص در نظر می‌گیرد (نظیر فعالیت های مربوط به کسب و کار ، مالکیت مؤسسات بانکی)، مفهومش این است که قوانین ایران بین اتباع ایران و اتباع بیگانه تفاوت می‌گذارد . در نتیجهٔ این تمایز ، ایرانیان در موقعیت مناسب‌تری قرار می‌گیرند که در آن نیازی به پروانهٔ ورود یا اقامت و نیازی به پروانهٔ مخصوص برای دست زدن به فعالیت های شغلی ندارند ، کاملا" آزادانه در مؤسسات بانکی صاحب سهم باشند و نظایر آن . در قوانین ایران هیچ تردید و ابهامی وجود ندارد که : یک فرد یا ایرانی است یا خارجی؛ tertium non datur (شق ثالثی وجود ندارد) . چنانچه ایرانی باشد می‌تواند از کل مزایای مقررات قانونی برخوردار شود . بر عکس چنانچه تابعیت خارجی داشته باشد ، در موقعیت نامطلوبی قرار می‌گیرد که در آن یا از برخی فعالیت ها ، حقوق ، و مزایا کلا" محروم می‌شود یا تحت شرایط معین و خاصی می‌تواند به آن فعالیت ها دست

شرکت یا از آن مزایا برخوردار شود.

مورد اتباع مضاعفی که از افشای تابعیت مضاعف خود برای مقامات ایرانی سرباز میزنند و به این ترتیب از کلیهٔ امتیازات در نظر گرفته شده برای ایرانیان برخوردار میشوند، به وضوح نمونه‌ای از تخلف از حسن نیت است: اتباع مزبور، تنها با عدم اظهار این مطلب که هم دارای تابعیت ایران و هم تابعیت خارجی هستند، برخلاف نص صریح قوانین ایران در مورد ممنوعیت اتباع مضاعف، از مزایایی ناعادلانه و نادرست بهره‌مند میشوند.

لازم به تذکر است که این تخلف از حسن نیت هنگامی جدی تر میشود که تابعیت غالب و مؤثر دارندهٔ تابعیت مضاعف، تابعیت خارجی وی باشد. زیرا این امر به معنای آن است که فرد مزبور روابط نزدیک تری با کشور خارجی (در اینجا، ایالات متحدهٔ) دارد که نسبت به آن اعلام وفاداری کرده است و سرسپردگی و خلوص نیتش نسبت به آن کشور در مقایسه با کشور دیگر (در اینجا ایران) برتری دارد. چنانچه فرد تبعه به کشور خارجی وابستگی بیشتری داشته باشد، به طوری که یک دیوان بین المللی آن کشور را در اعمال حمایت سیاسی و قضایی از فرد مورد بحث محق بداند، در این صورت نمیتوان از نتیجه‌گیری زیر خودداری کرد: هنگامی که فرد با توسل به تابعیت کشوری که وی تصمیم به ترک وفاداری به آن گرفته است، از مزایای مورد اشاره درفوق استفاده میکند، آنکار را برخلاف اصل حسن نیت عمل میکند.

این مفهوم به صورت گویایی توسط پروفسور هنری رولن (Henry Rolin)، در دفاعیاتش در دیوان بین المللی دادگستری در دعوای نوتبوهم (Nottebohm) بیان شده است. وی در خصوص قوانین لیختن اشتاین (Liechtenstein) در بارهٔ تابعیت، اشاره میکند که قوانین مزبور کسب تابعیت بیگانه را موکول به ترک تابعیت اصلی نموده است. وی تا آنجا پیش میرود که در مورد فلسفهٔ این قوانین از خودسؤال میکند

و تأیید می‌کند که این فلسفه را باید تا حدودی در نیت جلوگیری از داشتن تابعیت مضاعف جستجو کرد. اما این ملاحظات عامل تعیین کننده نبود: عامل تعیین کننده را، که موجب شد تعدادی از کشورها در سال ۱۹۳۰ و سالهای پس از آن شرایط متاهلی را (ترک تابعیت اصلی برای تحصیل تابعیت دیگر یا بکار گیری روند کسب تابعیت "Naturalization") در نظر بگیرند، باید در نیت جلوگیری از انتفاع افراد از دو تابعیت شان و کسب مزایا از هر دو آن تابعیت ها جستجو کرد. همچنان که پروفسور رولن اظهار داشته :

" چیزی که دولت ها (در سال ۱۹۳۰ و سالهای بعد، هنگام گذراندن این قوانین در کشورهای مختلف) در نظر داشتند این بود که اطمینان یابند که متقاضی (کسی که درخواست تابعیت ثانوی می‌نماید) در درخواستش صمیمی و جدی است، و این که دودوزه بازی نمی‌کند، و این که یک تابعیت را به عنوان یک تابعیت یدکی، یعنی تابعیتی مکمل کسب نکرده که بتواند در عین حال که به تابعیت قبلی اش، تابعیت دیروز، تابعیت امروز، تابعیت فردا و به طور خلاصه تابعیت قطعی اش، رجوع می‌کند، هر زمان که منافعش ایجاب کند و آن را مناسب تشخیص دهد، از آن تابعیت یدکی نیز استفاده نماید."

(I.C.J, Pleadings, Nottebohm case, Vol.II, pp.198-199; emphasis added).

شاید نقل عباراتی از پروفسور اف. سانتورو پاسارلی یکی از استادان برجسته حقوق مدنی اروپا، در اینجا بی مناسبت نباشد. وی می‌گوید :

" در انطباق با اصل کلی همبستگی، قواعد حقوقی،

در زمینهٔ معاملات خصوصی، اصلی را مقرر می‌دارد که به موجب آن شخصی که اظهاراتی می‌کند که درنتیجهٔ آن اعتقادی (خالی از هر گونه قصور) درمخاطب او نسبت به اظهاراتش ایجاد می‌شود، به ریسکی دست می‌زند. این حمایت از " اعتقادی که ناشی از قصور نیست " به خارج از قلمرو معاملات خصوصی نیز بسط می‌یابد. در نتیجه هر گاه شخصی اظهاری بکند و متعاقب آن به نفع خود
(Cejus Commoda ejus et incommoda)
به فعالیتی دست بزند که موجب خسارت به مخاطب اظهاراتش شود می‌توان از تعهد عینی صحبت به میان آورد: این تعهد عینی را می‌توان به عنوان " ریسک " تلقی کرد. اما این " ریسک " ناشی از آن اظهارات نیست بلکه بیشتر ناشی از اعتقادی است که در شخص دیگر بوجود می‌آید."

چنانچه این تفسیر درخشان اصل حسن نیت را در مورد دعاوی مورد بحث به کار ببریم روشن می‌شود اتباع مقاعفی که از تابعیت ایرانی خود به طریق ذکر شده استفاده کرده‌اند، برخلاف اعتقاد موجه مقامات ایران عمل کرده‌اند. از آنجا که مقامات ایرانی نمی‌توانند به قصور متهم شوند*، بنابراین حق داشته‌اند که بر این حقیقت که اتباع مقاعف با انجام فعالیت های ذکر شده به مثابهٔ اتباع ایران رفتار کرده‌اند، تکیه کنند. از سوی دیگر دارندگان تابعیت مقاعف مزبور به " ریسکی قانونی " دست زده‌اند، به خاطر آن که حق انتفاع بعدی از تابعیت دیگر خود را به صرف اقامهٔ دعوی علیه ایران از دست داده‌اند.

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* تنها راه ممکن برای متهم کردن ایران به قصور در این زمینه، که واقعاً " مخیره " است، این است که بگوییم که هر دولتی در زمان قانون گذاری یا اقدام در مورد اتباعش، از لحاظ بین المللی موظف است که امکان داشتن تابعیت خارجی آنان را بررسی کند حتی اگر آنان خود هرگز چنین ادعایی نکرده باشند.

بنابراین یک بار دیگر می‌توان استدلال کرد که دعاوی اقامه شده در دیوان توسط اتباع مضاعف، برخلاف اصل فراگیر حسن نیت است و در نتیجه باید رد شوند.

ب - نظریهٔ سوء استفاده از حق

توافقی عام در ادبیات حقوقی بین المللی وجود دارد که سوء استفاده از حق، یک اصل کلی حقوقی است که در مناسبات بین المللی قابل استناد است. در این زمینه رجوع شود به :

N.Politis, " Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux" , in Recueil des Cours de l'Académie de La Haye, Vol.6, 1925-I, p.1 ff.; G. Scelle, Précis du droit des gens, Vol.2, 1934, p.38; B.Cheng, General Principles of Law as Applied by International Courts and Tribunals, 1953, p.121 ff.; G.Schwrazenberger, " Uses and Abuses of the 'Abuse of Rights' in International Law", in Transactions of the Grotius Society, Vol.42, 1956, p.147 ff.; M.Virally, " The Sources of International Law", in M.Sorensen (ed.), Manual of Public International Law, 1968, p.148; Taylor, " The Content of the Rule Against Abuses of Rights in International Law", in British Yearbook of International Law, Vol.46. 1972-73, p. 323 ff.; B.O. Iluyomade, " The Scope and Content of a Complaint of Abuse of Right in International Law" in Harvard International Law Journal Vol.16, 1975, p.47 ff.; V.Paul, "The Abuse of Rights and Bona Fides in International Law", in Oesterreichisches Zeitschrift fuer oeffentliches Recht und Voelkerrecht, Vol.28, 1977, p.107 ff.; A.C. Kiss, " Abuse of Rights" , in Encyclopedia of Public International Law, Vol.7, 1984, p.1 ff.; A.Verdross-B. Simma, Universelles Voelkerrecht, 3rd ed., 1984, p.281; D. Nguyen Quoc, P.Daillier, A.Pellet, Droit international Public, 3rd ed., 1987, p.321; D.Carreau, Droit international, 2nd ed., 1988, pp.167 and 286.

احتمالا" جامع ترین تعریف سوء استفاده از حق توسط پروفسور آنتونی داماتسو داده شده است. از نظر وی نظریهٔ مورد بحث" به مفهوم این است که یک دولت نمی‌تواند حقوقی را که از لحاظ بین المللی دارا می‌باشد تنها به منظور زیان رساندن، یا به صورت ساختگی برای سرپوش گذاشتن بر اقدامی غیر قانونی یا فرار از زیر بار تعهدی مورد استفاده قرار دهد."

(" Good Faith ", in Encyclopedia of Public International Law, Vol.7, 1984, p.10); emphasis added .

بنا به اظهارات پروفسور کیس (I.C. Kiss) یکی از صاحب نظران در این زمینه، مفهوم سوء استفاده از حق در سه وضعیت حقوقی متمایز به کار می‌رود (مرجع قبلی صفحهٔ ۱) . از سه وضعیت مشخص شده توسط کیس، وضعیت سوم که کیس به شرح زیر توضیح داده، به کار ما مربوط می‌شود:

> " اعمال دلخواهانهٔ حقوق توسط یک دولت که موجب ضرر و زیان کشورهای دیگر، بدون نقض آشکار حقوق آن کشورها، می‌شود می‌تواند به معنی سوء استفاده از حق باشد. در مقابل وضعیت قبلی (که در آن حق به طور عمدی به منظوری جز آنچه حق برای آن وضع شده است و یا نتیجهٔ ایجاد خسارت اعمال می‌شود)سوء نیت یا قصد ایجاد خسارت لازم نیست به چنین صورتی باشد. در اینجا اهداف کلی تری مطرح است که به نقض اجتماعی حق اعمال شده مربوط می‌شود."

چنانچه این مفهوم را در مورد مسایل مورد بحث به کار ببریم، روشن می‌شود که اتباع مقاعی که، در شرایط فوق الذکر، حقوق در نظر گرفته شده در قوانین ایران را اعمال می‌کنند مرتکب سوء استفاده از حق می‌شوند. زیرا همچنان که پیش از

این تأکید، نقض اصل قوانین ایران در خصوص تابعیت اتباع خودی و بیگانه بر مبنای ایجاد یک تمایز آشکار بین ایرانیان و بیگانگان با مرجح شمردن دسته اول است.

دارندهٔ تابعیت مضاعف (یا تابعیت غالب و مؤثر خارجی) که بدون درخواست اجازهٔ کار، کارمندی خارجیانی که در ایران کار می‌کنند داشتن آن الزامی است، به منظور تأمین شرکت اظهار می‌دارد که ایرانی است و از اعتنای تابعیت خارجی خود، خودداری می‌کند و جهت خرید بلیط در مؤسسات بانکی باز هم اعلام می‌دارد که ایرانی است و تابعیت غالب خارجی خود را کتمان می‌کند، چنین تبعهٔ مضاعفی کلیهٔ این اعمال را به منظور اصلی زیان رساندن به مقامات ایرانی انجام نمی‌دهد؛ وی با اقدام برخلاف مقاصد اجتماعی قوانین ایران که موجد چنین حقوقی است، از حقوق خود سوء استفاده می‌کند. شخص مزبور قوانین ایران را دور زده و هدف اصلی آن قوانین را (که ایجاد تمایز بین ایرانیان و اتباع بیگانه است) نقض نموده و با طی کج راهه‌ای که مخالف روح نقض اجتماعی آن قوانین است حقوق و مزایایی کسب کرده است.

Iran Award 573-271-3 (Iran-U.S.Cl.Trib.), 1996 WL 1171811

JAHANGIR MOHTADI and JILA MOHTADI, Claimants,
v.
THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, Respondent.

CASE NO. 271
CHAMBER THREE

AWARD NO. 573-271-3

Iran-United States Claims Tribunal
Filed December 2, 1996
Signed December 2, 1996

AWARD

Appearances:

@@For the Claimants: Dr. Jahangir Mohtadi, Claimant; Mr. Ted Amsden, Ms. Margaret A. Costello, Counsel for Claimants; Mr. Mansour Anvari, Witness;
@@For the Respondent: Mr. Ali H. Nobari, Agent of the Government of the Islamic Republic of Iran; Mr. Nozar Dabiran, Legal Adviser to the Agent; Mr. Kamal Majedi Ardekani, Mr. Mohammad Reza Hossenian, Witnesses;
@@Also present: Mr. D. Stephen Mathias, Agent of the Government of the United States of America; Ms. Mary Catherine Malin, Deputy Agent of the Government of the United States of America.

I. INTRODUCTION

***1** 1. The Claimants in this Case are JAHANGIR MOHTADI and JILA MOHTADI ("the Claimants"), dual Iran-United States nationals, who are husband and wife and who reside in the United States. The Respondent in this Case is THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN ("the Respondent" or "GOI"). The Claimants seek compensation from the Respondent in the total amount of U.S. $2,289,694.00 for the alleged confiscation of two pieces of real estate located in Iran—one located in Velenjak, Tehran, and the other in Shahsavar, near the Caspian Sea. Interest and costs are also sought.

2. The Respondent denies liability. It raises several jurisdictional and other preliminary objections, including the following: that the Claimants' dominant and effective nationality was not that of the United States during the relevant period; and that Mrs. Jila Mohtadi has no standing to claim as she did not own or co-own either of the two properties at issue. The Respondent also denies that it has expropriated either of the properties or subjected them to any other measures affecting the Claimants' property rights. It further argues that if the Claimants are found to be dual nationals whose dominant and effective nationality is that of the United States, the caveat in Case No. A18 bars their recovery.

II. PROCEDURAL HISTORY

3. The Claimants filed a Statement of Claim on 14 January 1982. The Respondent filed a Statement of Defence on 31 May 1982.

4. By Order of 28 June 1985, the Tribunal noted that the Full Tribunal in Case No. A18 had held "that it has jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the Claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States," and ordered the Parties to file all the written evidence they wished the Tribunal to consider on the nationality issue. On 24 October 1985 the

Claimants filed evidence on their nationality, and on 18 January 1989 the Respondent did the same. By Order of 11 July 1990, the Tribunal joined all jurisdictional issues, including the issue of the Claimants' nationality during the relevant period between the time the claim allegedly arose and 19 January 1981, to the consideration of the merits of the Case. In the same Order, the Tribunal instructed the Claimants to submit certain additional information on their nationality, which they filed on 10 April 1991.

***2** 5. On 6 February 1991, the Claimants filed their Hearing Memorial. On 28 February 1992, the Respondent in turn filed its Hearing Memorial. On 29 June 1992, the Claimants filed their Rebuttal Memorial and on 2 March 1993, the Respondent filed its Rebuttal Memorial.

6. A Hearing in this Case was held on 7 December 1993.

7. In response to queries posed at the Hearing, the Claimants submitted additional information on 20 December 1993 and 19 January 1994.

III. JURISDICTIONAL AND PRELIMINARY ISSUES

A. Standing of Mrs. Jila Mohtadi to Bring a Claim

8. The Respondent raises an objection to the standing of Mrs. Jila Mohtadi to bring a claim before the Tribunal, on the ground that she is not the owner or the co-owner of either of the properties at issue. The Respondent argues that questions involving the ownership of real estate in Iran are governed by the lex loci rei sitae, which is Iranian law. The Respondent further argues that since both properties were purchased by her husband, Dr. Jahangir Mohtadi, acting alone and in his own name, Mrs. Mohtadi has no ownership rights in respect of the properties.

9. The Claimants respond that since Jahangir Mohtadi purchased both properties during the course of his marriage, his wife has an interest in the properties pursuant to United States law. They cite Section 558.1 of the Michigan Compiled Laws Annotated in support of the proposition that "Jila Mohtadi has a dower right to one-third part of all the lands her husband acquires or inherits during the marriage. This dower right vests if she bec[omes] a widow."

10. The Tribunal notes that it is clear from the Claimants' own contentions that any right that Jila Mohtadi may possess under the law of the State of Michigan is contingent upon her husband's death. As her husband, Jahangir Mohtadi, remains alive at the time of issuing this Award, the Tribunal finds that any claim Mrs. Mohtadi arguably may have is not ripe for adjudication. Consequently, the Tribunal finds it unnecessary to decide this issue. The Tribunal will therefore proceed to treat this claim as though it has been brought solely by Dr. Jahangir Mohtadi, who will henceforth be referred to as "the Claimant."

B. Dominant and Effective Nationality of Dr. Mohtadi

11. Dr. Jahangir Mohtadi was born in Iran to Iranian parents on 10 October 1930.[1] He was naturalized as a United States citizen on 24 July 1978. There is no evidence in the record that the Claimant has relinquished or otherwise lost either his Iranian nationality in accordance with Iranian law or his United States nationality in accordance with United States law. Consequently, the Tribunal finds that since 24 July 1978, the Claimant has been a citizen of both Iran and the United States.

***3** 12. On 6 April 1984 the Full Tribunal issued a decision in Case No. A18, in which it determined that the Tribunal has jurisdiction over claims against Iran by dual Iran-United States nationals "when the dominant and effective nationality of the claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States."[2] Accordingly, for the Tribunal to have jurisdiction over his claim, it must be shown that Dr. Mohtadi's United States nationality was dominant and effective during the relevant period, i.e., from the date his claim arose until 19 January 1981, the date on which the Claims Settlement Declaration entered into force. For the limited purpose of establishing the parameters of the relevant period, the Tribunal accepts the earliest date alleged by the Claimant, 26 June 1979, as the date on which his first claim arose. Consequently, for purposes of the inquiry into the dominant and effective nationality of the Claimant, the Tribunal concludes that the relevant period is that between 26 June 1979 and 19 January 1981.

13. In order to reach a conclusion as to the Claimant's dominant and effective nationality during the relevant period, the

Tribunal must determine whether the Claimant had stronger ties with Iran or with the United States during that period. To this end, the Tribunal must consider all relevant factors, such as the Claimant's habitual residence, center of interests, family ties, participation in public life and other evidence of attachment. See Case No. A18, 5 Iran-U.S. C.T.R. at 265. While the Tribunal's jurisdiction is dependent on the Claimant's dominant and effective nationality during the period between 26 June 1979 and 19 January 1981, the events and facts preceding that period also remain relevant to the issue. See Reza Said Malek and The Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 68-193-3 (23 June 1988), reprinted in 19 Iran-U.S. C.T.R. 48, 51-52.

14. The record reveals that the Claimant lived in Iran from 1930 to 1958, and that he attended the School of Pharmacology of Tehran University from 1947 to 1951 and the Medical School of Tehran University from 1952 to 1958. During 1959, the Claimant completed an internship in the United States at a hospital in Wichita, Kansas. Upon completion of the internship, he returned to Iran and married Jila Moin, who was also an Iranian national. From 1961 to 1966 the Claimant resided in the United States with his wife to specialize in medicine, completing internships at various hospitals in the State of Michigan. On 17 November 1964, his first child, Nader Roy Mohtadi, was born in the United States.

15. In August 1966, the Claimant and his family returned to Iran, and the Claimant worked at a government-sponsored hospital in Tehran until April 1968. The Claimant's daughter, Negin Mohtadi, was born in Iran on 2 November 1967. On 30 November 1967, the Claimant purchased the first property at issue in this Case—a parcel of land in Velenjak, Tehran. Around this time, the Claimant applied for permanent resident status in the United States, which was granted by the United States authorities. Thereafter, in April 1968, the Claimant and his family returned to the United States and the Claimant started a private practice as a medical practitioner in Northville, Michigan. The Claimant contends that from that time on, he paid Social Security and income taxes in the United States. He further contends that almost all of his professional experience was obtained in the United States, and that he has been a member of various American professional societies since 1968.

***4** 16. In 1969 the Claimant and his wife purchased a house in the United States for their residence. Also between 1968 and 1973, the Claimant and his wife purchased four parcels of real estate (including the building where his medical practice was located) in the States of Arizona and Michigan on a land contract basis. While residing in the United States, on 24 June 1974, the Claimant purchased the second property at issue in this Case—a property in Shahsavar, Iran—by proxy to his sister in Iran. In August 1975 the Claimant purchased a second residence in the United States.

17. Mrs. Jila Mohtadi was naturalized as a United States citizen on 18 July 1977. The Claimant was naturalized as a United States citizen on 24 July 1978; his daughter was naturalized as a United States citizen on the same day. The Claimant was issued a United States passport on 3 October 1978. On 6 August 1979, the Claimant and his wife renewed their Iranian passports at the Iranian Consulate in Chicago. The Claimant contends that he and his wife voted in the American Presidential election of 1980. From the time of their final move to the United States in 1968, the Claimant contends that he returned to Iran only three times—in 1970, 1973 and 1976—to visit relatives in Iran. The Claimant contends that his dominant and effective nationality during the relevant period was that of the United States.

18. The Respondent points out that the Claimant completed his elementary, secondary and tertiary education in the fields of pharmacology and medicine in Iran. It contends that the Claimant travelled to the United States merely to study and to specialize in his profession. The Respondent argues that the Claimant retained deep-rooted family, academic and cultural attachments to Iran, and it suggests that he acquired United States nationality out of expediency at the culmination of the Iranian Revolution. It argues further that the time spent by the Claimant in the United States does not provide evidence of his permanent residence there, nor of a shift in the center of his interests, family ties and social and professional attachments from Iran to the United States. The Respondent concludes that the Claimant was a dominant and effective Iranian national at all relevant times.

19. The Tribunal notes first that the Claimant lived in the United States for a substantial time before the commencement of the relevant period. Apart from a brief period between 1966 and 1968, he has lived in the United States continuously since 1961. Furthermore, from 1968 onwards, there are strong indications that the Claimant and his family had chosen to make their lives in the United States. Particularly from the late 1960s onwards, the Claimant's professional life was increasingly centered in the United States, as shown by the fact that the Claimant opened a medical practice in the United States in 1968 and has practiced his profession there ever since. The Claimant subsequently joined various professional associations. In addition, he and his wife purchased two family homes in the United States, in 1969 and 1975, as well as several other pieces

of property for investment and business purposes. His children were brought up in the United States and he fulfilled his civic duties, including the payment of taxes and participation in elections.

***5** 20. The Claimant's ties to Iran, on the other hand, weakened progressively over the years that he lived in the United States. After 1968 he travelled to Iran only three times, these being for family visits lasting approximately three or four weeks each in 1970, 1973 and 1976. By the commencement of the relevant period (at its earliest June 1979), his economic ties to Iran had dwindled to the properties at issue in this Case, which had been purchased several years earlier, in 1967 and 1974. He had no other business or professional interests in Iran after 1968. Furthermore, at the Hearing, the Claimant contended that by 1977 all his close relatives in Iran had died.

21. To be sure, one factor weighing against the Claimant is his delay in applying for United States nationality until an unspecified date in 1977 or 1978. However, this delay was credibly explained at the Hearing by the Claimant's description of his increasing objective and subjective attachment to the United States in the late 1960s and early 1970s, together with a gradual lessening of his ties to Iran. His application for United States citizenship and subsequent naturalization as a United States national demonstrate that in 1977 he made a definitive choice for the United States over Iran. The fact that the Claimant and his wife applied for extensions of their Iranian passports in 1979 is also a factor that weighs against the Claimant. However, at the Hearing, the Claimant explained this act as motivated by the possibility that it might have been necessary for him to travel to Iran to assist family members. In the light of this plausible explanation, this factor is likewise not sufficient to tilt the balance away from the dominance of the Claimant's United States nationality during the relevant period.

22. Consequently, the Tribunal finds that although the factors discussed above demonstrate that the Claimant did not sever all his links with Iran, these factors do not outweigh his closer and very lengthy ties to the United States. By the time the relevant period began, the center of his professional, economic and personal activities was the United States. The Tribunal therefore finds that the dominant and effective nationality of the Claimant from the date his claim is alleged to have arisen (26 June 1979) until 19 January 1981 was that of the United States. It follows that the Tribunal has jurisdiction over his claim.

IV. MERITS—FACTS AND CONTENTIONS

A. The Claimant's Contentions

1. The Velenjak Property

23. The Claimant contends that his claim in respect of the property in Velenjak arose through the expropriation of that property by the Respondent on 26 June 1979. The property in question is an undeveloped piece of real estate measuring approximately 2,110.5 square meters located in Velenjak, a residential suburb of Tehran. The Claimant alleges that he is the owner of the property, and in support of that allegation he has submitted a title deed showing that the land was registered in the Claimant's name on 30 November 1967. The Claimant further contends that this property was taken by the Respondent on 26 June 1979. In this regard, the Claimant relies on various pieces of Iranian legislation that allegedly effected a legislative taking of the property.

***6** 24. The first piece of legislation invoked by the Claimant is the "Act Concerning Abolition of Ownership of Mavat [Undeveloped] Urban Lands and the Manner of their Development" [hereinafter the "Abolition Act"], which was enacted by the Islamic Revolutionary Council on 26 June 1979.[3] The Claimant contends that this Act expropriated undeveloped urban lands like the Velenjak property. The Claimant further contends that the expropriatory effect of the Abolition Act was confirmed by the subsequent promulgation of Regulations implementing the Act, which were drafted by the Ministry of Housing and Urban Development and approved by the Council of Ministers on 13 August 1979 [hereinafter the "Abolition Regulations"]. In addition, the Claimant cites the Amendment to the Abolition Act passed on 27 August 1979 as confirming the expropriation of undeveloped urban lands, as well as the 1980 Implementing Act for Tehran.[4] The Claimant alleges that as of the date of the enactment of the Abolition Act, undeveloped urban lands in Iran could not be sold, transferred or otherwise disposed of.

25. In further support of his claim, the Claimant has submitted several articles from the Tehran daily newspaper Ettela'at. He

argues that these articles provide evidence of contemporaneous statements by government officials indicating that the Abolition Act, as implemented by the Abolition Regulations, effected a taking of undeveloped urban lands larger than 1000 square meters in area. He further contends that in September 1979 the National Organization for the Registration of Documents and Real Property issued a circular to all Notary Public Offices in Iran, prohibiting them from recording any transfer of title of undeveloped lands larger than 1000 square meters.

26. The Claimant points out that the Velenjak property was larger than 1000 square meters and contends that it would therefore not have qualified under the so-called "small parcel exemption" provided for in the Abolition Act, which exempted undeveloped lands smaller than 1000 square meters in area from the Act's effects in some instances. He argues that even if the land had qualified for exemption from the Abolition Act on that basis, he would not have been able to take advantage of the exemption because of alleged restrictions on the use and authentication of foreign powers of attorney in Iran.

2. The Shahsavar Property

***7** 27. The Claimant's second claim is for the alleged expropriation of a piece of real estate measuring approximately 27,583 square meters situated in the Shahsavar area in Iran, near the Caspian Sea. The Claimant alleges that he was the registered owner of this property, and he has submitted a title deed for the property showing that it was transferred to him on 24 June 1974.

28. The Claimant alleges that this property was expropriated by the Respondent on 16 September 1979 through the "Law Concerning the Manner of Grant and Reclamation of Lands Within the Jurisdiction of the Islamic Republic of Iran" [[[[[[[hereinafter the "Lands Grant Act"].[5] The Claimant argues that the Lands Grant Act expropriated land described as "woodlands" and that the Shahsavar property was woodland at the date of enactment of the Act. The Claimant also cites a contemporaneous newspaper report in support of this contention.

29. In the alternative, the Claimant alleges that his property rights were interfered with physically, through the invasion of his land by persons whose actions were allegedly sanctioned by the Respondent.

B. The Respondent's Contentions

30. The Respondent does not contest the Claimant's ownership of the properties in question. Rather, it denies that it expropriated those properties and specifically denies that the legislation invoked by the Claimant effected a taking of them.

1. The Velenjak Property

31. Concerning the property in Velenjak, the Respondent contends that the Abolition Act applied only to mavat land, see para. 38, infra. It further contends that the Velenjak property was bayer land, and not mavat land, because it is characterized in the title deed as bayer land. Consequently, the Respondent argues, the Abolition Act did not expropriate the Velenjak property. The Respondent concedes that the Velenjak property could have fallen within the scope of the Urban Lands Act of 18 March 1982, but it points out that this Act was passed after the Tribunal's jurisdictional cut-off date of 19 January 1981.

32. In response to the Claimant's allegation about limitations on powers of attorney, the Respondent contends that the Claimant would not have been affected by any such restriction because he held an Iranian passport.

2. The Shahsavar Property

33. Concerning the property in Shahsavar, the Respondent contends that the property was not woodlands at the date of the alleged taking (16 September 1979), but rather had been developed into farmland or orchards prior to that date. In support of this contention, it cites the 21 August 1967 Law Concerning Protection and Operation of Woods and Pastures, which allegedly leased woodland to persons for conversion into agricultural land within a limited period. According to the Respondent, this Act provides that woodland properties could be sold to the lessee only after they had been converted into agricultural land. As the Shahsavar property had been registered first in the name of the Claimant's brother-in-law, Mr. Mahmood Rostami, and then in the name of the Claimant himself in 1974, the Respondent concludes that the land must have been converted into farmland long before the passage of the Lands Grant Act in 1979. The Respondent further argues that

even if the property was woodlands at the alleged date of taking, it was not expropriated by the Lands Grant Act. In addition, the Respondent contests the relevance and reliability of the newspaper report submitted by the Claimant.

3. The Caveat in Case No. A18

***8** 34. The Respondent raises a further argument, namely that the claims should be dismissed on the merits by application of the caveat in Case No. A18. The Respondent argues in essence that the Claimant is claiming before the Tribunal, in his capacity as a United States national, for the purpose of receiving compensation for the alleged expropriation of real estate that he had purchased and continued to own solely in his capacity as an Iranian national. In this regard, the Respondent relies on an interpretation of Articles 988 and 989 of the Iranian Civil Code. It argues that Article 989 of the Civil Code envisages a one-year "grace period" after the acquisition of a second nationality within which the Claimant allegedly should have divested himself of his real properties in Iran. The Respondent argues further that the grace period in this instance expired on 24 July 1979, i.e., one year after the Claimant was naturalized as a United States citizen on 24 July 1978. The Respondent contends that at least as of 24 July 1979 the Claimant was in violation of Article 989 of the Iranian Civil Code by continuing to own real property in Iran. It raises the international law doctrines of estoppel, clean hands and abuse of rights as reasons why the claim should be dismissed on the merits, and it argues that Iran can incur no state responsibility under international law because it has not committed an internationally wrongful act.

V. MERITS—THE TRIBUNAL'S FINDINGS

A. Ownership

35. The Claimant contends that he was the registered owner of the two properties at issue in this Case—the Velenjak property and the Shahsavar property. In support of this contention he has produced title deeds to both properties, which show that the Velenjak property was registered in his name on 30 November 1967 and that the Shahsavar property was registered in his name on 24 June 1974. The Respondent does not contest Dr. Mohtadi's ownership of the properties in question, so this matter is not in dispute between the Parties. The Tribunal is satisfied that the record confirms that the Claimant was the registered owner of the properties at issue in this Case.

36. The Tribunal therefore must turn to the question whether—for each of the properties at issue—the legislation or other official actions invoked by the Claimant constituted either an expropriation or a measure affecting the Claimant's property rights within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration.

37. As noted above, the Claimant seeks to rely on several pieces of Iranian legislation to support his contention that his properties were expropriated. In order to come to a conclusion on whether an expropriation or other measure affecting property rights has occurred in respect of the Claimant's property, it will be necessary to review in some detail the relevant Iranian land reform legislation and other official acts of the Respondent. The Tribunal therefore turns first to the legislation invoked by the Claimant as relevant to the Velenjak property.

B. The Velenjak Property

1. Expropriation

a. Applicable legislation

***9** 38. As a preliminary matter, it should be noted that Iranian law classifies real estate into a number of different categories. Most relevant for present purposes is land classified as mavat and land classified as bayer. The Tribunal understands mavat land to be land that is undeveloped and that has no prior record of development. The Tribunal understands bayer land to be land that previously has been developed but that has fallen into disuse.

39. The Claimant's Velenjak property is identified in the title deed as bayer land. The Claimant, however, argues that the land is really mavat land because the land was in fact undeveloped and unutilized. By the close of the Hearing, there did not appear to be any dispute between the Parties as to the fact that there was no development of any kind on the Velenjak property from the date the Claimant bought it until at least the date of the alleged expropriation. In fact, the Respondent's

expert witness testified at the Hearing that the property remains undeveloped at the present time. Nevertheless, based on the use of the term bayer in the title deed to the property, the Tribunal infers that the property may have been developed or utilized in some way prior to the Claimant's acquisition of it. In any event, the Tribunal is disinclined to question the characterization of the land in the official deed. Accordingly, the Tribunal concludes that the Velenjak property must be deemed to be bayer land. It will therefore be necessary to inquire whether the 1979 Abolition Act, as amended and implemented, affected undeveloped bayer land such as the Velenjak property.

40. The starting point of the inquiry is the 1979 Abolition Act, adopted by the Revolutionary Council of the Provisional Government of the Islamic Republic of Iran on 26 June 1979.[6] The Abolition Act states in its Preamble:

Whereas under Islamic standards Mavat [undeveloped] land is not recognized as anyone's property, it is at the disposal of the Islamic Government, and ownership deeds that were issued during the former regime with regard to mavat lands lying within or outside city boundaries, are contrary to Islamic precepts and against the interests of the people.

41. The relevant provisions of the Abolition Act read as follows:

Article 1: In connection with lands lying within the legal (25-year) boundaries of cities, where such boundaries exist, and also in other cities within the limits to be determined and announced by the Ministry of Housing and Urban Development, the Government shall, in a gradual manner and with due observance of the detailed urban plan in each region, inform those individuals who were, under the criteria of the former regime, recognized as owners of such lands, to take measures to develop and improve those lands within a specified period. In the event no action is taken by them within the stipulated period, they shall be afforded no priority, and such lands will be taken over by the Government without compensation.

***10** Note: Those persons who have procured a small piece of land for their personal residence, and do not own a residential unit, shall be given, by the Government, a minimum period of three years to develop their lands.

Article 3: The manner of notification to those individuals who were recognized as the owners of such lands in the former regime, classification of lands as mavat [undeveloped], and the manner of development and improvement, as well as the conditions of transfer of the said lands, the determination of the area of land referred to in the Note to Article 1 in each region, and other matters relating to the implementation of this Act shall be in accordance with the Regulations which are to be prepared by the Ministry of Housing and Urban Development, and approved by the Council of Ministers.

42. Article 1 of the Abolition Act, read in conjunction with the Act's Preamble, evinces a clear policy by the new Government against the private ownership of undeveloped urban lands. Such lands are "not recognized as anyone's property" and are "at the disposal of the Islamic Government," according to the Preamble; and Article 1 refers to "those individuals who were ... recognized as owners" under the former regime (emphasis added). At the same time, Article 1 appears to hold out the possibility that the formerly-recognized owners of undeveloped urban lands might be able to regain their ownership by developing the land, although what sort of development would be required, and what period of time would be allowed for this to be accomplished, is left unspecified. The Note to Article 1 exempts some owners of "small" parcels of undeveloped lands from the Act's expropriatory scope for at least three years, but it does not define what constitutes a "small" parcel. Article 3 then goes on to delegate the resolution of most specific issues relating to the implementation and enforcement of the Abolition Act to the Ministry of Housing and Urban Development, which is authorized to draft implementing regulations for the approval of the Council of Ministers.

43. Less than two months after the passage of the Abolition Act, on 13 August 1979, the Council of Ministers approved Regulations drafted by the Ministry of Housing and Urban Development to implement the Act. These Regulations provided, inter alia, that "for the purposes of [the Abolition Act] undeveloped [mavat] land is land which has been left idle and on which no development or improvement has been made." However, Article 2 of the Regulations goes on to define "acceptable development and improvement" to include such examples as the existence of: a house; the ruins of a building; land under agricultural cultivation; flower gardens; tree orchards; parking lots; service stations; and swimming pools and recreation facilities.

44. It is not in dispute that the Claimant's property contained no such development, or indeed any analogous development. The plain wording of the Abolition Regulations, therefore, makes it clear that the Claimant's property would not have qualified as acceptably developed, and—despite its formal characterization in the title deed as bayer land—would therefore have come within the scope of the Abolition Act.

***11** 45. This reading of the Abolition Act is confirmed by other evidence, most significantly an Opinion issued by the Guardian Council on 3 February 1981—after the Tribunal's jurisdictional cut-off date of 19 January 1981. The Guardian Council is the body charged by the Constitution of Iran with ensuring that Iranian legislation conforms with Islamic law and the Constitution of Iran. Its 3 February 1981 Opinion held that the Abolition Regulations "applie[[[[[[[d] to previously developed bayer lands" and therefore were contrary to Islamic law and violated the Iranian Constitution. The Regulations were declared "unenforceable" to the extent that they applied to bayer land. After a request from the Ministry of Housing for a clarification of that Opinion, the Islamic Jurists of the Guardian Council confirmed that their Opinion related solely to the applicability of the Regulations to previously developed urban bayer lands and did not concern the Abolition Act itself or measures taken on the basis thereof.

46. While the Guardian Council Opinion is useful as an interpretive tool for understanding the intention and scope of the 1979 Abolition Act as applied, the Tribunal is acutely aware that the Opinion was not rendered until after the Tribunal's jurisdictional cut-off date of 19 January 1981. Consequently, the Tribunal cannot take the Opinion into account for any other purpose. The Tribunal is concerned exclusively with the impact, if any, of Iranian land reform legislation on the Claimant's property from the date the claim allegedly arose until 19 January 1981. Any subsequent changes to the legislation are not directly relevant to the potential impact of the legislation during the relevant period. The Guardian Council Opinion is significant merely in that it confirms that the scope of the Abolition Regulations extended to urban bayer land.[7]

47. In addition to defining the meaning of mavat land as used in the Abolition Act, the Abolition Regulations clarified the meaning of the small-parcel exemption contained in the Note to Article One of the Act. This small-parcel exemption was defined in Article 5 of the Regulations as applying to land with a maximum area of 1000 square meters in large cities like Tehran. An Amendment to the Abolition Act announced on 27 August 1979 further clarified the meaning of the small-parcel exemption by providing that for plots in excess of the small-parcel exemption, no grace period for development was granted; instead, such lands "will become Government property forthwith."

48. The scope of the Abolition Act was further extended by the "Law Concerning Abolition of Ownership of Mavat [Undeveloped] Urban Lands Situated within the Legal Twenty-Five-Year [Development] City Limit of Tehran and its Protective Border" [hereinafter the "Implementing Act for Tehran"], which was approved by the Revolutionary Council on 26 March 1980, and published in the Official Gazette dated 14 May 1980.[8] This Act extended the application of the Abolition Act beyond the 25-year city limit of Tehran to the city's "protective border." Its Single Article provided:

***12** The private ownership of all the lands situated within the legal twenty-five-year [development] city limit of Tehran and its protective border, per the attached map, which have remained in a mavat [undeveloped] condition and on which no development or improvement has taken place, is abolished by virtue of the provisions of the [Abolition Act] as from the date of transmission thereof [emphasis added].

49. In continuation of its program of land reform, on 18 March 1982 the Islamic Consultative Assembly approved the Urban Lands Act. That Act defined bayer land in the following way: "Bayer [unutilized] urban lands are lands which have a record of development and reclamation but have gradually reverted into mavat condition." The Urban Lands Act states that "[a]ll mavat urban lands are at the disposal of the Government of the Islamic Republic of Iran, and previous ownership deeds and documents are devoid of legal validity." Significantly, it states further in Article 7 that "[a]ll bayer urban lands which have no known owners are at the disposal of the Government." Article 8 prohibits the sale of urban bayer lands in excess of 1000 square meters, except to the Government, and Article 9 provides for the forced sale of bayer lands to the Government at its discretion. The Urban Lands Act also instituted new procedures for the cancellation of title deeds and for hearing the objections of interested parties, providing in addition that the process was to be overseen by the judicial authorities.

b. Tribunal's findings on expropriation

50. The Claimant has argued that the Velenjak property would not have fallen within the "small-parcel" exemption of the Abolition Act as implemented. The Claimant contends that this is so because the small-parcel exemption only covered land of less than 1000 square meters; the Claimant's land was over 2000 square meters. He argues further that in any event it would not have been possible for him to qualify for exemption, as he would not have been able to file a petition seeking an exemption on the basis of this provision within the three months required, especially from the United States.[9] This difficulty would have been compounded, he alleges, because there were restrictions in force on the use in Iran of foreign powers of attorney.

51. The Tribunal notes that the Respondent has not argued that the Velenjak Property fell within the small-parcel exemption. In large cities like Tehran, where the property was located, the small-parcel exemption would have applied only to lands of less than 1000 square meters. Consequently, based on its area—stated in the title deed to be 2,110.5 square meters—the Tribunal finds that the Claimant's land would not have fallen within the small-parcel exemption set out in the Abolition Act, as amended.

***13** 52. The Claimant has argued further that the effect of the Abolition Act, as amended and implemented, was to expropriate the Velenjak property, without the necessity of any specific action on the part of the authorities directed against his property in particular. The Respondent denies that the legislation was of relevance to land such as that owned by the Claimant. The Tribunal therefore turns to the question whether the Abolition Act, as amended and implemented, expropriated the Velenjak property.

53. In this regard, the Tribunal is not convinced that the mere passage of the Abolition Act with its Regulations and amendments in itself effected a taking of the Claimant's property. It is true that a textual reading of the Abolition Act and its amendments is consistent with its being a self-executing statute. For instance, the Abolition Act states that "mavat land is not recognized as anyone's property" and the 27 August 1979 Amendment to the Act states that the land covered by the Act "will become Government property forthwith." The title deeds to properties located within the geographical reach of the Abolition Act and the Implementing Act for Tehran would therefore be susceptible to cancellation at any time thereafter.

54. However, other factors suggest that the Abolition Act was not a self-executing statute. For instance, the Regulations to the Abolition Act, while not entirely clear, appeared to require that certain procedures be carried out, resulting in a determination whether the land in question was mavat land. Such procedures included the assessment of improvements to land in order to determine whether the land would be exempted from the Act, as well as application by landowners for exemption from the effects of the Act on the basis of the small-parcel exemption. A contemporaneous newspaper report supports this view. In the Ettela'at of 2 September 1979, the Iranian Minister of Housing and Urban Development, Mr. Mostafa Katirai, is reported to have announced:

We have divided the lands into two categories. Small undeveloped lands and large undeveloped lands. The owners of the small undeveloped lands must develop their lands within the time limit provided in the [Abolition Act]. Large lands and lands in excess of the limit provided by law belong to the Government. For this reason, we have asked the Ministry of Justice to notify the National Organization for Registration of Documents and Real Properties to issue a circular to the Offices of the Notary Public prohibiting any transaction on lands in excess of the limit specified by law, because the status of owners of large lands must first be determined so that if they allege that their lands are not undeveloped, the matter must be examined and decided whether or not the land has been developed, then a transaction on it would be permitted [emphasis added].

The Tribunal therefore concludes that the implementation and enforcement of the Abolition Act and the Implementing Act for Tehran apparently remained contingent upon a determination that the land in question was large, undeveloped land. See Karubian, Award No. 569-419-2 at paras. 52, 106-108.[10]

***14** 55. The Tribunal's conclusion that the legislation invoked by the Claimant was not self-executing and did not operate automatically to expropriate his property is strengthened by the fact that the Claimant's land is identified in the title deed as bayer rather than as mavat land. While the Regulations to the Abolition Act were drafted so widely that they covered bayer as well as mavat land, the precise status of the Claimant's land could not have been anything other than uncertain until a formal determination had been made. The Tribunal therefore finds that the Iranian land reform legislation relied on by the Claimant did not constitute a legislative taking of the Velenjak property. Nor is there any evidence that any procedures were followed

with respect to the Claimant's land under the Act.

56. The Tribunal's inquiry does not end here, however, because the Claimant argues further that even if the laws discussed above are found not to expropriate the property at issue, the property was taken de facto. The Claimant argues that his property rights were interfered with, inter alia, because of restrictions on his ability to transfer his properties and because of restrictions on the use in Iran of foreign powers of attorney.

57. It is well-settled in Tribunal practice that a claim for expropriation necessarily includes a claim for "other measures affecting property rights" as provided for in Article II, paragraph 1 of the Claims Settlement Declaration. See Eastman Kodak Company, et al. and The Government of Iran, et al., Award No. 329-227/12384-3 (11 November 1987), reprinted in 17 Iran-U.S. C.T.R. 153, 169 (hereinafter "Eastman Kodak") ("The Tribunal is satisfied that the Claimant's claim for expropriation must be taken to include a claim for a lesser degree of interference with its property rights."). Consequently, the Tribunal now turns to the question whether the legislation invoked by the Claimant constitutes a measure affecting property rights within the meaning of Article II, paragraph 1 of the Claims Settlement Declaration.

2. Other Measures Affecting Property Rights

58. It is firmly established in the Tribunal's jurisprudence that liability for interference with property rights may be found even where the formal legal title to property has not been affected. In Tippetts, Abbett, McCarthy, Stratton, for example, the Tribunal held that "[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected."[11]

59. Furthermore, the Tribunal has on numerous occasions held that a deprivation of property rights not amounting to an expropriation nevertheless may be compensable. For instance, in Eastman Kodak, 17 Iran-U.S. C.T.R. at 169, the Tribunal stated:

***15** The fact that Iran's interference did not rise to the level of an expropriation or of a deprivation of ownership rights does not, however, preclude the Tribunal from considering whether the interference established here was such as to constitute "other measures affecting property rights" as contemplated by Article II, paragraph 1, of the [CSD]. Such measures, while not amounting to an expropriation or deprivation, may give rise to liability in so far as they give rise to damage to the Claimant's ownership interests [[[[[[[citation omitted].

See also Foremost Tehran, Inc., et al. and The Government of the Islamic Republic of Iran, Award No. 220-37/231-1 (11 April 1986), reprinted in 10 Iran-U.S. C.T.R. 228, 251 (hereinafter "Foremost Tehran"). Furthermore, the Tribunal has interpreted the language "other measures affecting property rights" as not being limited to a taking of legal title to property, but rather as envisaging a broader range of circumstances that might give rise to liability. See, e.g., Karubian, Award No. 569-419-2, at para. 141; Kenneth P. Yeager and The Islamic Republic of Iran, Award No. 324-10199-1 (2 November 1987), reprinted in 17 Iran-U.S. C.T.R. 92, 99-100.

60. While the legislation invoked by the Claimant appears on balance not to have been self-executing, the history of land legislation during and after the Iranian Revolution indicates the existence of a program by the Iranian authorities at the time to effect far-reaching reform with respect to the ownership of undeveloped or unutilized land. The goal of the various pieces of legislation discussed at paras. 40 to 49, supra, read together, appears to have been to remove from its owners unutilized land larger than a size that might be used to build a house or run a small enterprise, and to redistribute such land. It is significant that more than one year after the Guardian Council declared the government's first attempt to expropriate urban bayer land to be unconstitutional, the 1982 Urban Lands Act explicitly authorized the expropriation of urban bayer lands in certain circumstances. This provides further confirmation that the ultimate intention of the Iranian legislature in its Revolutionary land reform program was to expropriate all undeveloped urban land, not merely land formally classified as mavat.[12]

***16** 61. As noted above, the Claimant's land was identified in the title deed as bayer land, i.e., land that had at some point been developed but had fallen into disuse. It is, however, undisputed that the land was in fact unutilized and unimproved, at least from the time the Claimant purchased it until the date of the Hearing. Therefore the Claimant was in the position of holding land that was formally classified as bayer land, but which was in appearance indistinguishable from mavat land.

While the land reform legislation invoked by the Claimant may not have automatically expropriated the Claimant's property, it clearly had an effect on his property rights.

62. Evidence that supports the Claimant's contention that his property rights were infringed includes several reports appearing in Tehran newspapers and other media during the months of May to November 1979.[13] An early foreshadowing of the passage of the Abolition Act is to be found in a report in the Tehran daily newspaper, Kayhan, on 19 May 1979, headlined "Unutilized (Bayer) Lands to be Expropriated for the Benefit of the Oppressed." The article reported that the Iranian Minister of Housing and Urban Development, Mr. Mostafa Katirai, had made the following statement in a radio and television interview:

In the course of the coming days the government will approve a bill on the basis of which owners of unutilized [bayer] lands located within the boundary of cities shall be given a specific deadline within which to act to construct [housing units] on their lands.

Engineer Katirai warned that if by the expiry of the deadline, owners of unutilized [bayer] lands located within the boundary of cities do not act to build [housing units], the government shall expropriate such lands for the benefit of the oppressed so that they may be used for implementation of the housing projects of the Ministry of Housing and Urban Development.

The article noted further that "[t]his bill is currently being debated in the Council of Ministers and will be implemented immediately upon approval." Mention of a proposed "Act Concerning Abolition of Private Ownership of Bayer [[[[[[[Unutilized] Lands Lying Within the 5-Year and 25-Year Boundaries" also appears in a Kayhan article dated 20 May 1979, which notes that "the Government shall not charge any money for the grant of bayer lands to the public." The Tribunal finds it particularly significant that the word used in these early reports for unutilized land is "bayer." Later, on 27 June 1979, the day after its approval by the Revolutionary Council, Kayhan published the full text of the Abolition Act, noting the "importance of this news."[14]

***17** 63. Further relevant newspaper reports include a 2 September 1979 article in the Tehran daily newspaper, Ettela'at, see para. 54, supra, reporting another announcement by the same Iranian Minister of Housing and Urban Development, Mr. Mostafa Katirai, that owners of small parcels of undeveloped lands were obliged to develop their lands within the time limit provided in the Abolition Act, while lands in excess of the limit provided by law belonged to the Government. The Minister went on to discuss a prohibition on the transfer of land in excess of the limit:
For this reason, we have asked the Ministry of Justice to notify the National Organization for Registration of Documents and Real Properties to issue a circular to the Offices of Notary Public prohibiting any transaction on lands in excess of the limit specified by law, because the status of owners of large lands must first be determined so that if they allege that their lands are not undeveloped, the matter must be examined and decided whether or not the land has been developed, then a transaction on it would be permitted.

A report in Ettela'at four days later, on 6 September 1979, confirms that announcement:
Transactions in Large Undeveloped Lands Shall Be Prohibited.

The National Organization for the Registration of Documents and Lands has issued a circular to all notary public offices throughout the nation, instructing them to prevent transactions in undeveloped lands larger than those limits set in the Regulations Concerning Nullification of Ownership of Undeveloped Lands.

In making this announcement, a spokesman for the National Organization for the Registration of Documents and Real Property told Ettela'at's news reporter that the Regulations Concerning Nullification of Ownership of Undeveloped Lands have been sent to all notary public offices, so that transactions in land will be carried out with due regard to the said Regulations, wherein "undeveloped lands" ["mavat"] and large vis-à-vis small lands have been defined.

Based on the said Regulations, an undeveloped land is a land on which there has been no development, and which has been left idle.

64. Another report in Ettela'at on 27 November 1979, under the headline "Without the Knowledge of the Organization for Development of Undeveloped Urban Lands: Transaction of Land is Illegal," reads as follows:
Yesterday, Engineer Mohssen Yahyavi who is in charge of the Ministry of Housing and Urban Development, in an interview, stated the plans of the said Ministry and his own point of view concerning the measure of land, housing problem, purchase of land....

I declare that there is no owner for large lands. If an individual or an entity attempts to divide lands without the permission of the Organization for Development of Undeveloped Lands and to make it available to the others, this is against the law and the Government shall not recognize such an act.

***18** A further report in the Ettela'at of 11 October 1979 affirmed that the Ministry of Housing and Urban Development had stated that "as of Saturday, October 13, without the permission of [the Organization for Development of Urban Lands] transaction of lands at any level and of any measurement is prohibited."

65. While newspaper reports alone may not be sufficient to establish the Claimant's contentions, the Tribunal regards these reports as contemporaneous evidence that corroborates several of the Claimant's contentions about the status of undeveloped land in Iran at the time. See Karubian, Award No. 569-419-2, at paras. 133-37.

66. The Claimant also has contended that his property rights were interfered with by virtue of alleged restrictions on the use in Iran of foreign powers of attorney. In Karubian, the Tribunal quoted from the Ettela'at of 5 March 1980, in which it was reported that the Islamic Revolutionary Prosecutor General had "issued a circular in which he notified all government offices, banks and notary public offices that powers of attorney sent to individuals from foreign countries shall, until further notice, be null and void." Id. at para. 46. The Tribunal further noted in Karubian that it was "aware of the existence of restrictions placed on powers of attorney sent from abroad." See id. at para. 139. In this Case, too, the Tribunal notes the existence of such restrictions on the ability of the Claimant to transfer his property from abroad.

67. The Tribunal previously has considered in some depth the legislation at issue in this Case. In Karubian, after a detailed examination of the Abolition Act and its Regulations and amendments, as well as other official actions alleged to have interfered with the claimant's property rights (such as restrictions on the use in Iran of foreign powers of attorney), the Tribunal concluded:
[ ] The Tribunal is satisfied that governmental action, at least for some time, restricted transactions in undeveloped lands that were larger than a certain size. The Respondent's action also prevented transactions by persons outside Iran. On this basis, the Tribunal concludes that the Claimant's right to dispose of his properties was adversely affected.

[ ] Even if the Claimant could have transferred his real property, the Tribunal is persuaded that the effect of adoption of the 1979 [Abolition] Act, along with its Amendment and its accompanying Regulations, was to impair the actual possibility of such a transfer. These laws made all undeveloped or unutilized properties in both urban and rural areas vulnerable to a determination that they were mawat, and as a consequence of that determination, subject to immediate cancellation of their title deeds by Iran. Under the circumstances, the Claimant would have had difficulties in finding a buyer for his properties.

Id. at paras. 142-43.

68. In this Case, the Tribunal is confronted with the same land reform legislation and substantially similar factual circumstances. While the property at issue in this Case is bayer rather than mavat land (such as the relevant property in Karubian, as agreed by the parties in that case), it is clear that bayer land also fell within the confiscatory ambit of the Abolition Act. See paras. 43-46, supra. Consequently, in the light of the relevant land reform legislation and other governmental measures detailed in contemporaneous newspaper reports, the Tribunal is satisfied that governmental action during the relevant period restricted transactions in all undeveloped lands that were larger than a certain size, whether formally classified as mavat or bayer land. The Claimant's land fell into the category of land that was affected by this governmental action. The Tribunal is persuaded that the effect of the adoption of the Abolition Act, together with its Regulations and amendments, was to impair the right and real possibility of the Claimant to transfer his property. As noted in Karubian (see para. 67, supra), under the circumstances, even if the Claimant had been able to transfer his property, he would

have had difficulty finding a buyer for the property.[15] The Abolition Act, as amended, impacted upon the Claimant's property rights in other ways as well. The Claimant certainly would have been unable to lease or mortgage the property after the Act's passage, because his continued ownership of it was, at best, uncertain. Even the Claimant's ability to use and develop the land was undermined, because the Government could have chosen to seize it at any time. See Karubian, Award No. 569-419-2, at para. 106.

***19** 69. The Tribunal therefore finds that, while the interference created by the cumulative effect of the land reform legislation and related governmental action did not rise to the level of an expropriation, at least prior to 19 January 1981, it has been established that the interference was of such a degree as to constitute "other measures affecting property rights" within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration.

70. The Tribunal further finds that the nature of the interference was such that its effect would have been felt from the date of the passage of the Abolition Act on 26 June 1979. At least as of that date, it would have been common knowledge that restrictions had been placed on the enjoyment and transferability of undeveloped land larger than a certain size. Indeed, even before the passage of the Abolition Act the public had knowledge of the government's intention to implement reforms with respect to unutilized lands, through newspaper reports dated as early as 19 May 1979, several of which reports referred explicitly to bayer rather than mavat land. The issue was reported on extensively in Tehran newspapers during the months of May to November 1979, see paras. 62-64, supra. The Abolition Act was formally announced to the public on 2 July 1979 by Notice No. 7/2064; this action would certainly have confirmed the chilling effect on land ownership and transferability created by the passage of the legislation. While it may not have been entirely clear until the promulgation of the Abolition Regulations that the Abolition Act intended to take undeveloped bayer land as well as mavat land, at least from the date of passage of the Abolition Act there was a cloud on the title of the Claimant's property. The passage of the Abolition Regulations merely aggravated an existing interference with the Claimant's property rights and confirmed that property of the type held by the Claimant did indeed come within the scope of the Abolition Act.

71. The Tribunal therefore concludes that the interference with the Claimant's property rights commenced on 26 June 1979, with the passage of the Abolition Act. This is consistent with the Tribunal's prior holdings that where a series of actions has resulted in a deprivation of property rights, the date of the deprivation should be taken to be the date on which the initial interference took place. See, e.g., Shahin Shaine Ebrahimi, et al. and The Government of the Islamic Republic of Iran, Award No. 560-44/46/47-3, para. 79 (12 October 1994), reprinted in --- Iran-U.S. C.T.R. ----, _; James M. Saghi, et al. and The Islamic Republic of Iran, Award No. 544-298-2, para. 77 (22 January 1993), reprinted in --- Iran-U.S. C.T.R. ----, _; Sedco, Inc. et al. and National Iranian Oil Company, et al., Award No. ITL 55-129-3 (28 October 1985), reprinted in 9 Iran-U.S. C.T.R. 248, 278; Tippetts, Abbett, McCarthy, Stratton, 6 Iran-U.S. C.T.R. at 225. It remains to be determined whether the interference of the type described above caused damage to the Claimant and what compensation, if any, is due to him.

C. The Shahsavar Property

***20** 72. As noted above, the Claimant contends that the Shahsavar property was expropriated by the "Law Concerning the Manner of Grant and Reclamation of Lands within the Jurisdiction of the Islamic Republic of Iran" (the "Lands Grant Act"), enacted on 16 September 1979.[16] This is so, the Claimant contends, because the Lands Grant Act expropriated land characterized as "woodlands"; at the time the Lands Grant Act was passed, continues the Claimant, his property was "woodlands." The Respondent contests these contentions, arguing instead that at the time of the alleged taking, the Shahsavar property had been developed as a farm or orchard. It further argues that even if the property was woodland, it was not expropriated by the Lands Grant Act.

73. The overall purpose of the Lands Grant Act appears to have been agrarian land reform. This emerges from the Preamble, which states that "lands and natural resources belong to the Great Creator and [ ] exploitation of these divine blessings should be accomplished through useful work with a view to satisfying the needs, and achieving the self-sufficiency, of society." Most of the provisions of the Act are concerned with the manner of assignment of lands nationalized under the law to local inhabitants and other applicants. Definitions for land included within the expropriatory scope of the Lands Grant Act may be found in Article 1, the relevant provisions of which read as follows:

e) Natural Forests and Groves: Natural forests or groves are expanses of open land containing live species of plants (trees, shrubs, bushes, saplings, weeds and mosses), or animals, regardless of the extent of their development, in the creation and development of which man has had no role.

g) Woodlands: These are undeveloped forests in any of the following forms:
1. Lands on which the number of trunks, saplings or forest bushes, separately or collectively, exceeds one hundred trunks per hectare....

The expropriatory provision of the Lands Grant Act appears in Article 5, which provides: "The exploitation of natural forests and groves as public wealth is, pursuant to applicable laws and regulations, under the control of the Government." This provision appears either to expropriate such lands or to confirm their previous expropriation.

74. Other definitions relating to woodlands appear in subsequent amendments to the Lands Grant Act. For instance, a 27 February 1980 Amendment defines "Natural Resources Lands" as "forests and pastures, natural groves, government nursery plantations [and] afforested woodlands." This Amendment confirms that "natural resource lands," which include "woodlands," are "at the disposal of the Islamic Government."

***21** 75. A further definition can be found in the Regulations implementing the Lands Grant Act, enacted by the Ministry of Agriculture and Rural Development on 10 April 1980 and approved by the Revolutionary Council on 21 May 1980 [[hereinafter "Lands Grant Regulations"]. The Lands Grant Regulations appear to affirm that woodlands fell within the expropriatory scope of the Lands Grant Act. Article 1(7) of the Lands Grant Regulations defines the term "Natural Resource Lands," as used in the Lands Grant Act, to include:
d) Wood Lands: These are undeveloped forests in any of the following forms:
1. Lands on which the number of stumps, saplings or bushes, separately or collectively, does not exceed one hundred per hectare.

The apparently strange definition in the Lands Grant Regulations of woodlands as having no more than 100 trunks per hectare is accompanied in the version submitted by the Claimant by a translator's comment indicating that the use of the negative in the Lands Grant Regulations is probably a typographical error. The definition is also inconsistent with that found in the enabling Lands Grant Act. In light of what is commonly understood as "woodland," the Tribunal agrees that it is more likely that the Regulations defined woodland as land where the number of trees exceeded one hundred trunks per hectare, and that the use of the negative in the text submitted to the Tribunal is a typographical error.

76. In support of the contention that the Shahsavar property was woodland at the time of taking, the Claimant seeks to rely on the description of the property in the title deed, which he translates as "a tract of plain jungle (wood) land." The Respondent's translation of the same part of the deed describes the property in similar terms as "plain forest lands." The Claimant also has submitted two photographs taken from the porch of a house on the property, allegedly during the Claimant's last visit to Iran in 1976. The photographs show a porch in a garden with a heavily wooded landscape in the background in two directions. The photographs do not, however, reveal the extent of the wooded property, or whether it extended in all directions. Furthermore, the photographs reveal that there was at least one building on the property. While the Claimant acknowledges that there were two small houses, a storehouse, a water pump, a water tank and fencing on the property, he contends that its essential nature remained undeveloped wooded land.

77. The Respondent argues, however, that the property cannot have been wooded land at the date of the alleged taking. This is assertedly so because rural woodlands had been expropriated by Iran in the 1960s. In this regard, the first law of relevance is the 1963 "Law Concerning Nationalization of the Country's Forests." Article One of that Law provides:
As of the date of the ratification of this legal decree, lands and whatever thereon of all natural forests, pastures and woods as well as forestlands of the country will be regarded as public property and belong to the government.

***22** 78. Subsequent legislation then allegedly provided for the conditions under which, and the manner in which, previously

nationalized forest land could be assigned to individuals. Article 31 of the Law Concerning Protection and Exploitation of Forests and Pastures (enacted on 21 August 1967) provides that

[t]he Forestry Department is authorized, in compliance with the following articles, to rent or sell to natural or legal persons the plain woodlands in the north of the country so that they may be used for agriculture, afforestation, cultivation of animal feed, and for animal husbandry, or converted to orchards, pastures or tree nurseries.

Article 34 of the same law states that if the forest land is so converted by a lessee within five years, "the Forestry Department is obligated to sell the rented lands irrevocably to the said lessee upon request." Note 2 to Article 35 provides that if the land has not been developed within five years, "[t]he Forestry Department is obligated ... to terminate the lease agreement with respect to that part of the forestlands on which development operations have not been carried out."

79. The Respondent argues that the Claimant must have acquired ownership of the Shahsavar property by means of this legislation, because the property was part of a piece of forestland leased to the Claimant's brother-in-law, Mr. Rostami, in 1968, and then transferred to him by the Ministry of Agriculture in 1971. The Respondent argues that in order for Mr. Rostami—and later the Claimant—to have been able to own the property, the forestland must have been developed into farmland or similarly cultivated land before Mr. Rostami was registered as the owner in 1971. Consequently, it argues, in 1979, at the date of passage of the Lands Grant Act, the Shahsavar property would no longer have been wooded land.

80. This explanation by the Respondent is facially plausible. It is arguably consistent with the rather obscure wording of the 1979 Lands Grant Act in that what appears to be the expropriatory provision therein may be read as merely confirming a prior expropriation. On the other hand, it is not entirely consistent with other evidence presented to the Tribunal, such as the Claimant's photographs of the property. Furthermore, the 1963 Law Concerning Nationalization of the Country's Forests contains a Note stating that "[m]asses of forests surrounded by farmlands located in the plain forestlands of the north of the country, which are within the areas covered by private title deeds will not be covered by [the expropriatory provision]." The Tribunal does not have at its disposal the information to determine whether the Claimant's property would have fallen within the scope of the 1963 Act. Moreover, the significance of the 1963 legislation is unclear in that it does not seem consistent with what appears to be a later attempt at land reform of much the same kind of property in 1979, through the Lands Grant Act and its Amendments and Regulations. The Respondent's explanation does, however, serve to question the accuracy of the Claimant's interpretation of the Lands Grant Act and its alleged effect on the Shahsavar property.

***23** 81. More importantly, though, it is unclear to the Tribunal precisely what the scope of the definition of "woodlands" in the Lands Grant Act was. For instance, it is unclear whether the improvements admittedly existing on the property (two small houses, a storehouse, a water pump, a water tank and some fencing) would have removed the Shahsavar property from the category of "woodlands."

82. The Tribunal normally would view the responsibility for providing a complete and persuasive explanation of Iranian legislation as falling upon the Respondent. This is because the Respondent is surely better positioned than a claimant to explain the meaning and effect of its own laws. Especially where the legislation is confusing and its scope ambiguous, as in the case of the Lands Grant Act, the Respondent may not confine itself to the mere assertion that particular legislation does not apply.

83. On the other hand, it falls to the Claimant to demonstrate with clarity the facts that bring his property within the scope of the legislation that allegedly expropriated his property. Where, as here, there is no evidence of physical interference attributable to the Respondent, see paras. 85-86, infra, the Claimant must take particular care to demonstrate that the subject property is, as a factual matter, of the type apparently covered by the Lands Grant Act. In that event the burden would shift to the Respondent to demonstrate that the scope of the Act was in fact narrower than the Claimant suggests.

84. In the present Case, the Tribunal finds that the Claimant has failed to meet his burden of proving that the Shahsavar Property was of the type covered by the Lands Grant Act. The photographs submitted by the Claimant do not show the extent of the forestation on the property. In particular, they do not demonstrate with clarity the number of trees per hectare over the expanse of the property, which is a highly relevant fact under the terms of the Lands Grant Act. Moreover, the affidavits submitted by the Claimant and his wife concede that there were improvements on part of the property. Indeed, the affidavit submitted by the Claimant's brother-in-law, Mr. Rostami, refers to the property as a "Farm" and a "Woodland Farm." In sum,

it is simply not clear to the Tribunal that the expanse of the property indeed remained in its original wooded state at the date of the alleged taking and that it had not been developed, at least to some extent. Under the circumstances, the Tribunal concludes, on balance, that the Claimant has not shown that the Shahsavar property was expropriated by the 1979 Lands Grant Act. For the same reason, the Tribunal concludes that the Claimant has not made out a claim for "other measures affecting property rights" with respect to the Shahsavar land.

85. The Claimant argues in the alternative that there has been physical interference with the property attributable to the Respondent and amounting to an expropriation. He bases this contention on the fact that in 1980 there was an alleged intrusion onto the land and a confiscation of personal property, which was reported by Mr. Rostami to the local police station. The Claimant contends that the Respondent should be held liable because it failed to act when notified of the incident. The Claimant's brother-in-law also stated in his affidavit that he "believe[d] that the destruction and confiscation was done with the knowledge and approval of the local governmental authorities." At the Hearing, the Claimant testified that the person responsible for the intrusion was the caretaker or gardener of the property, Mr. Esfandiar Goleij, possibly acting with some other unidentified persons.

***24** 86. The Tribunal finds that this intrusion is more consistent with theft than with government-sanctioned interference with the property. This conclusion is supported by the fact that the Claimant's brother-in-law chose to report it to the police station rather than to the revolutionary authorities or courts. The Tribunal finds that the evidence presented by the Claimant is insufficient to establish that the alleged interference amounted to any more than an informal occupation of the property by the resident gardener, accompanied by other unidentified persons. It is well-established in Tribunal practice that not every action arising from revolutionary chaos may be attributed to the Government of Iran. See, e.g., Sea-Land Service, Inc. and The Islamic Republic of Iran, et al., Award No. 135-33-1 (22 June 1984), reprinted in 6 Iran-U.S. C.T.R. 149, 164-66 (holding that no expropriation had taken place where the disruption was due to general revolutionary upheaval); Starrett Housing Corp., et al. and The Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 32-24-1 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 122, 156 (holding that "[a] revolution as such does not entitle investors to compensation under international law.") The Tribunal therefore finds that there is insufficient basis for attributing liability to the Respondent for any physical intrusion onto the Shahsavar property in 1979 or 1980.

87. Consequently, the Claimant's claim in respect of the Shahsavar property is hereby dismissed by reason of the Claimant's failure to prove that the Respondent expropriated the property or otherwise interfered with his property rights.

D. The Caveat in Case No. A18

88. The Tribunal notes that the Respondent has argued in this Case that the Claimant's claims should be barred on the basis of the caveat in Case No. A18. The Respondent bases its argument on Articles 988 and 989 of the Iranian Civil Code. Article 988, in relevant part, reads as follows:

Iranian nationals cannot abandon their nationality except on the following conditions:

3. That they have previously undertaken to transfer, by some means or other, to Iranian nationals, within one year from the date of the renunciation of their Iranian nationality, all the rights that they possess on landed properties in Iran or which they may acquire by inheritance although Iranian laws may have allowed the possession of the same properties in the case of foreign nationals....

Article 989 of the Iranian Civil Code, in relevant part, reads as follows:

In case any Iranian subject acquired foreign nationality after the solar year 1280 (1901-1902) without the observance of the provisions of law, his foreign nationality will be considered null and void and he will be regarded as an Iranian subject. Nevertheless, all his landed properties will be sold under the supervision of the local Public Prosecutor and the proceeds will be paid to him after the deduction of the expenses of sale.

***25** 89. The Respondent argued in its pleadings and at the Hearing that because the Claimant had acquired a foreign nationality on 24 July 1978, as of 24 July 1979—one year after his acquisition of United States nationality—he was in violation of the provisions of Articles 988 and 989 and could no longer legally own real property in Iran. At the Hearing, Counsel for the Respondent argued as follows:

> What I am trying to say is that, when a national or an individual who has acquired U.S. nationality fails to perform his legal obligations required by the laws of Iran or the United States, the application of the legal requirements would have two consequences: 1) to deny claims founded on any rights retained over immoveable property for more than a year after the acquisition of U.S. nationality or obtained subsequent to the acquisition of that nationality—in simple words: whoever acquires U.S. nationality has the right to retain his immoveable property in Iran only within one year; [and] 2) to disallow any other claims that the Claimant could not possibly have because of the restrictions imposed upon him by Iranian law, as a result of his loss of Iranian nationality. That is to say, if a claimant has failed to perform his legal obligations, whatever claims brought by him on the basis of his nationality must be disallowed.

Again during the Hearing, he reiterated:

> Mr. Mohtadi's problem is that he could not own any immoveable property in Iran after the lapse of one year after his acquisition of United States nationality. Meaning that, after he acquired United States nationality he was considered a foreigner, and Iran bars foreigners from acquiring immoveable property in Iran.

90. It further seems clear that the Respondent reads Article 988 and 989 together to arrive at an understanding of their import. To quote the Respondent's Lead Counsel once again:

> Here, if we read these two Articles [988 and 989] together, we certainly will arrive at the conclusion that a person who has renounced his Iranian nationality without observing the legal requirements, and has failed to make use of the one year period required by that law to sell his properties, is subject to punishment. In fact the sanction set by the Government for observance of that Article of the law is that it enjoys the right to sell the properties of such persons and to remit the proceeds to them.

91. The Respondent's stance regarding the one-year grace period is consistent with the Tribunal's prior holding that Articles 988 and 989 of the Iranian Civil Code, read together, provide for a one-year grace period after the acquisition of a second nationality before the question of the enjoyment of property rights contrary to Iranian law has to be considered. In the Mahmoud case, the Tribunal held as follows:

> According to Iranian law, therefore, the Claimant could only have kept the property for one year from the date of her naturalization. The period of one year had not yet expired at the date of the alleged expropriation and thus the question of her enjoyment of property rights contrary to Iranian law does not fall to be decided.

***26** Leila Danesh Arfa Mahmoud and The Islamic Republic of Iran, Award No. 204-237-2 (27 November 1985), reprinted in 9 Iran-U.S. C.T.R. 350, 354. See also Article 4, Note 2, of the Tribunal Rules (stating that "[a]n appointed representative shall be deemed to be authorized to act before the arbitral tribunal on behalf of the appointing party for all purposes of the case and the acts of the representative shall be binding upon the appointing party").

92. The Tribunal has held in para. 71, supra, that the "measures affecting property rights" that affected the Claimant's property interests in the Velenjak property commenced from the date of passage of the Abolition Act (26 June 1979). As noted at para. 70, supra, the impact of the passage of the Act, which had been presaged in several newspaper reports, would have been intensified by its official announcement to the public on 2 July 1979. These events both occurred less than one year after the Claimant's acquisition of United States nationality on 24 July 1978. Consequently, in the light of this finding, and given the Tribunal's dismissal of the Claimant's claim for the Shahsavar property, see para. 87, supra, the issue of the Claimant's enjoyment of real property rights in Iran in a manner inconsistent with Iranian Law does not fall to be decided. The Tribunal therefore finds it unnecessary to consider this issue.

VI. VALUATION

93. The Claimant's initial contribution on the question of valuation is an affidavit by Mr. Akbar Vaghei, who states that "on a

part-time basis I sold land in Tehran" during the 1970s and who claims to have been "familiar" with properties in Tehran, having bought or sold "more than ten pieces of property in Tehran from 1973 through 1976." Mr. Vaghei states further that the Velenjak Property was located close to the Tehran Hilton Hotel and that—based upon his inspection of the site in April 1992—it is surrounded by large and expensive residences. He values the Velenjak Property in 1979 at U.S. $1,300,000.00. No indication is given of his formal qualifications as an appraiser.

94. At the Hearing, the Claimant presented the testimony of a second expert, Mr. Mansour Anvari, who stated that he had worked for the Ministry of the Interior of Iran; served as mayor of several municipalities; acted as the representative of the Minister at the Plan and Budget Organization; and had been the majority shareholder, managing director and chairman of the board of the Khara Construction Company. As part of his work with the Khara Construction Company, he allegedly bought or sold "more than 70 pieces of property" between 1970 and 1979 in Iran, including approximately eight pieces in Tehran, most notably within "two miles" of the Velenjak Property. At the Hearing, Mr. Anvari explained the basis for his valuation in some depth. Regarding the Respondent's contention that land prices in Iran were extremely depressed during 1979, he testified that although "during the Revolution and the period of transformation, the market was inactive," after a "period of two to three months, when everything returned to normal, the prices again found their natural course." Mr. Anvari values the Velenjak Property at U.S. $1,195,751.00 in 1979.

***27** 95. The Respondent contests the Claimant's valuation of the Velenjak Property. It presents the testimony of Mr. Kamal Majedi Ardakani, who states that he worked at the National Organization for the Registration of Documents and Real Property for 30 years as a topographical engineer and assessor. At the time the Hearing was held, he had worked as an authorized expert licensed by the Ministry of Justice for 17 years. In the pleadings and at the Hearing, Mr. Ardakani testified that during the Islamic Revolution land prices in Iran fell drastically because of the large number of people leaving Iran and the reduced demand for houses. He values the Velenjak Property at between 3,000 and 3,500 Rials per square meter, which, converted at the 1979 exchange rate of 70.6 Rials to the dollar, results in an assessment between U.S. $89,000.00 and U.S. $104,000.00 for the property.

96. The Tribunal notes as an initial matter that the qualifications of the expert witnesses provided by both Parties contain certain deficiencies. Mr. Vaghei claims to have experience in the purchase and sale of property. By his own admission, however, this experience is confined to the sale of a very limited number of properties. Furthermore, his affidavits provide little detail as to the basis for his valuation. Consequently, the Tribunal is not convinced that Mr. Vaghei is adequately qualified or experienced such that the Tribunal could give his evidence substantial weight.

97. The qualifications of Mr. Anvari are more extensive. He appears to have had substantial exposure to land issues both through the governmental positions he held and through his commercial dealings involving the purchase and sale of land in Tehran and its environs. Furthermore, he allegedly had knowledge of comparable properties, in that he had bought land within two miles of the Velenjak Property and his own house was located in the same area. The qualifications of Mr. Ardakani, on the other hand, while revealing that he has occupied two positions in Iranian offices dealing with land transactions, are ambiguous as to whether he himself ever assessed property values in either of those two functions. Moreover, at the Hearing he admitted that he had never been a property broker and had never appraised property for tax or insurance purposes.

98. The Tribunal now turns to the content of the experts' opinions, noting first the extreme lack of detail contained in the valuation by Mr. Vaghei. Mr. Anvari, on the other hand, provided a much more thorough explanation for his valuation and gave a plausible explanation for fluctuations in property prices around the time of the Revolution. The views of the Claimant's experts, however, are disputed by Mr. Ardakani, who testified to a sharp drop in property prices in Iran during the Revolution. He testified that his conclusions were supported by his having studied the "relevant registration records" and having "surveyed the local situation" of the land. He failed, however, to produce any documentation corroborating his contentions regarding comparable land values, despite his admitted access to such documents. In addition, the Tribunal found some of his statements during the Hearing to be somewhat less than fully candid. For example, he testified that the large size of the Velenjak property and the fact that it has a view overlooking Tehran would reduce the price of the land—a position the Tribunal finds to be at odds with common sense.

***28** 99. The title deed provided by the Claimant provides very little guidance on the question of valuation. According to the deed, the Claimant paid an amount of 180,000.00 Rials (approximately U.S. $2,500.00) for the property in 1967. The

Claimant has, however, explained the discrepancy between the amount in the title deed and the amount he claims to have paid for the land in 1967, namely $200,000.00, by saying that the figures in the title deed were entered by the broker. His counsel speculated that the use of the lower amount might have been intended to avoid the payment of higher transfer taxes. The Tribunal notes that even adjusting for the effects of inflation and increases in the value of real property, $2,500.00 does not appear to be a realistic figure. Furthermore, the Respondent does not suggest that the property was worth such a minuscule amount, valuing the property closer to $100,000.00 in 1979.

100. In sum, the Tribunal notes that the evidence proffered by both Parties contains deficiencies. In this regard, however, the Tribunal notes further that the Respondent could have remedied any deficiencies in its valuation evidence without difficulty. Documents within the control and access of the Respondent—such as government statistics, tax records and registration records of sales of comparable properties in 1979—would have been relatively easy for the Respondent to procure. In fact, the Respondent's expert stated explicitly that he had viewed at least some such documents, and yet he failed to present them to the Tribunal. The Claimant, on the other hand, is surely in a weaker position with respect to gathering material held in governmental offices in Iran.

101. Given the above considerations, and in light of the deficiencies in the record, the Tribunal must rely upon its discretion to assign a value to the Velenjak Property "which is reasonable and equitable taking into account all the circumstances in this Case." Seismograph Service Corporation, et al. and National Iranian Oil Company, et al., Award No. 420-443-3 (31 March 1989), reprinted in 22 Iran-U.S. C.T.R. 3, 80 [hereinafter "Seismograph"]. See also Starrett Housing Corporation, et al. and The Government of the Islamic Republic of Iran. et al., Award No. 314-24-1 (14 August 1987), reprinted in 16 Iran-U.S. C.T.R. 112, 221. The Tribunal concludes that a fair and reasonable assessment of the value of the property in June 1979 would be U.S. $600,000.00.

102. The Tribunal turns now to determining the appropriate measure of compensation to be applied in a situation where no outright expropriation has taken place, but where the Claimant's property rights nevertheless have been affected within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration. The approach of the Tribunal in such cases has been to identify the particular ownership right or rights affected by the government's actions and to award compensation for the infringement of that right or rights, less the value retained after the interference had occurred. See Eastman Kodak Company and The Government of Iran, Award No. 514-227-3 (1 July 1991), reprinted in 27 Iran-U.S. C.T.R. 3, 17; Seismograph, 22 Iran-U.S. C.T.R. at 80; Foremost Tehran, 10 Iran-U.S. C.T.R. at 253.

***29** 103. In order to determine which rights have been affected in the present case, the Tribunal first turns to the so-called "bundle of rights" that make up the right of ownership. Under the law of both civil and common law countries, the elements of this right traditionally are regarded to include: the right to use the property; the right to enjoy the fruits of it; the power to possess the property; the right to exclude others from the possession or use of the property; and the right to dispose of it. Moreover, the right of ownership of real property generally confers "wide powers of control, disposition and use of the land."[17] Examples of such powers would be the rights to use and improve the real property, lease it, mortgage it, sell it or otherwise dispose of it, and to prevent third parties from using or occupying the land. Ownership is thus a comprehensive right, limited in the public and private law of most legal systems only in areas such as the control of natural resources, planning and development regulations and nuisance.[18]

104. The nature of the interference found to have occurred, see para. 68, supra, effectively made the Velenjak Property subject to seizure by the government at any time and thereby affected several of the Claimant's rights of ownership in the property. First, as concluded in para 68, supra, Dr. Mohtadi's ability to sell the property was certainly affected by the passage of the Abolition Act and public awareness of that fact. Second, given the publicity associated with the interference with the property, the likelihood of his being able to mortgage or lease the property would have been negligible, as no rational tenant or mortgagee would have been interested. Third, the passage of the Abolition Act would have infringed upon the Claimant's ability to develop the property in any significant way, such that the right was rendered meaningless. Fourth, with the imminent possibility of confiscation by government authorities created through the Abolition Act and its amendments and Regulations, his right to exclude others from the property was likewise affected.

105. On the other hand, some elements of the Claimant's ownership rights remained unaffected. First, he undoubtedly retained title to the Velenjak Property. Neither of the Parties has ever suggested that between the date the claim arose and 19 January 1981, the property was transferred from his name. Second, the Claimant retained the use of the land, although this

right was, in reality, quite limited due to the "cloud" of possible confiscation that hung over the property.

106. Significantly, however, it is clear from the pleadings and from testimony at the Hearing that the Claimant had purchased and retained the Velenjak Property primarily for investment purposes. There is no indication in the record that he intended to develop the property in any significant way; rather, he intended to resell the land at a higher price than he had paid in 1967. For this reason, the Claimant's loss of his ability freely to sell the property had a profound effect on the use that the Velenjak Property had for him and thus fundamentally affected his right of ownership. This interference was exacerbated by the fact that it would have been highly unlikely that he would have been able to derive income from the property by leasing it. The retention of bare title to the property and the limited use-rights remaining would not have been significant in comparison to the Claimant's loss of his primary use for the property.

***30** 107. Furthermore, the interference with the Claimant's rights was not merely ephemeral. See Tippetts, Abbett, McCarthy, Stratton, 6 Iran-U.S. C.T.R. at 225-26. Even after the Guardian Council in February 1981 declared unconstitutional the attempt to take bayer land through the Abolition Regulations, the Iranian legislature continued its attempts to reform the ownership of certain urban bayer lands. For instance, the Urban Lands Act of 1982 authorized the taking of urban bayer lands under certain circumstances, see paras. 49, 60, supra. See also Karubian, Award No. 569-419-2, at para. 36 (discussing other takings of mavat lands by the Government of Iran).

108. Under the circumstances, the Tribunal deems it fair to apply a discount of 15% to the full value of the property (namely $600,000.00, see para. 101, supra), to reflect the lesser degree of interference with the property and the value of the residual rights that the Claimant maintained in the property during the period between the date of initial interference and 19 January 1981. Consequently, the Tribunal concludes that the Claimant should be compensated in the amount of U.S. $510,000.00 for interference with his property rights attributable to the Respondent.

VII. COSTS

109. Considering the outcome of the Award, the Tribunal, applying the criteria outlined in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298, 323-24, decides to award the Claimant U.S. $15,000.00 in costs of arbitration.

VIII. AWARD

110. For the foregoing reasons,
THE TRIBUNAL AWARDS AS FOLLOWS:

(a) The Respondent is ordered to pay the Claimant, Dr. Jahangir Mohtadi, the sum of U.S. $510,000.00, plus simple interest at the rate of 8.2% per annum (365 day basis), calculated from 26 June 1979 up to and including the day on which the Escrow Agent instructs the Depositary Bank to effect payment to the Claimant out of the Security Account, for its interference with the Claimant's property rights in respect of the Velenjak property;

(b) The claim for the expropriation of the Shahsavar property is dismissed for failure to prove expropriation or any other measure affecting property rights;

(c) The Respondent is ordered to pay the Claimant costs of arbitration in the amount of U.S. $15,000.00;

(d) This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague 2 December 1996

Gaetano Arangio-Ruiz
Chairman Chamber Three

Richard C. Allison

(Separate Opinion)
Mohsen Aghahosseini
Dissenting as to the findings on the Velenjak Property.

Iran-U.S. Cl.Trib.1996

Jahangir Mohtadi and Jila Mohtadi v. Islamic Republic of Iran

SEPARATE OPINION OF RICHARD C. ALLISON

1. Although I have concurred in the Award in this Case in order to form the requisite majority, I take a somewhat different view of the issue of confiscation of the Velenjak property. I do not quarrel with the Award's conclusion that the Abolition Act constituted interference with the Claimant's rights in that property so as to be a "measure[ ] affecting property rights" as contemplated by Article II, paragraph 1, of the Claims Settlement Declaration. I would go farther, however, and conclude that the entirety of the Claimant's interest in the Velenjak land was effectively taken by the Act during the jurisdictional period that necessarily delimits the operative facts to be taken into consideration by the Tribunal in the cases brought before it.[1] This is so whether—as I believe—the Abolition Act itself together with its implementing measures effected the confiscation *de jure* or whether a combination of circumstances resulted in a *de facto* confiscation.

***31** 2. This conclusion is based upon (1) the Abolition Act itself, (2) the statements of policy and intent issued by the Revolutionary authorities in respect of the Act, (3) the Regulations spelling out the purposes and application of the Act, which, as the Guardian Council recognized, clearly embraced bayer lands, and (4) the practical effect of these and other measures. Moreover, it can hardly be ignored that the Revolutionary Council of the Islamic Republic of Iran, on 26 March 1980, stated in the "Implementing Act for Tehran" that the Abolition Act abolished private ownership of undeveloped land "as from the date of promulgation thereof." Since in my view the Claimant's Velenjak property was taken by the Government of Iran during the Tribunal's jurisdictional period, the Claimant should have been awarded the full value of the land.

Richard C. Allison

Footnotes

1 This is the date that appears as his birth-date on his United States Certificate of Naturalization and United States passports. Other documents, however, such as his Iranian identity card, state that his birth-date is 1 November 1930. The Tribunal does not regard this inconsistency as material.

2 Islamic Republic of Iran and United States of America, Decision No. DEC. 32-A18-FT (6 April 1984), reprinted in 5 Iran-U.S. C.T.R. 251, 265 [[[[[[[hereinafter "Case No. A18"].

3 The Parties have provided different English translations for the title of the Act; in addition, its date of enactment was referred to in Rouhollah Karubian and The Government of the Islamic Republic of Iran, Award No. 569-419-2 (2 March 1996), reprinted in --- Iran-U.S. C.T.R. ----, __ [hereinafter "Karubian"] as "27 June 1979." The English version of this Award relies upon the translation provided by the Tribunal's Language Services Division.

4 See para. 48, infra.

5 The English version of this Award relies upon the English translation of the Lands Grant Act provided by the Tribunal's Language Services Division.

6 The Abolition Act was announced to the public by Notice No. 7/2064 dated 2 July 1979 and published in Official Gazette No. 10025 on 24 July 1979.

7 In fact, subsequent to the Guardian Council Opinion, the Iranian legislature passed a new measure, the Urban Lands Act, which expressly provided for the confiscation of urban bayer lands in some circumstances. See para. 49, infra.

8 This Act was referred to in Karubian, Award No. 569-419-2, as the "Urban Lands Extension Act."

9 Article 10 of the Abolition Regulations appears to provide for a possible exception from the Abolition Act if a landowner provided proof to the Ministry of Housing, within 3 months of the date of the Regulations, that his land fell within the "small parcel" exemption.

10 This requirement of a prior inquiry into the status of undeveloped lands does exist under the 1982 Urban Lands Act, which provided for a procedure whereby determinations as to which lands were mavat or bayer would be made by a committee composed of representatives of the Ministry of Justice, the Ministry of Housing and Urban Development and the local mayor. Objections could be lodged within 10 days after announcement of the determination. The judicial authorities would take the final decision.

11 Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, et al., Award No. 141-7-2 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 225.

12 It appears that the Government of Iran also intended to take some rural bayer lands. A 2 March 1980 Amendment to the Lands Grant Act declared that large areas of bayer land in the hands of major land owners that had been kept unutilized would be taken over by the Respondent in order to grant such lands to farmers and other eligible applicants for cultivation. A further Amendment approved on 19 March 1980 restricted the scope of the 2 March 1980 Amendment by providing that such large bayer lands would be taken over by the Government only "if necessary."

13 All English translations by the Tribunal's Language Services Division.

14 These reports from Kayhan newspaper were submitted by the Government of Iran in Cases Nos. 800-804 (Dora Sholeh Elghanayan, et al. and The Islamic Republic of Iran).

15 The Respondent has recognized in other cases that substantial amounts of undeveloped land were confiscated pursuant to the Abolition Act. For example, the Respondent argued in one submission that
[l]egal decisions, such as the approval of the Cancellation of Ownership of Mawat Lands Act, brought extensive lands at the disposal of the government which declared that such lands would be used to meet the needs of homeless persons. Naturally such decisions had extraordinary effects on the demand in the real estate market.
See Case No. 266 (Moussa Aryeh and The Government of the Islamic Republic of Iran).
In another case, the Respondent's expert recognized the effect of these actions on property owners:
Repeated publication of the news related to assignment of mavat lands to cooperative companies, private-sector companies as well as the measures taken by the government for housing in such lands in the press in 1358 (1979) and the people's knowledge of the government plans in the field of housing resulted in the fact that they did not hurry for homebuying. This in itself caused decrease in demand, [and] decline in the price of land and houses.
See Cases Nos. 839-840 (Eliyahou Aryeh, et al. and The Government of the Islamic Republic of Iran).

16 English translation by the Tribunal's Language Services Division. The Act was approved on 16 September 1979, announced to the public by Notice No. 55934 dated 26 September 1979 and published in Official Gazette No. 10092 dated 16 October 1979.

17 Robert Megarry, et al. Manual of the Law of Real Property 506 (7th ed. 1993).

18 See id. at 506-56; Roger A. Cunningham, et al., The Law of Property 1-25 (1993); C.G. Van Der Merwe, The Law of Things 97-115 (1987).

1 Under Article II, paragraph 1, of the Claims Settlement Declaration the Tribunal has jurisdiction over "claims and counterclaims [that] are outstanding on the date of this Agreement" [*i.e.*, 19 January 1981]. This temporal limitation upon the claims that the Tribunal may adjudicate has, in a few instances, produced results that are to some extent anomalous. For example, in *Foremost Tehran, Inc., et al.* and *The Government of the Islamic Republic of Iran, et al.*, Award No. 220-37/231-1 (11 Apr. 1986), *reprinted in* 10 Iran-U.S. C.T.R. 228, the Tribunal dismissed the claimant's "creeping expropriation" claim for the reason "that the interference with the substance of Foremost's rights did not, by 19 January 1981, ... amount to an expropriation." *Id.* at 250. In the present Case the Guardian Council, on 3 February 1981, ruled that the confiscation of bayer land was incompatible with the Constitution of the Islamic Republic of Iran, thus arguably reversing the taking of the Claimant's Velenjak property after the end of the Tribunal's jurisdictional period although the Respondent, which is in possession of the relevant records, has neglected to provide any evidence to support this notion.

End of Document

Iran Award 569-419-2 (Iran-U.S.Cl.Trib.), 1996 WL 1171804

ROUHOLLAH KARUBIAN, Claimant,
v.
THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, Respondent.

CASE NO. 419
CHAMBER TWO

AWARD NO. 569-419-2

Iran-United States Claims Tribunal
Filed March 6, 1996
March 6, 1996

AWARD

Appearances :

@@For the Claimant : Mr. John A. Westberg, Mr. Lewis M. Johnson, Ms. Guita Karubian, Attorneys, Mr. Rouhollah Karubian, Claimant, Mr. John Karubian, Person Appearing for the Claimant, Mrs. Vida Foroutan, Assistant to the Claimant, Mr. Manoochehr Vahman, Mr. Hamid Sabi, Expert Witnesses.
@@For the Respondent : Mr. Ali H. Nobari, Agent of the Islamic Republic of Iran, Dr. Jafar Niaki, Legal Adviser to the Agent, Professor Ian Brownlie, Q.C., Professor Joe Verhoeven, Counsel to the Agent, Mr. Khosrow Tabasi, Legal Adviser to the Agent, Mr. Behrouz Salehpour, Legal Assistant to the Agent, Mr. Hossain Dadgar, Mr. Seyed Zabiollah Alavi Harati, Mr. Mohammad Isary, Mr. Hossain Sedghi Nia, Mr. Mohammad Taghi Madani, Representatives of the Respondent, Dr. Ahmad Hashemi, Mr. Kamal Majedi, Expert Witnesses.
@@Also present : Mr. D. Stephen Mathias Agent of the United States of America, Mrs. Mary Catherine Malin, Deputy Agent of the United States of America.

I. INTRODUCTION

***1** 1. The Claimant, ROUHOLLAH KARUBIAN, seeks compensation from THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN ("the Respondent") in the total amount of U.S. $4,091,582, as finally pleaded, for the value of four separate properties[1] in Iran which he alleges were expropriated by the Respondent or subjected to other measures, attributable to the Respondent, that affected his property rights within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration. Interest and costs are also sought.

2. The Respondent submits that the Claimant is solely a national of Iran and, as such, cannot bring a claim against Iran before this Tribunal. Alternatively, it argues that the Tribunal lacks jurisdiction to hear the case on the basis that the Claimant's dominant and effective nationality is Iranian or at least not that of the United States. It further contends that if the Claimant is found to be a dual national whose dominant and effective nationality is that of the United States, the caveat in Case No. A18, infra, para. 146, bars his recovery. It also denies that it has expropriated any of the properties at issue in this Case or subjected them to other measures affecting the Claimant's property rights.

3. On 3 March 1989 the Tribunal issued an Order declaring that, on the evidence before the Tribunal at that time, it appeared that the Claimant was, during the period between the time the alleged claims arose and 19 January 1981, a national of both Iran and the United States. The Order stated that:
***2** to reach definitive conclusions as to the dominant and effective nationality of the Claimant, as well as the Tribunal's jurisdiction over the Claims presented by the Claimant and the relevance, if any, to the merits of the Claimant's other nationality, the Tribunal will have to examine further the nationality issue, together with other issues, such as the facts and

applicable laws relating to the alleged acquisition and ownership of the property which constitutes the basis of this Claim as well as the actions by the Respondent allegedly affecting them. The Tribunal therefore decides to join all jurisdictional issues, including the issue of the Claimant's nationality, to the consideration of the merits of this Case.

4. While listing this Case for hearing, the Tribunal decided, in its Order of 14 February 1994, that:
No new documents may be introduced prior to the Hearing unless the Tribunal so permits and unless the request for the introduction of new documents is filed at least three months before the Hearing, the request is accompanied by the documents themselves, and an explanation is given of the circumstances that have prevented the filing of the documents earlier.

5. Two months before the Hearing, the Claimant submitted two new documents, filed at the Tribunal on 21 November 1994. The Tribunal, in its Order of 6 December 1994, reserved decision on the admissibility of these new documents in so far as they concerned matters other than the notice of witnesses. In view of the outcome of this Case, see infra, para. 164, it is unnecessary for the Tribunal to take a decision on the admissibility of these documents.

6. The Hearing in this Case was held on 19 and 20 January 1995.

7. At the Hearing, Professor Joe Verhoeven, Counsel to the Respondent, made a detailed argument on the question of the applicability of the standard of compensation in the Treaty of Amity[2] to dual nationals. The Claimant requested that he be given an opportunity to reply to the Respondent by way of a post-hearing submission. At the close of the Hearing and in its Order of 27 January 1995, the Tribunal stated that it would decide in due course whether to permit such a submission. In view of the outcome of this Case, see infra, para. 164, it is unnecessary to make any determination on the standard of compensation applicable under the Treaty of Amity. Thus, there is no need to address the Claimant's request for a post-hearing submission on this issue.

II. FACTS AND CONTENTIONS: NATIONALITY

Birth

8. The Claimant was born in Teheran on 21 March 1912. His parents were Iranian. He holds an Iranian Identity Card issued at Tehran in 1918.

Education

9. The Respondent states, and it is not disputed by the Claimant, that he received his primary and secondary education in Iran.

***3** 10. In December 1934, at the age of 22, the Claimant went to the United States as a student on a scholarship to the Colorado School of Mines where he graduated with a Bachelor's Degree in Petroleum Engineering in June 1938. He entered the California Institute of Technology, Pasadena, in September 1938 and graduated in 1939 with a Master of Science Degree in Geology. In September 1939, it is contended, he entered the University of California, Berkeley, where he completed his studies in May 1940.

11. The Respondent submits that the Claimant studied in the United States as an Iranian holding an Iranian Passport and that the means by which he undertook his studies there were derived from Iran.

Residence

12. Following completion of his studies in the United States, the Claimant returned to Iran in 1940. He resided there until he, his wife, and their children moved to the United States in 1948. The Claimant has resided in the United States continuously since 1948.

13. From time to time the Claimant has returned to Iran using his Iranian Passport. The Claimant's son, John F. Karubian, stated at the Hearing that his father had visited Iran no more than ten times between 1948 and 1978, the average duration of these trips being approximately two weeks each and none of them longer than one month.

Employment

14. The Claimant contends that in 1942 he was a liaison officer in Iran between the Iranian, Soviet and United States Armies. During the years 1948 to 1961 he was president of Amir and Company, an import and export fine arts business based in New York. The Claimant and his wife, Touba, a graduate of the New York School of Interior Design, relocated to California in 1961 and commenced a similar business under the name of "Touba Kay Galleries" in Beverly Hills. This business continued until 1978 when they liquidated the business and retired. Since retirement, the Claimant has continued occasionally to deal in and appraise arts and antiques. The Claimant has been a member of the American Appraisers' Association since 1950. He has also been a member of other professional associations such as the Beverly Hills Board of Realtors and the Geothermal Institute of America.

Nationality

15. Because the Claimant was born in Iran and because his father was Iranian, he was, under Article 976, paragraph 2 of the ranian Civil Code, at all relevant times, and still is, a national of Iran.

16. The Claimant, his wife and children moved to the United States in March 1948. The Respondent contends that the assertion that the Claimant immigrated to the United States is groundless because he departed for the United States on an Iranian passport which indicates that it is not valid for the purposes of emigration. There is no evidence of the date on which the Claimant commenced the formal United States naturalization process, but it is clear that he was issued a Certificate of Naturalization on 6 April 1954.[3]

***4** 17. After obtaining his Certificate of Naturalization the Claimant obtained a United States passport, and he has maintained it since then. In 1968 the Claimant also obtained an Iranian passport and subsequently acquired another in 1973 after the loss of the former.

18. The Respondent argues that the Claimant's United States nationality is rendered null and void pursuant to Article 989 of the Iranian Civil Code because the Claimant acquired United States nationality without abandoning his Iranian nationality in accordance with Iranian law. The Respondent, therefore, is of the view that the Claimant does not have standing to claim against Iran.

Family

19. The Claimant and his wife, Touba Karubian, were married in Tehran in September 1940. Three children were born of the marriage; all three were born in Iran.

20. The Claimant's three children were subsequently naturalized as citizens of the United States. They all reside in Southern California within the immediate residential area of the Claimant, and all are married to United States citizens. The Claimant has several grandchildren, all of whom, he says, are United States citizens. The Claimant's son graduated from the University of California at Los Angeles and is an economist who has worked for the United States Government and for American corporations involved in the defence industries. His youngest daughter is an attorney who practices law in the State of California.

21. As contended, the oldest brother, sister and younger brother of the Claimant went to the United States in 1947, 1948 and 1959, respectively. Since their respective arrivals they have resided continuously in the United States, have become naturalized citizens of the United States (with the exception of the younger brother), and have children who are all United States citizens. The younger brother has served in the National Guard of the United States.

22. The Claimant's father arrived in the United States in 1959. He passed away in 1961 and was buried in Los Angeles.

Property in the United States

23. The Claimant asserts that in 1951 he purchased a residential property for his family in Forest Hills, New York, and that the present family residence in Beverly Hills was purchased around 1963. He also contends that he owns or has been the owner of several other substantial pieces of real estate located in the United States.

Civic Activities

24. The Claimant belongs to numerous civic associations in the United States. His memberships include the Los Angeles County Museum of Art, the American Association of Retired Persons and the Concerned Citizens for the Safety of Beverly Hills. He has also served as the President of the Iranian Jewish Cultural Organization of California.

Other Factors

25. On the evidence presented by him, the Tribunal is satisfied that the Claimant has paid taxes in the United States since 1961; has held a California Driver's License; and is the holder of a social security number in the United States. The Claimant also contends that he has voted in Presidential, state and local elections in the United States since his naturalization.

III. LEGISLATION AND RELATED OFFICIAL ACTS

***5** 26. In order to understand fully the facts and contentions relating to the properties involved in this Case, it is necessary to review first the relevant Iranian land reform legislation and other official acts of the Respondent. The Tribunal will therefore discuss these before examining the facts and contentions related to the specific properties in question.

The 1979 Act Concerning Abolition of Ownership of Mawat[4] [Undeveloped] Urban Lands and the Manner of their Development[5]

27. On 27 June 1979, the Revolutionary Council of the Provisional Government of the Islamic Republic of Iran adopted the Act Concerning Abolition of Ownership of Mawat [Undeveloped] Urban Lands and the Manner of their Development ("the 1979 Act"). Its Preamble declared:

Whereas under Islamic standards mawat [undeveloped] land is not recognized as anyone's property, it is at the disposal of the Islamic Government, and ownership deeds that were issued during the former regime with regard to mawat lands lying within or outside city boundaries, are contrary to Islamic standards and against the interests of the people.

The relevant provisions of the 1979 Act were as follows:

Article 1: In connection with lands lying within the legal (25-year) boundaries of cities, where such boundaries exist, and also in other cities within the limits to be determined and announced by the Ministry of Housing and Urban Development, the Government shall, in a gradual manner and with due observance of the detailed urban plan in each region, inform those individuals who were, under the standards of the former regime, recognized as owners of such lands, to take measures to develop and improve those lands within a specified period. In the event no action is taken by them within the stipulated period, they shall be afforded no priority, and such lands will be taken over by the Government without compensation.

Note: Those persons who have procured a small piece of land for their personal residence, and do not own a residential unit, shall be given, by the Government, a minimum period of three years to develop their lands.

....

Article 3: The manner of notification to those individuals who were recognized as the owners of such lands in the former regime, classification of lands as mawat [undeveloped], and the manner of development and improvement, as well as the conditions of transfer of the said lands, the determination of the area of land referred to in the Note to Article 1 in each region, and other matters relating to the implementation of this Act shall be in accordance with the By-Laws which are to be prepared by the Ministry of Housing and Urban Development, and approved by the Council of Ministers.

***6** Article 4: The Ministry of Housing and Urban Development shall implement this Act.[6]

28. The application of the provisions of the 1979 Act was extended on 25 September 1979 to the region beyond the 25-Year City Limit of Tehran out to the city's "Protective Border," the extent of which is not known, by the Law Concerning the Abolition of Ownership of Mawat [Undeveloped] Urban Lands Situated within the Legal Twenty-Five-Year [Development] City Limit of Tehran and its Protective Boundary[7] ("the Urban Lands Extension Act").

Regulations to the 1979 Act

29. On 13 August 1979 the Regulations to the 1979 Act[8] were approved by the Council of Ministers pursuant to Article 3 of the 1979 Act. The Regulations to the 1979 Act, inter alia, provided guidelines on (a) how to determine whether a piece of land was mawat; (b) what constituted acceptable development and improvement of that land in order to obtain a certificate to the effect that the land was not mawat; (c) how to interpret the Note to Article 1; (d) how to notify the owners of lands specified in that Note of the requirement to develop and improve such lands; and (e) how mawat lands were to be disposed and assigned.

30. The Regulations were challenged as being unconstitutional and not conforming to the standards of Islamic law. On 3 February 1981, the Secretary-General of the Guardian Council, Mr. Lotfollah Safi, communicated to the Minister of Housing and Urban Development that, in the Opinion of the Islamic Jurists of the Guardian Council, the Regulations to the 1979 Act were unenforceable in so far as they applied to bayer land.[9] After a request by the Minister of Housing and Urban Development for a clarification of that Opinion, the Islamic Jurists of the Guardian Council, on 4 February 1981, held that their previous Opinion related solely to the applicability of the Regulations to the 1979 Act to bayer lands and did not concern the 1979 Act itself or measures taken on the basis thereof.[10]

Amendment to the 1979 Act

31. On 27 August 1979 an amending Act ("the Amendment to the 1979 Act")[11] limited the application of the grace period provided under Article 1 of the 1979 Act to lands within the size requirements of the Note to that Article. The Amendment declared "with respect to areas in excess thereof there is no need for the Government to grant a time-limit and these [lands] will become Government property forthwith."[12]

Urban Lands Act 1982

***7** 32. In response to the pronouncements of the Islamic Jurists of the Guardian Council on the Regulations to the 1979 Act, the Urban Lands Act ("the 1982 Act") was approved at a meeting of the Islamic Consultative Assembly on 17 March 1982.[13] The relevant part of that Act reads as follows:

Article 5: All mawat urban lands are at the disposal of the Government of the Islamic Republic of Iran, and previous ownership deeds and documents are devoid of legal validity, unless such lands have been transferred by the Government as of 22.11.1357 [11 February 1979].

Note: The title deeds of mawat lands which, according to [the 1979 Act] and the present Law, have been, or will be, put at the disposal of the Government and are held as collateral, shall be considered as released. Claims by individuals arising from the sale of such lands will cease to exist. Other claims, however, shall be collected by the creditor from the debtor's other property.[14]

33. The Respondent explains that the 1979 Act and its Regulations did not provide a comprehensive framework for implementation of the law. The Act therefore posed problems for the government in carrying out its legal duty concerning urban mawat lands. Moreover, the Respondent considered the removal of the judiciary from the process not to be in the public interest. The Respondent believed that the judicial authorities, rather than administrative committees, should be made

responsible for hearing the objections of interested parties. The Respondent states that the 1982 Act addressed these concerns and completely changed the previous rules.

34. The Claimant argues that the 1982 Act did not explicitly repeal or amend the 1979 Act but rather that it confirmed the 1979 Act's nullification of deeds to mawat lands.

Rural Lands

35. The Claimant contends that rural lands not covered by the 1979 Act, its Amendment and Regulations were affected by the 1979 Law Concerning the Manner of Grant [of Usufruct] and Reclamation of Lands within the Jurisdiction of the Islamic Republic of Iran[15] ("the Lands Grant Act"). This Act gave owners of mawat, bayer and coastal[16] lands periods of two, five and three years, respectively, to take action to reclaim and exploit such land. Failure to do so within that period would result in those lands being taken over by the Government and granted for agricultural purposes or allocated for public use.

***8** 36. However, several subsequent amendments to the Lands Grant Act changed its initial purport. An amendment approved on 2 March 1980 and published in the Official Gazette No. 10238 dated 21 April 1980, remaining silent as to mawat land, declared that control of large areas[17] of bayer land in the hands of major land holders[18] which had been kept unutilized would be taken over by the Respondent in order to grant them to farmers and other eligible applicants so that they may be cultivated. An amendment approved on 19 March 1980 and published in the Official Gazette No. 10244 dated 29 April 1980, restricted the scope of the previous amendment by providing, inter alia, that large bayer lands belonging to major land holders would be taken over by the Government only "if necessary." In another amendment, approved on 15 April 1980 and published in Official Gazette No. 10254 dated 11 May 1980, mawat lands, the size of which was not specified, were declared to be at the disposal of the Respondent. They were to be granted to individuals or companies according to their needs and abilities and where the best interests of society warranted, to be allocated for public use.

37. In addition to referring to many of the above-mentioned pieces of legislation, the Claimant cites the Implementing Regulations for the Lands Grant Act, approved on 21 May 1980 and published in Official Gazette No. 10285, and alleges that by May 1980 his properties that could be considered rural lands were explicitly declared to be under the Respondent's control for the purposes of redistribution to persons who would cultivate them.

Newspaper Reports on Official Statements and Governmental Action

38. The Claimant has submitted several extracts of reports from the Etela'at newspaper to support his claim that the Respondent purported to implement the above-mentioned land reform legislation in 1979 and 1980. That newspaper reported a number of governmental acts and public statements allegedly made by Iranian officials during the years 1979 and 1980 regarding the meaning and effect of the foregoing legislation. A brief description of some of the English translations of the Etela'at reports submitted by the Claimant follows.

39. The Iranian Minister of Housing and Urban Development in 1979, Mr. Mostafa Katirai, is reported to have announced: We have divided the lands into two categories. Small undeveloped lands and large undeveloped lands. The owners of the small undeveloped lands must develop their lands within the time limit provided in [the 1979 Act]. Large lands, and lands in excess of the limit provided by the law belong to the government. For this reason, we have asked the Ministry of Justice to notify the National Organization for Registration of Documents and Real Properties to issue a circular to the offices of Notary Public prohibiting transaction on lands in excess of the limit specified by law, because the status of owners of large lands must first be determined so that if they allege that their lands are not undeveloped, the matter be examined and decided whether or not the land has been developed, then a transaction on it would be permitted.[19] (Claimant's emphasis not included.)

***9** Etela'at, 2 September 1979.

40. It is reported that the Director of the Ministry of Housing and Urban Development, Mr. Mohsen Yahyavi, declared: [T]here is no owner for large lands. If an individual or an association attempts to divide lands without the permission of the Organization for Development of Undeveloped Lands and to make it available to the others, this is against the law and the government shall not recognize such an act.[20]

Etela'at, 27 November 1979.

41. The Mayor of Tehran, Mr Tavassoli, though neither a government official nor an officer of the said Organization, allegedly stated:
The Organization for Development of Urban Lands shall first transfer the ownership of the lands in excess of 1,000 square meters in Tehran and other cities with more than 200,000 population and lands in excess of 1,500 square meters [in other cities] to the government and then will divide said lands into separate parcels, construct canals and prepare the lands for development.[21]

Etela'at, 4 September 1979.

42. In the fall of 1979 the National Organization for Registration of Documents and Real Property reportedly issued a circular notice to all officers for the registration of official documents throughout Iran. According to an Etela'at newspaper report on 6 September 1979, the circular notice prohibited the recording of any transfer of title to land which exceeded the limits imposed by Article 5 of the Regulations to the 1979 Act.

43. The Public Relations Bureau of the Ministry of Housing and Urban Development is reported to have announced that 10 June 1980 was the last day to file petitions to exempt lands within the city limits of Tehran from the scope and effects of the 1979 Act. The report further stated that the deadline would not be extended. Etela'at, 9 June 1980. It is not known whether there were further such extensions.

44. In Guilan Province, where the Chaboksar property is located, see infra, para. 49, and in Mazandaran Province, where the Nashtarood property is located, see infra, para. 82, similar deadlines were set. The owners of unutilized urban lands in Guilan Province had until 1 July 1980 to file exemption petitions and those in the Province of Mazandaran had until 26 November 1980. Etela'at 4 May 1980 and 24 November 1980.

45. The Respondent regards the foregoing extracts from the Etela'at newspaper as irrelevant.

46. In addition to the newspaper extracts that the Claimant has submitted, the Tribunal notes that the Etela'at of 5 March 1980 reported as follows:
Today, Ali Ghoddoussi, the Islamic Revolutionary Prosecutor General, issued a circular in which he notified all government offices, banks and notary public offices that powers of attorney sent to individuals from foreign countries shall, until further notice, be null and void.[22]

IV. FACTS AND CONTENTIONS: PROPERTY

A. The Properties Subject to the Claim

***10** 47. The original Statement of Claim, filed in 1982, sought compensation in respect of five properties, viz., Chaboksar, Ahmad-Abad, Farahzad, Nashtarood and Varamin. At the Hearing, Counsel for the Claimant formally withdrew the Claim relating to the Varamin property.

48. Most of the Claimant's assertions regarding the current status of his properties are founded on the contents of a report by an unidentified representative in Iran. The Claimant maintains that he made repeated attempts to obtain information from persons in Iran on the status of his properties. In his Affidavit of 12 May 1992 the Claimant explains that he finally obtained the services of a representative in Iran to make an independent report but that the representative was unwilling to be identified. The report is dated 6 May 1992.

Chaboksar

49. The property described as Chaboksar is comprised of eight parcels of land located in the Village of Mahaleh Sheikh Zahed in Guilan Province.[23] The property fronts the Caspian Sea and covers an area of 31,300 square meters. It was purchased by the Claimant from Major General Amir-Hossein Attapour in February 1973.

50. The Respondent admits that it canceled the Claimant's title deeds to the eight parcels of land which constituted the Chaboksar property. However, the Respondent submits that those deeds were canceled pursuant to the 1982 Act. According to the Respondent, the Urban Lands Organization, in compliance with that Act, considered the land to be mawat. As a consequence, the matter was brought before the Assessment Commission established under Article 12 of the 1982 Act. On 15 August 1985 the Commission, comprised of representatives of the Minister of Housing and Development, Minister of Justice and the local Mayor, unanimously determined that the Chaboksar property was mawat land, given the absence of evidence of development, rehabilitation, construction, cultivation or harvesting. Subsequently, upon request by Guilan's Department General of Urban Land, new title deeds for the Chaboksar property were issued in the name of the Respondent, represented by Guilan's Department General of Urban Land. All Notary Public offices were notified of the circumstances by way of circular No. 2103 dated 19 May 1986.

51. The Respondent submits that, because the Claimant's title deeds to the Chaboksar property were canceled only after the Assessment Commission's finding in August 1985, the matter falls outside the jurisdiction of the Tribunal. According to the Respondent, there is no connection between the relevant 1979 legislation and the 1982 Act because the latter changed totally the 1979 legislation.

52. Furthermore, the Respondent submits that the Chaboksar property was never found to be subject to the 1979 Act. This Act necessarily required that certain procedures were to be carried out under its Regulations and that a determination had to be made regarding whether the land in question was mawat. The Respondent adds that such a determination regarding Chaboksar should have been made during the period of enforcement and validity of the 1979 Act. It is the Respondent's view that the 1979 Act was no longer in force after the approval date of the 1982 Act.

***11** 53. This conclusion of the Respondent is also based on an analysis of the Note to Article 5 of the 1982 Act which, in relevant part, states "[t]he title deeds of [mawat] lands which, according to the [1979 Act] and the [1982 Act], have been, or will be, put at the disposal of the Government and are held as collateral, shall be considered released."[24]

54. The Respondent expresses the view that the above Note distinguishes between lands that have already been acquired by virtue of the 1979 Act and those that will be acquired in accordance with the 1982 Act. Consequently, the Respondent infers that, after the enactment of the 1982 Act, the 1979 Act was no longer in force and that, thereafter, the Respondent could only acquire title deeds to urban mawat lands by virtue of the 1982 Act.

55. The Claimant, however, maintains that the expropriation of mawat urban lands was complete in September 1979, after the Amendment to the 1979 Act came into effect. It is his contention that the enactment of the 1982 Act only confirmed the 1979 Act. At the Hearing, Counsel for the Claimant submitted that the 1982 Act did not replace or repeal the 1979 Act, but rather ratified it, in so far as it referred to mawat lands.

56. Included in the evidence presented by the Claimant is a letter written to him by Mr. Menashe Yaghoubzadeh, dated 3 June 1979.[25] The letter states that the Respondent has "appropriated" the Chaboksar property. The Claimant contends that this letter, which predates the enactment of the 1979 Act, describes what was happening during the period leading up to the 1979 land reform legislation.

57. The Claimant also relies on the 1979 land reform legislation in conjunction with related official acts, see supra, paras. 27-44, to substantiate his claim that he was deprived of his ownership rights in the Chaboksar property as of September 1979.

58. According to the Respondent, the consequence of the 1985 decision by the Assessment Commission was to render invalid ab initio the Claimant's Chaboksar title deeds, which had been acquired illegally. Therefore, the Respondent maintains, this decision could not amount to an expropriation of property. The illegal acquisition is said to have resulted from the Claimant's purchase of mawat land, which could not be privately owned. The only way to legally own mawat land, states the Respondent, is for an individual to undertake a process of reclamation and improvement in accordance with Articles 141-145 of the Iranian Civil Code.

59. The Claimant, however, asserts that pursuant to Article 140 of the Iranian Civil Code he is the legitimate owner of the title deeds to the Chaboksar property. That Article provides that ownership is acquired, inter alia, by "means of contracts and obligations." This provision, according to the Claimant, renders irrelevant any examination of whether he reclaimed and improved mawat land. The Claimant argues that he acquired ownership over the land in question by purchasing it from its prior owner by contract, for valuable consideration.

***12** 60. Furthermore, the Claimant contends that the title deeds are valid under Articles 1287, 1290 and 1292 of the Iranian Civil Code which read as follows:

Article 1287. Documents which have been drawn up at the General Department for Registration of Documents and Landed Properties, or at the offices of Notaries Public, or before other official authorities, within the limit of their competency and in accordance with legal Regulations, are notarial [[[[[[[official].

....

Article 1290. Official documents are binding in respect of the two parties and their heirs and successors. They are binding in respect of third parties if this has been stipulated by the law.

....

Article 1292. Denial and expression of doubt is not entertainable against notarial documents or documents which have the value of notarial documents, but the party can claim that the documents have been forged or prove that they have for some reason lost their validity.[26]

61. The Claimant notes that these provisions have been supplemented by Articles 70 and 72 of Iran's Registration Law which provide as follows:

Article 70. An instrument which has been registered in accordance with the laws and all of its provisions and signatures included therein shall be valid unless it is proved to be a forgery. The denial of the provisions of official documents concerning the receipt of all or a portion of the price or the property or the undertaking to pay the price or to deliver the property shall not be heard.

....

Article 72. All transactions relating to immovable properties which have been registered in accordance with the regulations for the registration of immovable property shall have complete validity and official status for the parties to the transaction and their legal successors and for third parties.[27]

62. Based upon the above legislative provisions, the Claimant asserts that the title deeds, which state that he is the owner of the properties described therein, may not be challenged under Iranian law.

63. In reply, the Respondent draws attention to the condition in Article 1287 of the Civil Code of Iran which requires that the document must be drawn up "in accordance with legal regulations" and the proviso in Article 1292 which allows a party to claim that a notarial document has "for some reason lost validity." The Respondent also refers to the Articles 27 and 141 to 145 of the Civil Code of Iran and Article 41 of the By-Law to the Registration of Property Act to support its assertions that mawat land cannot be privately owned and that the title deeds to the Chaboksar property have not been registered in accordance with the law.

64. Article 41 of the By-Law of Registration of Property Act states that applications for registration of mawat lands shall not be accepted. Thus, the Respondent submits that, pursuant to this Article, the acceptance of an application for the registration of mawat land by the Registration Bureau is unlawful. Consequently, it asserts that if such an application is accepted, the condition requiring the adherence to law in Article 1287 of the Civil Code is not met and a party may claim that the title deed has lost its validity under Article 1292.

***13** 65. The Respondent also argues that since 1952, several laws such as the 1956 Law Concerning Lands Belonging to the State, Municipalities, Endowments and Banks, as amended, were passed to annul title deeds that nonetheless might have been or might be issued for mawat lands in contravention of the Iranian Civil Code.

66. Finally, it is the Respondent's submission that the transfer by contract of the Chaboksar property to the Claimant could not have conveyed proper title because the deeds to that property had been issued contrary to law. That is, the Respondent argues that the vendor of the property did not have legal title and therefore could not transfer legal title to Mr. Karubian.

67. In spite of the Respondent's admission that it acquired Chaboksar in August 1985, the Claimant's representative in Iran reported on 6 May 1992 that the Claimant's ownership of Chaboksar "is confirmed in the Registration File and has not been taken away from him. The Laws passed have also not yet put a cloud on his title [in the Registration File]."

Farahzad

68. The property described as Farahzad consists of five parcels of land which total 20,250 square meters. It is situated in Shemiran, Tehran.[28] The Claimant purchased the property on 22 February 1958 from the Farahzad Company.

69. The Respondent's pleadings indicated that, after the commencement of the 1982 Act, the Tehran Urban Lands Organization considered that certain parcels of land in the Village of Farahzad, including three of the parcels owned by the Claimant, were mawat. The Respondent also states, and there is evidence in support of its position, that the issue was reconsidered by the said Organization which decided that the Claimant's three parcels of land were not mawat but were instead dayer[29] because there were two water pools, an orchard, a building, and a water and electricity connection on the property. As for the remaining two parcels of the Claimant's Farahzad property, no records indicate that they have been found to be mawat.

70. The letter written by Mr. Yaghoubzadeh to the Claimant, see supra, para. 56, also refers to the Farahzad property and states that this property, in addition to the Chaboksar property, was "appropriated" by the Respondent. The only other evidence related to the Farahzad property that the Claimant has submitted is contained in his representative's report which alleges that a portion of the Farahzad lots probably had been "turned into a green belt (park) and a temporary produce market by the Tehran Municipality District 2 Office. But all of the local people are of the opinion that about half the area has not been seized."

71. In response to this allegation by the Claimant's representative, the Respondent draws attention to a passage in the representative's report relating to the Farahzad property where he states that "the Registration File shows no transaction or transfer or cancellation of a deed or request for issuance of a deed against the interests of [the Claimant]. There are no adverse claims against the ownership of [the Claimant] on the Registration File." The Respondent considers that this passage shows that there was no interference with the Claimant's ownership rights in the Farahzad property and that it confirms the Tehran Urban Lands Organization's decision, see supra, para. 69.

***14** 72. The Respondent also highlights the inability of Claimant's representative to determine the exact location of the Claimant's Farahzad property. One cannot, according to the Respondent, ascertain that the green belt and the temporary produce market are located on the Farahzad property when there is uncertainty with regard to the location of the Claimant's lots. At the Hearing, the Respondent's valuation expert, Mr. Kamal Majedi stated that the Farahzad village was in the midst of a rural area but did not indicate when this was the case. Mr. Majedi acknowledged that he had not visited the Farahzad property.

73. The Respondent further states that the Claimant has given no date as to when the alleged taking of the property actually or probably began. Thus, it submits that the Tribunal has no jurisdiction to decide the claim.

Ahmad-Abad

74. Ten parcels of land make up the property described as Ahmad-Abad, which is located south of the Farahzad property in Ahmad-Abad, Shemiran, Tehran.[30] It covers an area of 2,726.9 square meters. The property was purchased from Yousef Daee

and Touran Toubia on 4 March 1957.

75. The Claimant's representative in Iran reported that the Ahmad-Abad property is in the Municipality Limits of District 2 of Tehran and that, in general, all property within the Districts of the Municipality of Tehran are within the 25 year boundary. Thus, the Claimant contends the property was subject to the 1979 Act, the affected area of which was widened by the Urban Lands Extension Act.

76. The Respondent, in its written pleadings, agreed that there was no dispute that the Ahmad-Abad property was urban land. At the Hearing, however, the Respondent's valuation expert, Mr. Kamal Majedi expressed the opinion that the property was located in a rural area but did not indicate when this was the case. Mr. Majedi acknowledged that he had not visited the Ahmad-Abad property.

77. The Claimant's representative in Iran alleges that the Ahmad-Abad property is under the possession and control of the employees of the municipality and is known as "lands of the Islamic Judge." He explains that during 1979 and 1980 a sharia judge[31] of a municipal court, acting ultra vires, gave lands to the employees of the municipality by way of a handwritten order. The employees of the municipal authority took possession of such lands, built on them and obtained title deeds that were not in conformity with the official registration files. The representative's search of the registration file failed to reveal any transfer, request for cancellation of a deed, request for issuance of a new deed or request for the seizure of Claimant's land. The representative notes that the rightful owners of the "lands of the Islamic Judge," who at the time of seizure complained to the judicial authorities, were able to obtain alternate lands.

***15** 78. The Respondent contests the Claimant's assertions that it is liable for any deprivation related to the Ahmad-Abad property by arguing that it is bound by the by-laws of the 1982 Act and that it cannot transfer the lands to others without possession of the title deeds to that land. It adds that the title deed is issued in the name of the Respondent only after (a) referral to an Assessment Commission; (b) obtaining a final determination declaring the land to be mawat, which determination is subject to judicial review; and (c) referral thereafter to the State Registration of Deeds and Properties Bureau for annulment of the Claimant's title deeds.

79. The Respondent relies on the report of the Claimant's representative which states, in reference to the Ahmad-Abad property, that "no transfer or request for cancellation of a deed or a request for the issuance of a new deed under Articles 147 and 148 of the Registration Law is to be found. There is also no request for the seizure of this block. Consequently, according to the Registration File, there is no cloud on or change in the ownership of [the Claimant], while, in fact, the ownership title is in question." This statement, according to the Respondent, serves as a confirmation of its position that it took no measures affecting the Ahmad-Abad properties.

80. The Respondent argues that no evidence has been adduced to indicate the land was mawat and, thus, subject to the legislative enactments and regulations in issue. The Respondent further submits that the Claimant's real action is against the sharia judge and any usurpers of his lands; particularly because the Claimant possesses the title deeds to his lands. The Respondent states that it opposed the action of the sharia judge and that he was subsequently dismissed from his position. It further states that some owners of the seized lands, on the basis of the order of the sharia judge, complained to the competent courts. The courts reportedly found that the complaints were justified and allowed the complainants to obtain lands in exchange for the lands constituting the subject matter of their complaints. This course of action, the Respondent adds, was also open to the Claimant if the lands in question had indeed been among those lands seized.

81. The Respondent also submits that the Claimant's representative in Iran has not been able to determine the precise location of the Ahmad-Abad property. Thus, it questions how the representative can say with any certainty that the lands are part of the sharia judge's lands and that they have been occupied by others.

Nashtarood

82. The property described as Nashtarood is a single parcel of land measuring 3760 square meters. It is located in the Marzeh Village of Nashta in Mazandaran Province and its northern side faces the Caspian Sea.[32] It was acquired on 9 November 1972 from Mr Ardeshir Binesh Aghevli.

***16** 83. The Claimant contends that the Nashtarood property was taken by the Respondent on the basis of what is said in his representative's report. The representative alleges that a custodian or guard is living on the property. The custodian or guard apparently refused to identify himself to the Claimant's representative and did not disclose any particulars of who authorized him to act in such a capacity.

84. The Respondent argues that the guard was the Claimant's appointed caretaker, who had been retained long before the Islamic Revolution. The Respondent denies having interfered with, or taken, the Nashtarood property. It has presented a letter dated 18 March 1991 from the Head of the Department for Registration of Deeds and Real Estate, Tonokabon, which refers to the Nashtarood property and concludes that "according to our records on file, the said land continues to be in [the Claimant's] ownership."

85. In response to this letter, the Claimant asserts that what appears in the registration file for particular parcels of land does not represent what has actually happened to his property.

86. The Respondent also states that there is no evidence presented by the Claimant to prove that the Nashtarood land was determined to be mawat or that it was subject to the 1979 or 1982 Acts. It relies on the report by the Claimant's representative which states "[the Claimant] whose ownership, according to the Registration File, is without objection may request the issuance of a fee simple title deed to his lot. To this date, 3,679 square meters of the block are shown in the Registration File under [the Claimant's] own ownership and there is no outstanding registered or legal claim against it."

B. Alleged Governmental Actions Affecting the Claimant as a Land Owner Living Outside Iran

Alleged New Regulations on Powers of Attorney

87. The Claimant contends that after the Revolution in 1979, new regulations were implemented which were specifically designed to prevent persons residing outside Iran from engaging in any major transaction in the country. The Claimant states that he was "told of a new regulation that had been put into effect that prohibited legalization of transactions involving more than [[[[[[[ ] 1,000,000 [rials] ... by means of a power-of-attorney executed outside Iran." He further asserts that it "became known throughout the Iranian-American community that Iranian consular offices in Europe and the United States would not 'consularize' (authenticate) powers-of-attorney involving more than [[[[[[[ ] 1,000,000 [rials]."

88. The practical effect of the alleged restriction on powers of attorney, the Claimant argues, is that it prevented land transactions by any person residing outside the country. It appears that prior to 1979, the Claimant had granted a formal power of attorney to Dr. Mousa Hanani, giving Dr. Hanani full authority to sell any of the Claimant's real property on the instruction of the Claimant. It also appears that on another occasion in 1972, an Iranian attorney in fact, Dr. Parviz Taleghani, acted on the basis of a power of attorney given by the Claimant to carry out the acquisition of the Nashtarood property.

***17** 89. The Respondent states that, even if the new alleged regulations did exist, they would not prevent the Claimant from authorizing his attorneys in fact in Iran to protect his property interests. At the Hearing, the Respondent referred to other cases before the Tribunal, and in particular Jalal Moin and Islamic Republic of Iran, Award No. 557-950-2, para. 14 (25 May 1994), which, in the opinion of the Respondent, shows that it was possible for the Claimant, without entering Iran, to grant a power of attorney authorizing an attorney in fact in Iran to transfer his properties.

Travelling to Iran

90. The Claimant asserts that from 1979, as an American, he could not safely travel to Iran for any purpose.

91. The Respondent denies that it was dangerous for the Claimant to travel to Iran. It contends that it was not the Respondent's actions but the United States Government that prohibited the travel of Americans to Iran.

C. Valuation

92. As noted supra, in the Statement of Claim filed on 18 January 1982, the Claimant sought compensation in respect of five separate properties the total of which he valued at U.S. $13,006,100 on the basis of alleged offers to purchase the properties.

In the final pleadings, following a valuation by an Iranian appraiser of the properties, the amount claimed was adjusted to U.S. $4,091,582.[33] The Respondent, however, gives a considerably lower estimate of the 1979 value of the properties.[34]

V. JURISDICTION

Nationality of the Claimant

93. In accordance with the various criteria set forth by the Full Tribunal in its decision in Islamic Republic of Iran and United States of America, Decision No. DEC 32-A18-FT (6 April 1984), reprinted in 5 Iran-U.S. C.T.R. 251, the Tribunal must first determine, on the basis of the evidence, whether the Claimant was, during the relevant period from the time his Claims arose until 19 January 1981, the date of the Claims Settlement Declaration, a national of the United States or a national of Iran, or of both. If the Claimant is found to be a national of both countries, i.e., a dual national, his dominant and effective nationality during that period must be determined.

***18** 94. It is the Claimant's contention that his Claims arose sometime between February 1979 and 19 January 1981 as a result of the Respondent's actions. For the purpose of determining the Claimant's dominant and effective nationality, therefore, this is assumed to be the relevant period in this Case.

95. It is not in dispute that the Claimant is an Iranian national by birth under Article 976 of the Iranian Civil Code. No proof has been offered that he ever relinquished his Iranian nationality or that he otherwise lost that nationality. At the same time, the Claimant has shown to the Tribunal's satisfaction that he has been a United States national since 1954 and that he maintained that nationality during the relevant period. The Tribunal therefore finds that the Claimant was a national of both Iran and the United States during the relevant period.

96. The question remains, however, as to the Claimant's dominant and effective nationality during that same period. For jurisdictional purposes, the Claimant must show to the Tribunal's satisfaction that his dominant and effective nationality was that of the United States during this period.

97. The Claimant has made the United States his continuous and habitual place of residence since moving there with his family in 1948. He became a naturalized citizen of the United States approximately twenty-five years before the relevant period. Most, if not all, of his family are fully integrated into the United States, having acquired American nationality and being resident there for considerable lengths of time. All of his grandchildren have been born in the United States. His import and export fine arts business was based in the United States from 1948 until his retirement in 1978. The Claimant's attachment to the United States is also demonstrated by his active participation in public life in that country. All these facts, as reflected in the evidence submitted, remain uncontradicted. The Tribunal, therefore, has little difficulty in reaching the conclusion that the Claimant has demonstrated that his dominant and effective nationality, during the relevant period, is that of the United States.

98. Because the Tribunal has found that the Claimant was a dominant and effective United States national during the relevant period, the Tribunal concludes that his Claims are claims of a national of the United States as defined in Article VII, paragraph 1, of the Claims Settlement Declaration. See Case No. A18, supra, at 25, 5 Iran-U.S. C.T.R. at 265.

Other Jurisdictional Issues

99. The Claims are for the alleged deprivation of the Claimant's various parcels of real property in Iran. The Claimant has submitted title deeds in his name, deeds which were issued by the Registration Office of Documents and Real Estates, Iranian Ministry of Justice, for all the properties which form the subject matter of the Claims. The Tribunal is satisfied that the Claims fall within the Tribunal's subject matter jurisdiction of claims arising "out of ... expropriations or other measures affecting property rights...." Article II, paragraph 1, Claims Settlement Declaration.

***19** 100. The Respondent argues that the Claims were not outstanding on 19 January 1981, as jurisdictionally required by Article II, paragraph 1, of the Claims Settlement Declaration, because no expropriation of the Claimant's property ever took place during the relevant period. Whether the Claimant was able to prove to the Tribunal's satisfaction that prior to 19

January 1981 a compensable deprivation of his properties or interference with his property rights occurred forms part of the merits of the Claims. "The Tribunal cannot base its jurisdiction on the presumption that the Claimant will eventually prevail on the merits." Albert Berookhim, et al. and Islamic Republic of Iran, et al., Award No. 499-269-1, para. 17 (27 Dec. 1990), reprinted in 25 Iran-U.S. C.T.R. 278, 286. To deny the Tribunal's jurisdiction on the ground put forward here by the Respondent "would amount to endorsing a fin de non-recevoir, that is ... a 'ground [ ] of defence based on the Merits of the case and calculated to cause the judge to refuse to entertain the application.' " Vernie Rodney Pointon, et al. and Islamic Republic of Iran, Award No. 516-322-1, para. 28 (23 July 1991), reprinted in 27 Iran-U.S. C.T.R. 49, 58. See also Edgar Protiva, et al. and Islamic Republic of Iran, Award No. 566-316-2, para. 40 (14 July 1995). Consequently, the Tribunal rejects this jurisdictional objection by the Respondent.

101. The Tribunal is satisfied that these Claims were owned continuously by a national of the United States throughout the relevant period, as required by Article VII, paragraph 2, of the Claims Settlement Declaration.

Conclusion on Jurisdiction

102. For all the foregoing reasons, the Tribunal concludes that it has jurisdiction over these Claims.

VI. MERITS

A. Liability

103. The Tribunal now proceeds to determine whether the Claimant has been subjected to "expropriation or other measures affecting property rights" for which the Respondent bears responsibility in accordance with Article II, paragraph 1, of the Claims Settlement Declaration.

Expropriation under the 1979 Act

104. The Claimant contends that to establish the expropriation of property, an actual physical taking of property or formal transfer is not necessary. Consequently, he claims that the above-mentioned legislation and governmental actions, see supra, paras. 27-44, amounted to an expropriation of all the properties subject to these Claims.

105. In the absence of a formal act of expropriation, the possibility of the occurrence of a deprivation or taking is not excluded. It is well settled in this Tribunal's practice "that a taking of property may occur under international law, even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of property." Harza Engineering Co. and Islamic Republic of Iran, Award No. 19-98-2, at 9 (30 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 499, 504. See also Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA, et al., Award No. 141-7-2, at 10-11 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 225; Harold Birnbaum and Islamic Republic of Iran, Award No. 549-967-2, para. 28 (6 July 1993); and Edgar Protiva, et al., supra, at para. 53.

***20** 106. The Amendment to the 1979 Act declared that the mawat lands in excess of the area size mentioned in the Note to Article 1 of the 1979 Act "will become government property forthwith." Therefore, the title deeds to those properties located within the geographical scope of the 1979 Act and the Urban Lands Extension Act were susceptible to cancellation at any time thereafter. However, the implementation and the enforcement of the 1979 Act, coupled with its Amendment, still remained contingent upon a determination that the subject land was, in fact, mawat. The Amendment to the 1979 Act abolished the grace period within which to take measures to develop and improve so-called large mawat lands, those lands in excess of the size stipulated in the Note to Article 1 of the 1979 Act. The Amendment did not abolish the guidelines set out in the 1979 Regulations. All findings as to whether a parcel of land was mawat were still required to be made in accordance with those Regulations. In effect, the Regulations laid down the preconditions to be satisfied before the acquisition of any mawat land by the Respondent.

107. The practical effect of the 1979 Act and its Amendment is also consistent with the legal meaning ascribed to the term "forthwith," the definition of which is "without delay, hence within a reasonable period of time under the circumstances of the case." Black's Law Dictionary (4th ed.).

108. The view of the Tribunal is also confirmed by the announcement of the Iranian Minister for Housing and Urban Development, Mr. Katirai, in the Etela'at of 2 September 1979 where he is reported to have said that the status of lands in excess of the size limit provided for in the Note to Article 1 of the 1979 Act must first be individually determined before a transaction on it would be permitted, see supra, para. 39.

109. No evidence has been adduced to indicate that any such determinations concerning the status of the Claimant's properties were made pursuant to the 1979 Act. Nor does the Tribunal have any evidence before it to conclude that there had been an implementation of the 1979 Act which resulted in the transfer of the Claimant's properties to the Respondent.

110. However, the uncertainty as to whether a certain parcel of land was mawat was always present after the enactment of the Amendment to the 1979 Act. Inextricably linked to this uncertainty was the doubt over the ownership of such lands. Only after an investigation and a final finding was made on whether that property was considered to be mawat land, in accordance with the 1979 Act and its Regulations, could the doubt over the ownership of that property be removed.[35]

111. In sum, the Tribunal is not satisfied that the very existence and binding force of the 1979 Act, its Amendment and its Regulations constituted, by themselves, a measure or measures which amounted to an expropriation of the Claimant's Chaboksar, Ahmad-Abad, Farahzad and Nashtarood properties. It is therefore unnecessary to examine whether the properties were located within the geographical area covered by the 1979 Act or the Urban Lands Extension Act.

Validity of Title Deeds to the Chaboksar Property

***21** 112. The Tribunal will now consider the Chaboksar property. As an initial matter, the Respondent's objection to the validity of the Claimant's title deeds to that property will be addressed.

113. The Respondent submits that the land on which the Chaboksar property is situated was mawat and that, as such, the title deeds to that property have no validity because mawat land cannot be privately owned under Iranian law. Thus, the Respondent argues, these title deeds were illegally issued. The Respondent concludes that it is not possible to consider the cancellation of such illegally acquired title deeds as expropriation.

114. The Tribunal observes that a title deed issued by an official government registration office is, prima facie, strong evidence indicating that title to real property has been officially conferred on the person whose name appears on the deed as the owner or transferee. Affirmation of this general presumption is found in Articles 1287, 1290 and 1292 of the Iranian Civil Code and Articles 70 and 72 of the Iranian Registration Law, see supra, paras. 60-61.

115. The Respondent asserts, however, that Articles 27 and 141 to 145 of the Iranian Civil Code together with Article 41 of the By-Law to the Registration of Property Act prevented the registration of mawat lands, and that the 1956 Law Concerning Lands Belonging to the State, Municipalities, Endowments and Banks, as amended, provided for annulment of title deeds to mawat lands that nonetheless had been issued and for the return of title to such land to the government, leaving the title deed holder to seek compensation from the transferor, see supra, paras. 63-65. Therefore, according to the Respondent, the Claimant could not have legally registered his title deeds to this land, which was subsequently confirmed to be mawat.

116. On the evidence before the Tribunal, it appears that the investigation of whether a certain piece of land can properly be defined as mawat is a complex process and until a final decision is made regarding whether the land is mawat or not, the status of that land is uncertain or even unknown. The circumstances relating to the Farahzad property, where the Tehran Urban Lands Organization initially found that certain parcels of the Farahzad property were mawat and the subsequent reversal of that position, see supra, para. 69, serve as an illustration of the problems associated with ascertaining the status of a piece of land.

117. No submission has been made nor any evidence produced which shows that, prior to registration, any investigation was made to determine the status of the Chaboksar land.

118. The Tribunal concludes that at the time of registration, it was unknown whether the Chaboksar property was mawat land. Consequently, at that time, Article 41 of the By-Law to the Registration of Property Act could not have been applied to prevent registration of the Chaboksar property. Also, Articles 1287 and 1292 of the Iranian Civil Code could only be invoked

to question the validity of the title deeds when the land was finally determined to be mawat in 1985. The Tribunal, therefore, proceeds with the assumption of the validity of the Chaboksar title deeds during the relevant period.

Expropriation of the Chaboksar Property: the report by Claimant's unidentified representative

***22** 119. The only specific evidence proffered by the Claimant in support of this Claim is the report by his unidentified representative in Iran. The evidentiary value that could be given to such a report is highly questionable. But even if the Tribunal were prepared to give weight to that report, its contents would not justify a finding that actions attributable to the Respondent had resulted in the expropriation of the Chaboksar property. Though the Tribunal is mindful of the difficulties faced by the Claimant in collecting evidence on this issue, it could not, in any event, give such great weight to a report, the author of which is not specifically identified, as to make it the foundation of its findings in the absence of other corroborative evidence. The Claimant has not, therefore, presented adequate evidence to establish that the Respondent has expropriated the Chaboksar property.

Expropriation of the Chaboksar Property under the 1982 Act

120. The admission by the Respondent that the title to the Chaboksar property has formerly been transferred to it pursuant to the provisions of the 1982 Act necessitates the Tribunal's consideration of whether the 1979 Act and its Amendment constituted a formal expropriation of all lands subsequently determined to be mawat and whether, as the Claimant argues, a determination under the 1982 Act that the Chaboksar land was mawat could be an expropriation which should properly date from 1979. If so, the Tribunal would have jurisdiction to entertain the claim for the deprivation of the Chaboksar property.

121. In order to resolve this question, the Tribunal must examine the relationship between the 1979 Act and the 1982 Act. The Claimant argues that the differences between the two Acts are merely procedural and that the 1982 Act did not repeal or amend the 1979 Act but explicitly confirmed the nullification of title deeds to all urban mawat lands under the 1979 Act. He further asserts that the Respondent's interference with the Claimant's rights in respect of the properties that qualified as urban mawat lands was complete in September 1979.

122. While acknowledging that the aim of the 1982 Act was to maintain the principle underlying the cancellation of title deeds to mawat lands introduced by the 1979 Act, the Respondent contends that the 1982 Act totally changed the previous rules on determining mawat land and thus replaced the 1979 Act, which thereafter had no effect or application.

123. Despite the absence of an explicit law repealing the 1979 Act, the Tribunal is not persuaded that the 1979 Act would have been invoked to annul ownership of mawat lands after the adoption of the 1982 Act. In the present case, the Chaboksar property title deeds were canceled pursuant to the 1982 Act, an indication that the implementation of the 1982 Act took precedence over or superseded the 1979 Act.

124. Moreover, as the Respondent points out, a reasonable inference may be drawn from the Note to Article 5 of the 1982 Act that the words "have been," as used there, refer to the title deeds which had previously been annulled by the 1979 Act and the words "will be" refer to those title deeds which would in future be annulled in accordance with the procedure contemplated by the 1982 Act. In other words, the intention of this Note was to preserve the previous annulment of title deeds carried out under the 1979 Act. All future annulments, as far as the evidence before the Tribunal suggests, were to take place under a different procedure pursuant to the 1982 Act.

***23** 125. The 1982 Act was a far more detailed piece of legislation than its predecessor. It was comprised of 17 Articles and 14 Notes as compared to the 4 Articles and 1 Note of the 1979 Act. A major substantive difference between the two Acts was the introduction, in Article 12 of the 1982 Act, of a stage at which the determination of whether land was mawat or bayer was entrusted to an Assessment Committee composed of the representatives of the Minister of Housing and Urban Development, the Minister of Justice, and the local mayor. Built into that procedure was a right to challenge the finding of the committee in a court of law, a right which had not been granted in the 1979 Act.

126. In light of the foregoing considerations, the Tribunal rejects the Claimant's argument that the cancellation of the deeds to the Chaboksar property under the 1982 Act is an expropriation which should properly date from 1979. In so concluding the Tribunal attaches particular importance to the fact that the deeds to the Chaboksar property were canceled pursuant to the

1982 Act and not pursuant to the 1979 Act. The Tribunal therefore finds that the cancellation of the Claimant's title to the Chaboksar property occurred subsequent to 19 January 1981. In addition, there is absence of proof of expropriation during the relevant period, see supra, para. 119. Consequently, the Claim for the Chaboksar property is dismissed for lack of proof during the period over which the Tribunal has jurisdiction.

Expropriation of the Farahzad, Ahmad-Abad, and Nashtarood Properties

127. The Tribunal now turns to the Claims for the alleged expropriation of the Farahzad, Ahmad-Abad and Nashtarood properties. The only specific evidence proffered by the Claimant in support of these Claims is the report by his unidentified representative in Iran. The Tribunal has already explained why this report cannot justify a finding that actions attributable to the Respondent had resulted in the expropriation of these properties, see supra, para. 119. Accordingly, the Tribunal dismisses for lack of proof the expropriation Claims related to the Farahzad, Ahmad-Abad and Nashtarood properties.

Other Measures Affecting Property Rights

128. The Claimant argues alternatively that if the Tribunal reaches the conclusion that his properties were not expropriated, it is open to the Tribunal to make a finding that the previously referred legislation and governmental actions, see supra, paras. 27-44, constitute other measures affecting property rights as contemplated by Article II, paragraph 1, of the Claims Settlement Declaration. The Claimant maintains that these other measures interfered with his ownership rights in all the properties in question and that as a direct result of the Respondent's actions he lost the enjoyment of those properties. Thus, he seeks compensation for the full value of his interests in the properties.

129. The Respondent denies that the measures referred to by the Claimant have any relevance to the Claimant's claim. The Respondent states that the cited legislation and governmental actions, see supra, paras. 27-44, relate to mawat land in a general manner and by no means apply to the Claimant's properties because the actions were not directed at the Claimant's properties specifically. It is the Respondent's position that it has not interfered in any way with the Claimant's use or enjoyment of the benefits of his lands.

***24** 130. It is well settled in this Tribunal's practice that liability may be established for interference with property rights despite there being no effect on the formal legal title to that property. For example, in Tippetts, Abbett, McCarthy, Stratton, supra, the Tribunal held that "[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected." Id. at 10-11, 6 Iran-U.S. C.T.R. at 225 (footnote omitted); see also Harza Engineering Co., supra.

131. In Eastman Kodak Company, et al. and Islamic Republic of Iran, et al., Partial Award No. 329-227/12384-3 (11 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 153, the Tribunal stated:

> The fact that Iran's interference did not rise to the level of an expropriation or of a deprivation of ownership rights does not, however, preclude the Tribunal from considering whether the interference established here was such as to constitute "other measures affecting property rights" as contemplated by Article II, paragraph 1, of the [Claims Settlement Declaration]. Such measures, while not amounting to an expropriation or deprivation, may give rise to liability in so far as they give rise to damage to the Claimant's ownership interests.

Id. at para. 59, 17 Iran-U.S. C.T.R. at 169 (citation omitted).

132. The Tribunal, in Foremost Tehran, Inc., et al. and Islamic Republic of Iran, Award No. 220-37/231-1 (11 April 1986), reprinted in 10 Iran-U.S. C.T.R. 228, also stated that an interference "attributable to the Iranian Government or other state organs of Iran, while not amounting to an expropriation, gives rise to a right to compensation for the loss of enjoyment of the property in question." Id. at 33, 10 Iran-U.S. C.T.R. at 251.

133. The Claimant contends that the Etela'at newspaper extracts he has submitted are evidence in support of his Claim that his property interests were subjected to other measures affecting property rights.

134. Commenting on the Etela'at newspaper reports submitted by the Claimant, the Respondent takes the position that "newspaper writings, which may contain personal views and opinions of their writers concerning events and occurrences,

cannot be recognized as valid evidence by an international forum." The Respondent further states that even if it is assumed that all the submitted reports of statements made by Iranian government officials were true, they do not prove these Claims.

135. In view of these arguments, the Tribunal will assess the relevance and probative value of this type of evidence.

136. In Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgement of 27 June 1986, I.C.J. Reports 1986, p. 14, the International Court of Justice approached press materials with much caution. Nonetheless it held that:

[A]lthough it is perfectly proper that press information should not be treated in itself as evidence for judicial purposes, public knowledge of a fact may nevertheless be established by means of these sources of information, and the Court can attach a certain amount of weight to such public knowledge.

***25** Id. at p. 40, para. 63.

The Court added:

[S]tatements [by representatives of States made during press conferences or interviews and reported by the local or international press] ... emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavorable to the State represented by the person who made them. They may then be construed as a form of admission.

Id. at p. 41, para. 64.

137. In the circumstances of this Case, as the information in the Etela'at newspaper reports submitted by Mr. Karubian has not been contradicted, the Tribunal finds these reports to be of sufficient probative value to corroborate his assertion that his property rights were affected by the Respondent's actions.

138. The Respondent relies on the decision in Moin, see supra, para. 89, and states that the Claimant, without entering Iran, could have used the powers of attorney he had granted before the Islamic Revolution or could have granted a new power of attorney authorizing an attorney in fact in Iran to transfer property on his behalf.

139. The statements in Moin concerning powers of attorney were restricted to that part of the Award which dealt with facts and contentions. The Tribunal takes note of the statement by the Claimant in the present Case that his attorney in fact was not in Iran during the relevant period. The Tribunal is also aware of the existence of restrictions placed on powers of attorney sent from abroad, see supra, para. 46. These are restrictions of the type alleged by the Claimant.

140. These Iranian restrictions on the Claimant's ability to sell were not, however, the only hindrance the Claimant faced in relation to transactions in his Iranian properties. For example, on 9 April 1980 the United States amended its "Iranian Assets Control Regulations" to impose certain restrictions on Iranian transactions. See 45 FR 24432, Apr. 9, 1980, as amended at 45 FR 26940, Apr. 21, 1980. These amendments provided that "no person subject to the jurisdiction of the United States," unless authorized, "shall, directly, or indirectly, in any transaction involving Iran ... or any person in Iran ... [m] ake any payment ... or other transfer of funds or other property or interests therein to any person in Iran." § 535.206, (a)(4) (emphasis added). The Tribunal cannot know whether the United States Government would have authorized such a transfer of the Claimant's Iranian real property had the Claimant requested United States' authorization for such a transfer.

141. The language of Article II, paragraph 1, of the Claims Settlement Declaration, viz., "other measures affecting property rights," is not limited to a taking of legal title to property. It envisages a broader range of circumstances which may give rise to liability. See, e.g., Kenneth P. Yeager and Islamic Republic of Iran, Award No. 324-10199-1, para. 30 (2 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 92, 99-100.

***26** 142. The Tribunal is satisfied that governmental action, at least for some time, restricted transactions in undeveloped lands that were larger than a certain size. The Respondent's action also prevented transactions by persons outside Iran. On this basis, the Tribunal concludes that the Claimant's right to dispose of his properties was adversely affected.

143. Even if the Claimant could have transferred his real property, the Tribunal is persuaded that the effect of adoption of the 1979 Act, along with its Amendment and its accompanying Regulations, was to impair the actual possibility of such a transfer. These laws made all undeveloped or unutilized properties in both urban and rural areas vulnerable to a determination that they were mawat, and as a consequence of that determination, subject to immediate cancellation of their title deeds by Iran. Under the circumstances, the Claimant would have had difficulties in finding a buyer for his properties.

144. The Tribunal concludes that, while the interference created by the cumulative effect of the land reform legislation and related governmental action, see supra, paras. 27-40 and 42-44, did not rise to the level of an expropriation, it has been established that the interference was of such a degree as to constitute other measures affecting the property rights of the Claimant within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration. Consequently, the Respondent is responsible to the Claimant for damages resulting from these measures.

145. It remains to be determined whether the interference of the type described above caused damage to the Claimant and what compensation, if any, is due to him. See Eastman Kodak, supra, at para. 61, 17 Iran-U.S. C.T.R. at 169. While the Tribunal is satisfied that there has been an interference with the Claimant's ownership rights, a determination of the amount of damage caused for which the Respondent is liable is unnecessary in view of the Tribunal's finding on the applicability of the caveat in Case No. A18 in the present Case, see infra, para. 162.

B. A18 Caveat

146. In Case No. A18, Islamic Republic of Iran and United States of America, Decision No. DEC 32-A18-FT (6 April 1984), reprinted in 5 Iran-U.S. C.T.R. 251, the Full Tribunal added the following important caveat to its conclusion: "[W] here the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim." Id. at 26, 5 Iran-U.S. C.T.R. at 265-266. In its Order of 3 March 1989 in this Case, the Tribunal stated that the relevance of the Claimant's other nationality was to be examined together with other issues "such as the facts and applicable laws relating to the alleged acquisition and ownership of the property which constitutes the basis of this Claim as well as the actions of the Respondent allegedly affecting them." See supra, para. 3.

147. In James M. Saghi, et al. and Islamic Republic of Iran, Award No. 544-298-2 (22 Jan. 1993), the Tribunal held:
***27** The caveat is evidently intended to apply to claims by dual nationals for benefits limited by relevant and applicable Iranian law to persons who were nationals solely of Iran. However ... [e]ven when a dual national's claim relates to benefits not limited by law to Iranian nationals, the Tribunal may still apply the caveat when the evidence compels the conclusion that the dual national has abused his dual nationality in such a way that he should not be allowed to recover on his claim.
Id. at para. 54.

148. The Respondent argues that because the Claimant comes before the Tribunal as a United States national and because his Claims relate to benefits limited by Iranian law to sole Iranian nationals, the Claims are barred by the A18 caveat and also by principles of clean hands, estoppel, good faith and abuse of rights which operate in international law. The Respondent states that Iranian law prohibits foreigners from owning real estate in Iran. Although there are certain limited exceptions to this rule, see infra, para. 158, according to the Respondent, these exceptions do not apply to the properties involved in this Case. The Respondent further contends that the Claimant concealed his United States nationality when registering his purchase of the properties in order to circumvent Articles 988 and 989 of the Civil Code of Iran. See infra, paras. 155-156.

149. The Claimant asserts that Iranian law does not prohibit an Iranian national from acquiring a second nationality. The only consequence of holding two nationalities, argues the Claimant, is that only the Iranian nationality will be recognized within Iran. The Claimant denies that he concealed his United States nationality from anyone in Iran and maintains that no legal provision renders illegal the purchase of real estate in Iran by an Iranian national who has acquired another nationality. He also states that any Iranian real property owned by dual nationals will be subject to sale by the relevant public prosecutor and the proceeds will be paid to the dual national under Article 989 of the Iranian Civil Code, see infra, para. 156. According to the Claimant, this confirms a dual national's right under Iranian law to receive compensation whenever the government exercises its statutory authority to sell a dual national's real estate.

150. The Claimant further argues that, prior to the 1979 Revolution, the Iranian government actively encouraged dual nationals to invest in Iran in order to develop the economy. Consequently, he submits that the Respondent is estopped from

arguing that the Claimant was not permitted to purchase land in Iran as a dual national.

151. The Claimant asserts that he was informed by Iranian government officials, including Engineer Khalil Taleghani, former Minister of Agriculture, and Engineer Moazami, former Minister of Post, Telephone and Telegraph, that he could invest in the country as an Iranian national because he had been born in Iran and had remained an Iranian citizen under Iranian law. He contends that the purchase of real estate by dual nationals was tolerated in Iran so long as the dual national made the purchase in his or her capacity as an Iranian national. He denies that he concealed his United States nationality from any Iranian government authority.

***28** 152. The Claimant's son, Mr. John F. Karubian, states in his Affidavit of 8 May 1992 that, prior to the Revolution, he was invited by Mr. Taher Ziaie, the President of the Iranian Chamber of Commerce and Industries, to participate in a committee established to encourage Iranians who resided overseas and who were dual nationals to return to Iran and become involved in Iran's development. He claims that government officials on this committee said that dual nationals who returned to Iran would not be required to give up their other nationality.

153. In the Tribunal's view, the evidence referred to supra, at paras. 151 and 152, is not sufficient to establish that Iranian government officials encouraged him, as a dual national, to purchase real property in Iran. No indication is given as to whether the persons mentioned in the affidavits were acting in their official capacities or were implementing governmental policies. Further, it is not made clear what type of investment was allegedly encouraged. The Tribunal therefore rejects the Claimant's contention that the Respondent should be estopped from arguing that he illegally purchased real property in Iran as a dual national.

154. The Tribunal will now examine whether the right to acquire real property in Iran by contract is a benefit limited by Iranian law to those whose nationality is Iranian. The starting point for this determination is Article 988 of the Civil Code of Iran.

155. Article 988 of the Iranian Civil Code states that Iranian nationals cannot abandon their nationality without complying with the conditions set out in that Article. Of the four conditions stipulated in Article 988, the condition most relevant for present purposes is subparagraph 3 which provides that a person seeking to abandon his or her Iranian nationality must undertake:

> to transfer to Iranian nationals, by one means or another and within one year from the date of their renunciation of [Iranian] nationality, their rights to immovable properties in Iran which they possess or which they may acquire through inheritance, even if Iranian law permits foreign nationals to own them.[36]

156. Iranian nationals who acquire foreign nationality without observing the provisions of law are subject to Article 989 of the Iranian Civil Code. That Article provides that the foreign nationality of such individuals will be considered null and void and that they will be regarded as Iranian subjects. It further states "[n]evertheless, all his landed properties will be sold under the supervision of the local Public Prosecutor and the proceeds will be paid to him after the deduction of the expenses of sale."[37]

***29** 157. The Respondent, in addition to the Civil Code, also relies on the Law of Nationality of Iran, decreed by the King in 1906, to support its argument that the right of ownership of real property is exclusively reserved for Iranian nationals. The relevant Sections of this Law follow.

> Section Eight: If an Iranian national living abroad wishes to acquire the nationality of another state, firstly, he/she must not be under criminal charges in the courts of Iran; secondly, he/she must not already have been on trial or have escaped such trial; thirdly, he/she must not have escaped military service; and, fourthly, he/she must not be in debt and intend to escape such debt. Otherwise his/her change of nationality shall be null and void.
>
> Section Nine: Change of Iranian nationality, in spite of compliance with the stipulated requirements, is still subject to the permission and decision of the King. If an Iranian national living abroad acquires foreign nationality without obtaining such permission, he/she shall be barred entry into Iran. If he/she owns real estate or other property in Iran, he/she shall be forced to give up such property.

....

Section Fourteen: Those who came to Iran from foreign countries and during their residence in Iran concealed their nationality and were treated in all matters as Iranian nationals, or purchased real estate in Iran, which privilege is exclusively available to nationals of Iran, shall be treated as nationals of the State of Iran, and their claim to foreign nationality will not be accepted.[38]

158. Aside from the Civil Code and the Law of Nationality of Iran, various other laws and regulations exist, or have existed, which specifically address the issue of foreign ownership of real estate in Iran. The Foreign Nationals Immovable Properties Act, enacted on 6 June 1931, provides for the forced sale of any farmlands in Iran that a foreign national may have owned. The Decree Law Concerning Landed Property Ownership by Foreign Nationals, approved by the Council of Ministers on 26 November 1948, sets out detailed disclosure requirements that a foreign national must comply with to obtain permission to own real estate in Iran. Such permission is granted only if the real estate is for the place of residence or business of the foreigner. The foreigner must pledge that if Iran ceases to be his or her permanent place of residence, any real property owned in Iran must be transferred within six months from the date of his or her departure from Iran. Furthermore, such transfer may only be made to an Iranian national or to a foreign national who has obtained permission to own real property. The Decree Concerning Landed Property Ownership by Foreign Nationals, approved on 25 September 1963, enabled those without Iranian permanent residence permits, but who regularly made seasonal trips to Iran to tour and use resort areas, to buy immovable properties for their personal residence.

***30** 159. The foregoing legislation indicates that, except for certain circumstances which do not exist in the present Case, the right to acquire real property in Iran by contract is reserved by relevant Iranian law to Iranian nationals. Accordingly, the Tribunal finds that the Claimant could only have acquired the properties in question as an Iranian national.

160. In seeking compensation for the alleged expropriation of his properties or for any recoverable damage sustained by other measures which affected his property rights, the Claimant, a dual national with dominant and effective United States nationality, brings his Claims before the Tribunal as a United States national. The Claimant's use of his other nationality, i.e., his purchase of real property as an Iranian national, is relevant to the merits of the Claims as envisaged by the A18 caveat.

161. As the Tribunal has concluded, under Iranian law, the right to acquire real property in Iran by contract, apart from certain limited exceptions, is a benefit reserved for Iranian nationals, see supra, para. 159. The Tribunal must therefore assume that the Claimant purchased all the properties that are the subjects of these Claims in his capacity as an Iranian national after he had acquired United States nationality. He now claims in respect of those properties as a national of the United States. If the Tribunal were to allow him to recover against the Respondent in these circumstances, it would be permitting an abuse of right. Consequently, the A18 caveat must bar the Claimant's recovery. See James M. Saghi, et al., supra.

162. In view of the foregoing considerations, the Tribunal finds that the A18 caveat bars the Claimant, who brings these Claims as a United States national, from recovering against the Respondent for interference with property rights that, under Iranian law, he could have acquired only as an Iranian national.

VII. COSTS

163. Each Party shall bear its own costs of arbitration.

VIII. AWARD

164. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

A. The Claim for the expropriation of the Chaboksar property is dismissed for lack of proof during the period over which the Tribunal has jurisdiction.

B. The Claims for the expropriation of the Ahmad-Abad, Nashtarood and Farahzad properties are dismissed for lack of proof.

C. Other measures attributable to the Respondent affected the Claimant's property rights in the Chaboksar, Ahmad-Abad, Nashtarood and Farahzad properties, but the caveat in the Decision in Case No. A18 bars the Claims in regard to the said measures.

D. Each Party shall bear its own costs of arbitration.

Dated, The Hague 06 March 1996

Krzysztof Skubiszewski
Chairman, Chamber Two
George H. Aldrich

Koorosh H. Ameli

Concurring Opinion

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Footnotes

1 In the Statement of Claim, filed on 18 January 1982, the Claimant sought compensation in respect of five separate properties which he valued at U.S. $13,006,100. At the outset of the Hearing, the Claim relating to a property at Varamin was withdrawn. In the final pleadings the amount claimed was adjusted to U.S. $4,091,582. See infra, para. 92 and note 31 thereto.

2 Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed 15 August 1955, entered into force 16 June 1957, 284 U.N.T.S. 93, T.I.A.S. No. 3553, 8 U.S.T. 900.

3 The Claimant's Naturalization Certificate was issued under the name of Richard Kay. That name was adopted after he arrived in the United States to facilitate his immigration and that of his family. Subsequently, after deciding that the name change was unnecessary, he and his family assumed their original names, the Claimant's being Rouhollah Karubian, and a court order to that effect was obtained in 1956.

4 The Tribunal understands that mawat land is land which is undeveloped and has no prior record of development.

5 English title of the Act as translated by the Tribunal's Language Services Division. The Parties have presented different English translations for this title. The Tribunal has previously referred to this Act as the "Act to Abrogate Ownership of Never-Utilized Lands and the Manner of Development Thereof." See Zaman Azar Nourafchan, et al. and Islamic Republic of Iran, Award No. 550-412/415-3, para. 19 (19 Oct. 1993).

6 Published in Official Gazette No. 10025 on 24 July 1979 and announced to the public by Notice No. 7/2064 dated 2 July 1979. English translation by the Tribunal's Language Services Division.

7 Published in Official Gazette No. 10257 dated 14 May 1980.

8 Published in Official Gazette No. 10075 dated 25 September 1979.

9 The Tribunal understands that bayer land is land which has previously been developed but which has fallen into disuse.

10 Published in Official Gazette No. 10580 dated 27 June 1981.

11 Published in Official Gazette No. 10062, dated 9 September 1979 and announced to the public by Notice No. 53688 dated 27 August 1979.

12 English translation by the Tribunal's Language Services Division.

13 Published in Official Gazette No. 10813 dated 13 April 1982 and announced to the public by Notice No. 10856 dated 7 April 1982.

14 English translation by the Tribunal's Language Services Division.

15 English translation by the Tribunal's Language Services Division. The Act was approved on 16 September 1979, published in Official Gazette No. 10092 dated 16 October 1979 and announced to the public by Notice No. 55934 dated 26 September 1979.

16 "Coastal lands" under Article 1, paragraph i, of the Lands Grant Act is defined, in relevant part, as "lands lying alongside the coasts of seas."

17 A large area of land is described as one that is three times the size of the land area which, in accordance with local custom, is necessary to support one farmer and his family.

18 The term "major land holder" is not defined.

19 English translation by Claimant.

20 English translation by Claimant.

21 English translation by Claimant.

22 English translation by the Tribunal's Language Services Division.

23 The Chaboksar property title deeds submitted by the Claimant state that he is the owner of the property and that the deeds are in accordance with the records on file with the Department of Real Estates.

24 English translation by the Tribunal's Language Services Division.

25 The Claimant's English translation of this letter incorrectly translates the date as 13 June 1980.

26 English translation by Claimant.

27 English translation by Claimant.

28 The Farahzad property title deeds submitted by the Claimant state that he is the owner of the property and that they are in accordance with the records on file with the Department of Real Estates.

29 Developed land.

30 The Ahmad-Abad property title deeds submitted by the Claimant state that they were transferred to him on 4 March 1957 and that they are in accordance with the records on file with the Department of Real Estates.

31 Islamic religious judge.

32 The Nashtarood property title deed submitted by the Claimant states that one undivided share of eighty shares thereof was transferred to him on 9 November 1972 and that it is in accordance with the records on file with the Department of Real Estates.

33 The following table lists the U.S. dollar values of the properties as claimed by the Claimant at different stages of the proceedings:

Property	Statement of Claim	Final Pleadings

Nashtarood	$ 380,000	$ 255,143
Chaboksar	$ 4,696,800	$ 1,788,572
Farahzad	$ 5,062,500	$ 1,880,357
Ahmad-Abad	$ 879,000	$ 167,510
Varamin	$ 2,000,000	——
	$13,006,100	$ 4,091,582

34 The following table lists the different 1979 values of the properties in rials per square meter as submitted by the Claimant and the Respondent:

Property	**Claimant**	**Respondent**
Nashtarood	4,750	250-300
Chaboksar	4,000	300-350
Farahzad	6,500	400-450
Ahmad-Abad	4,300	250-300

35 While there was no right of judicial review specifically provided under the 1979 Act, the Tribunal is aware that such a right was granted by the 1982 Act. See infra, para. 125.

36 English translation by the Tribunal's Language Services Division from Civil Code of Iran, Amir-Kabir Publications, 1977-78. The Note to Article 988 states, inter alia, that orders for the sale of the property will be issued for those who renounce their Iranian nationality but do not leave Iran within the specified time.

37 English translation by Musa Sabi.

38 English translation by the Tribunal's Language Services Division.

A/CN.4/SER.A/1999/Add.1 (Part 1)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1999

Volume II
Part One

Documents of the fifty-first session

UNITED NATIONS
New York and Geneva, 2008

NOTE

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Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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* *

The reports of the special rapporteurs and other documents considered by the Commission during its fifty-first session, which were originally issued in mimeographed form, are reproduced in the present volume, incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.

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ABBREVIATIONS

AALCC	Asian-African Legal Consultative Committee
CAHDI	Ad Hoc Committee of Legal Advisers on Public International Law
CMEA	Council for Mutual Economic Assistance
EEC	European Economic Community
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IMO	International Maritime Organization
ISO	International Organization for Standardization
ITU	International Telecommunication Union
IUCN	International Union for Conservation of Nature and Natural Resources
OAS	Organization of American States
OAU	Organization of African Unity (now African Union (AU))
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
UNCCD	United Nations Convention to Combat Desertification
UNEP	United Nations Environment Programme
UNIDROIT	International Institute for the Unification of Private Law
WHO	World Health Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

*

* *

I.C.J. Reports	ICJ, *Reports of Judgments, Advisory Opinions and Orders*
LGDJ	Librairie générale de droit et de jurisprudence
P.C.I.J., Series A	PCIJ, *Collection of Judgments* (Nos. 1–24: up to and including 1930)
P.C.I.J., Series A/B	PCIJ, *Judgments, Orders and Advisory Opinions* (Nos. 40–80: beginning in 1931)
P.C.I.J., Series C	PCIJ, *Pleadings, Oral Statements and Documents* (Nos. 5288: from 1931*)*
RGDIP	*Revue générale de droit international public* (Paris)
UNRIAA	United Nations, *Reports of International Arbitral Awards*

*

* *

In the present volume, the "International Tribunal for the Former Yugoslavia" refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and the "International Tribunal for Rwanda" refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

*

* *

NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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* *

The Internet address of the International Law Commission is **www.un.org/law/ilc/index.htm.**

FILLING OF CASUAL VACANCIES (ARTICLE 11 OF THE STATUTE)

[Agenda item 1]

DOCUMENT A/CN.4/494

Note by the Secretariat

[*Original: English*]
[*26 January 1999*]

1. Following the election in April 1998 of Mr. Luigi Ferraro Bravo as a judge of the European Court of Human Rights, the election in October 1998 of Mr. Mohamed Bennouna as a judge of the International Tribunal for the Former Yugoslavia and the appointment in January 1999 of Mr. Václav Mikulka as Director of the Codification Division, three seats have become vacant in the International Law Commission.

2. In this case, article 11 of the statute of the Commission is applicable. It prescribes that:

> In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this statute.

Article 2 reads:

> 1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.
>
> 2. No two members of the Commission shall be nationals of the same State.
>
> 3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

> At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

3. The terms of the three members to be elected by the Commission will expire at the end of 2001.

Annex 190

STATE RESPONSIBILITY

[Agenda item 3]

DOCUMENT A/CN.4/498 and Add.1–4

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

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

CONTENTS

Multilateral instruments cited in the present report

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

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

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Scope of the present report[1]

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

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

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

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

Review of draft articles in part one

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

1. INTRODUCTION

(a) *Overview*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the attacking State,[598] and this is plainly correct as a general proposition. In the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ observed that:

> [A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.[599]

This rather convoluted formulation may have been adopted to indicate that the law of neutrality, while it clearly distinguishes between conduct as against a belligerent and conduct as against a neutral, does not imply that neutral States are unaffected by the existence of a state of war. A State exercising an inherent right of self-defence of a State has certain belligerent rights, even as against neutrals. The extent to which the traditional law of neutrality has survived unchanged in the Charter period is still controversial, but fortunately the Commission does not need to enter into these controversies in this context. The language of article 34 leaves open all issues of the effect of action in self-defence vis-à-vis third States, and no alteration seems required.

(iv) *The formulation of article 34*

303. Finally, France and (in an earlier comment) Mongolia question the simple reference in article 34 to self-defence in conformity with the Charter of the United Nations.[600] However, these suggestions are opposed to each other: France seeks a reference to what it regards as the wider right of self-defence under general international law, whereas Mongolia seeks an express reference to Article 51. In the Special Rapporteur's opinion, it is neither necessary nor desirable to resolve underlying questions about the scope of self-defence in modern international law—even if it were possible to do so in the draft articles, which having regard to Article 103 of the Charter it is not. It is not the function of the draft articles to specify the content of the primary rules, including that referred to in Article 51. Article 34 uses the phrase "a lawful measure of self-defence taken in conformity with the Charter of the United Nations", and this is a sufficient reference to the modern international law of self-defence, customary and conventional. No change to article 34 is proposed in this respect.

(v) *Conclusions on article 34*

304. For these reasons it is recommended that article 34 be retained, but that a new paragraph be added to distinguish in general terms between those obligations which prevail even as against a State exercising a right of self-defence, and those which do not.[601]

(g) *Article 35. Reservation as to compensation for damage*

305. Article 35 provides as follows:

> Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act.

Article 35 is the only provision in chapter V which deals with the consequences (substantive or procedural) of invoking circumstances precluding wrongfulness. It is proposed to deal with it in that context, and after considering whether any additional circumstances ought to be provided for.[602]

4. Possible justifications or excuses not included in chapter V

306. Although the Commission saw six circumstances originally enumerated in chapter V as the main generally applicable ones, it evidently did not regard the list as "absolutely exhaustive", and noted the possibility of the development of further general or specific excuses for wrongful conduct. In its view, chapter V was "not to be construed as closing the door on that possibility".[603] This raises a number of questions for the Commission on second reading. First, are there other circumstances precluding wrongfulness of a general character which ought to be recognized in chapter V? Secondly, what provision—if any—is necessary to deal with the possibility that new excuses for non-performance might arise in the future? The second question is dealt with in the context of chapter 1 of part two, since it concerns the effect of the draft articles as a whole. The first question is addressed below.

307. Different legal systems, in fact, recognize different ranges of justifications or excuses for non-performance of obligations, and the review undertaken earlier of the evolution of chapter V shows that a number of other candidates for inclusion have been considered at various times.[604] It is necessary to mention three of them.

(a) *Performance in conflict with a peremptory norm* (jus cogens)

308. Articles 53 and 64 of the 1969 Vienna Convention deal with cases where the provisions of a treaty are themselves in contradiction with an existing or new peremptory norm, in which case the consequence is the invalidity or termination of the treaty. Moreover, those cases are regarded so seriously that the offending provision is inseparable, i.e. the whole treaty is invalid, even if only one of its provisions is impugned.[605] But there is a third possibility. A treaty, apparently lawful on its face and innocent in its purpose, might fail to be performed in circumstances where its performance would produce, or

[598] *Yearbook … 1980*, vol. II (Part Two), commentary to article 34, p. 61, para. (28).

[599] *I.C.J. Reports 1996* (see footnote 211 above), p. 261, para. 89.

[600] See paragraph 297 above, and for Mongolia's comment, *Yearbook … 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 76, para. 8.

[601] For the proposed formulation of the article, see paragraph 358 below. For its location, see paragraph 357 below.

[602] See paragraphs 338–349 below.

[603] *Yearbook … 1980*, vol. II (Part Two), commentary to article 34, p. 61, para. (29).

[604] See paragraph 217 above.

[605] 1969 Vienna Convention, art. 44, para. 5. Article 64 states that in the case of a new peremptory norm, "any existing treaty which is in conflict with that norm becomes void and terminates". Thus the whole treaty terminates if any provision of it is in conflict with a peremptory norm.

substantially assist in, a breach of a peremptory norm. An example might be where a treaty right of passage through a strait or overflight through the airspace of a State was being exercised in order to commit an act of aggression against another State, or where weapons promised to be provided under an arms supply agreement were to be used to commit genocide or crimes against humanity. There is no reason in such cases why the treaty itself should be void or should terminate. It is not intrinsically unlawful, and no new peremptory norm is involved. It is simply that, as a result of extrinsic circumstances, the performance of the treaty would violate, or lead directly to the violation of, a peremptory norm. In such cases the question is whether "non-performance of a treaty stipulation which conflicts with a rule of *jus cogens*—provided that the conflict is properly established—should not be considered a ground [i.e. a justification] for a breach of that treaty".[606] At the level of principle, the answer must surely be yes. If a peremptory norm invalidates an inconsistent treaty, how can the obligation to perform the treaty stand against the breach of such a norm? No doubt the link between performance of the treaty obligation and breach of the peremptory norm would have to be clear and direct. But in such cases, the temporary suspension of the obligation to perform surely follows from the peremptory character of the norm that would otherwise be violated.

309. On the other hand, there is a question as to how this result is to be achieved. In many cases it will be sufficient to interpret the relevant treaty rule as not requiring the conduct in question, in the same way as direct conflict between treaties and peremptory norms will usually be avoided by interpretation.[607] However, the relevant rule may be clear, and so too the conflict with the peremptory norm in the given circumstances.

310. Sir Gerald Fitzmaurice treated this question under the heading "Non-performance justified *ab intra* by virtue of a condition of the treaty implied in it by international law", and specifically on the basis of an implied condition of "continued compatibility with international law",[608] noting that:

> A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility …
>
> The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.[609]

No similar rule applied to "a rule in the nature of *jus dispositivum*",[610] since the parties were free to contract out of such a rule, including prospectively.

311. It should be stressed that, in the passage quoted, Sir Gerald Fitzmaurice evidently did not contemplate either the invalidity of the treaty or its termination. His focus was on the question of non-observance, in a situation of what might be referred to as occasional conflict or inconsistency. A treaty which is on its face inconsistent with a peremptory norm no doubt cannot stand, but few treaties are of this character. Cases of "occasional conflict" are much more likely, and it is not clear why these should entail total invalidation.[611] Moreover, it should again be noted that under the 1969 Vienna Convention, it is necessary that a State should take action to invoke some ground for invalidity or termination, and this includes action pursuant to articles 53 and 64. A State may be reluctant to see a treaty invalidated or terminated as a whole, yet it may be legitimately concerned as to a specific case of performance of the treaty conflicting with the demands of a peremptory norm.[612] In the event of such a conflict, there is, anyway, no room for election or for an option as between the two conflicting norms.

312. As various comments on the draft articles indicate, a number of Governments continue to harbour concerns about the notion of *jus cogens*.[613] These relate, it seems, not so much to a lack of support for the substantive values embodied in the relatively few indisputable *jus cogens* norms (the prohibitions against genocide, slavery, crimes against humanity and torture, the prohibition of aggression, and a few others), as to the worry that the notion is radically indeterminate and will destabilize treaty relations. But in nearly 20 years since the 1969 Vienna Convention came into force there has been no case where *jus cogens* has been invoked to invalidate a treaty. During the same period, tribunals, national and international, have affirmed the idea of peremptory norms in various contexts, not limited to the validity of treaties.[614] ICJ, while so far avoiding the use of the term itself, has also endorsed the notion of "intransgressible principles".[615]

313. In the Special Rapporteur's view, there can be no going back on the clear endorsement of the notion of peremptory norms contained in the 1969 and 1986 Vienna Conventions. According to article 53 common to the two Conventions, a peremptory norm of general international law is one from which no derogation is permitted, except by a later norm of the same status. It follows from this definition that obligations generated by a peremptory norm must prevail over other obligations in case of conflict. The Special Rapporteur thus agrees with Sir Gerald Fitzmaurice and Rosenne that, once the peremptory character of a norm of *jus cogens* is clearly recognized, that norm must prevail over any other international obligation not having the same status. Indeed

[606] Rosenne, op. cit., p. 65. The author adds that "it is difficult to foresee this hypothesis in concrete terms" (ibid.).

[607] This discussion focuses on the potential conflict between treaty performance and a peremptory norm. In the case of a rule of customary international law, the possibility of conflict is much less, but it is not excluded.

[608] *Yearbook … 1959* (see footnote 6 above), p. 46.

[609] Ibid.

[610] Ibid.

[611] Any more than the "occasional" inconsistency between a Security Council resolution and the 1971 Montreal Convention invalidated the latter (see paragraphs 9 and 24 above).

[612] See the remarks of Judge ad hoc Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, pp. 439–441. The Court did not address these issues in its Order.

[613] See paragraph 236 above.

[614] See, for example, the decisions of the International Tribunal for the Former Yugoslavia in *Prosecutor* v. *Anto Furundzija*, judgement of 10 December 1998, unreported, and of the British House of Lords in *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate,* ex parte *Pinochet Ugarte (No. 3)*, 24 March 1999, *The Weekly Law Reports 1999*, vol. 2, especially pp. 832–848 (Lord Browne-Wilkinson).

[615] *I.C.J. Reports 1996* (see footnote 211 above), p. 257, para. 79.

in such cases the State concerned would not have the choice whether or not to comply: if there is inconsistency in the circumstances, the peremptory norm must prevail. On the other hand, the invalidation of a treaty which does not in terms conflict with any peremptory norm, but whose observance in a given case might happen to do so, seems both unnecessary and disproportionate. In such cases, the treaty obligation is, properly speaking, inoperative[616] and the peremptory norm prevails. But if the treaty can in future have applications not inconsistent with the peremptory norm, why should it be invalidated by such an occasional conflict? Certainly, an occasional conflict with a non-peremptory norm of customary international law (which may have the same content as a treaty) would not invalidate the customary rule for the future.

314. Is such a conflict to be resolved at the level of the secondary rules, or is it not (like consent[617]), more properly considered part of the formulation of the primary obligation? The position is not the same as it is with respect to consent since, as argued above, the consent requirement is intrinsic to the *particular* norm or obligation, whereas the effect of peremptory norms is extrinsic to that norm or obligation and arises as an aspect of the system of international law. Nonetheless in some respects at least the impact or effect of peremptory norms occurs prior to and independently of the secondary rules of responsibility—for example, in the case of article 53 of the 1969 Vienna Convention itself. If a treaty is invalid, no obligation arises to which chapter V can apply. But is this always the situation? The question may be asked in the following way: when the draft articles speak of the obligations of States in accordance with the applicable primary rules, do they nonetheless conceive of those obligations as general in form? Or are they obligations applicable to the specific States concerned in the specific circumstances of each particular case? In short, are the obligations referred to in articles 3 (*a*) and 16 general in character, or are they highly individualized and specified? The latter conception, rigorously applied, might dissolve part one of the draft articles altogether, referring everything to the auspices of the primary rules. Yet this does not seem a useful result or one consistent with the development of a systematic approach to State responsibility. Thus it seems sensible still to think of the obligations which are the subject of the draft articles as being, or at least as including, obligations of a general character. By the same token, it seems appropriate to reflect the overriding impact of peremptory norms *in casu*—in situations of occasional conflict—as a circumstance precluding wrongfulness under chapter V of part one.[618]

315. Accordingly, chapter V should contain a provision to the effect that the wrongfulness of an act of a State not in conformity with an international obligation is precluded if the act is required in the circumstances by a peremptory norm of general international law. It should be stressed that nothing less than direct conflict between the two obligations, that is to say, an impossibility to comply at the same time with both in the circumstances that have arisen, can be sufficient for this purpose.[619]

(b) *The* "exceptio inadimplenti non est adimplendum"

316. The maxim "*exceptio inadimplenti non est adimplendum*" (often referred to as the *exceptio inadimpleti contractus*) stands for the idea that a condition for one party's compliance with a synallagmatic obligation is the continued compliance of the other party with that obligation. It is connected with a broader principle, that a party ought not to be able to benefit from its own wrong. This was formulated by PCIJ in the *Factory at Chorzów* case in the following way:

> It is … a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.[620]

The *exceptio* thus operates in the same manner as other circumstances precluding wrongfulness, and it requires consideration here.

(i) *Application of the* exceptio *in international case law*

317. The application of the *exceptio* was an issue in the *Diversion of Water from the Meuse* case. In that case, the Netherlands complained, inter alia, about Belgium's taking of water for irrigation and other purposes from a particular lock on the Belgian side, which was said to be unlawful under a bilateral Treaty of 1863. Belgium argued that its use of the lock was not unlawful having regard to the similar use by the Netherlands of a lock on its side. Subsidiarily it argued that, "by constructing certain works contrary to the terms of the Treaty, the Applicant has forfeited the right to invoke the Treaty against the Respondent".[621] The Court upheld the principal Belgian contention, inter alia, by comparing the use of the two locks:

> Neither of these locks constitutes a feeder, yet both of them discharge their lock-water into the canal, and thus take part in feeding it with water otherwise than through the treaty feeder … In these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past.[622]

In his separate opinion, Judge Altamira denied that the obligations of the two parties were synallagmatic; accordingly Belgium could not invoke the Netherlands' own conduct as a circumstance precluding wrongfulness.[623] Judges Anzilotti (dissenting) and Hudson disagreed. Judge Anzilotti, referring to Belgium's subsidiary submission, said that:

> I am convinced that the principle underlying this submission (*inadimplenti non est adimplendum*) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any

[616] See paragraphs 227–228 above.

[617] See paragraph 243 above.

[618] The "nominalist" approach to obligations, which is rejected here, might have further consequences for chapter V. It would reinforce a very narrow conception of the chapter (covering only circumstances precluding responsibility, not wrongfulness). It would tend to the exclusion of article 34 on self-defence.

[619] For the text of the proposed article, see paragraph 358 below.

[620] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 31.

[621] *Diversion of Water from the Meuse, P.C.I.J., Series C, No. 81*, p. 209.

[622] Ibid., *Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 25.

[623] Ibid., p. 43.

case, it is one of these "general principles of law recognized by civilized nations" which the Court applies in virtue of Article 38 of its Statute.[624]

Judge Hudson referred both to analogous principles of the English law of equity as well as to civil law sources and said:

> It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law … A very similar principle was received into Roman Law … The *exceptio non adimpleti contractus* required a claimant to prove that he had performed or offered to perform his obligation … [E]ven where a code is silent on the point Planiol states the general principle that "in any synallagmatic relationship, neither of the two parties may claim a benefit to which it is entitled unless it offers to perform its own obligation" …
>
> The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.[625]

318. In the *Appeal Relating to the Jurisdiction of the ICAO Council*, ICJ emphasized that a mere allegation by a party to a treaty that another party had committed a material breach of it could not allow the former unilaterally to consider that treaty as terminated or suspended.[626] In his separate opinion, Judge de Castro expressly referred to the *exceptio inadimpleti contractus* in the context of India's contention that "[n]o question of interpretation or application can arise with regard to a treaty which has ceased to exist or which has been suspended".[627] Relying upon the principle laid down in article 60 of the 1969 Vienna Convention, "which follows from the contractual nature of treaties",[628] Judge de Castro said:

> It should not be overlooked that the rule opens the possibility of raising the *exceptio inadimpleti non est adimplendum*. The breach of an obligation is not the cause of the invalidity or termination of the treaty. It is a source of responsibility and of new obligations or sanctions. Alongside this, it is the material breach of a treaty which entitles the injured party to invoke it in order to terminate or suspend the operation of the treaty.[629]

319. In the *Gabčíkovo-Nagymaros Project* case, the question arose in a rather specific and unusual form. As noted above, ICJ held that Hungary was not justified in suspending and terminating work on the project in the period 1989–1991, but equally that Czechoslovakia was not entitled unilaterally to divert the Danube for the purposes of its Variant C. Both parties were accordingly in breach of the 1977 Treaty, but the Court declined to allow Hungary to rely on Czechoslovakia's breach (undoubtedly a material breach) as a ground for termination. Relying on the passage from the *Factory at Chorzów* case, cited above (para. 316), the Court said it could not:

> overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct … Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.[630]

Subsequently the Court noted that "[t]he principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct".[631] However, it should be noted that while Slovakia's later breach of the Treaty was "caused" by Hungary's earlier breach (in the sense of it being a *causa sine qua non*), it was not caused by the earlier breach in the sense of the *Factory at Chorzów* dictum. Instead it was, as the Court held, independently unlawful.

(ii) *Comparative law underpinnings of the "*exceptio*"*

320. As Judges Anzilotti and Hudson indicated in *Diversion of Water from the Meuse*,[632] the principle underlying the *exceptio* is widely recognized in national legal systems in respect of reciprocal or synallagmatic obligations, i.e. where it is clear that performance of an obligation by one party is either a precondition or a concurrent condition to the performance of the same or a related obligation by the other party. A cognate situation arises where the breach by one party is consequential upon and directly produced by an earlier breach of the other party (e.g. where a delay in completion of certain work by one party is caused by a delay in delivery of a necessary piece of equipment by the other). Moreover, in national law (just as in the treaty cases cited above), what is at stake appears to be a circumstance precluding wrongfulness in respect of the continued performance of an obligation, rather than its termination. As Treitel notes, after a thorough review of the comparative law experience:

> The effect of the *exceptio* in CIVIL LAW must be distinguished from that of termination … Termination brings to an end each party's duty to perform, though the circumstances making the remedy available may give the injured party a right to damages; it also gives the injured party a right to the return of his own performance on restoring what he has received under the contract. The *exceptio* does not produce these effects, but only gives rise to what has been called a "waiting position". It is a "dilatory plea" which does not terminate the contract but merely entitles the injured party *for the time being* to refuse to perform his part … The injured party may rely on the *exceptio* both in legal proceedings and extra-judicially. Where the circumstances are such as to justify the injured party's refusal to perform the court is bound to give effect to

[624] Ibid., p. 50.

[625] Ibid, p. 77, citing, inter alia, Planiol, *Droit civil*, 6th ed. (1912), vol. 2, p. 320.

[626] *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 67, para. 38.

[627] Ibid., p. 124.

[628] Ibid., p. 129.

[629] Ibid., p. 128, footnote 1. Judge de Castro adds further that "[i]t is the breach of rights or obligations having their source in the agreement which lies at the root of the *exceptio non adimpleti*" (p. 129), thus pointing out the limits of India's contention.

[630] *I.C.J. Reports 1997* (see footnote 51 above), p. 67, para. 110.

[631] Ibid., p. 76, para. 133. Among the dissentients on this point, see the declaration of President Schwebel (ibid., p. 85) or the dissenting opinions of Judges Herczegh and Fleischhauer, who both consider as a decisive element the seriousness or lack of proportionality of Czechoslovakia's breach of its obligations as compared to Hungary's (ibid., p. 198 (Judge Herczegh), and p. 212 (Judge Fleischhauer, stressing that "[t]he principle that no State may profit from its own violation of a legal obligation does not condone excessive retaliation")). See also the declaration of Judge Rezek (p. 86). But Judge Bedjaoui strongly objects to that view, noting that treaties "cannot be destroyed by violating them. Save by mutual consent, States cannot and may not rid themselves of their treaty obligations so easily" (ibid., p. 138).

[632] See footnote 621 above.

the *exceptio*: it has no discretion in the matter even in those systems (such as the French) in which the remedy of termination is subject to the discretion of the court.[633]

321. The principle of the *exceptio* is also reflected in international commercial law instruments. For example, article 80 of the United Nations Convention on Contracts for the International Sale of Goods provides simply that:

> A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

It does not seem to matter for the purposes of article 80 whether the act or omission which caused the non-performance was or was not wrongful. The principle is differently formulated, under the rubric of "withholding performance", in article 7.1.3 of the UNIDROIT Principles of International Commercial Contracts, which provides that "[w]here the parties are to perform simultaneously, either party may withhold performance"[634] if the other is not willing and able to perform.

(iii) *Should the principle be recognized in the draft articles?*

322. In his fourth report on the law of treaties, Sir Gerald Fitzmaurice discussed the principle in the framework of "circumstances justifying non-performance". He was not certain whether it was properly classified as a justification "*ab extra* by operation of a general rule of international law", or "*ab intra* by virtue of a condition of the treaty implied in it by international law".[635] But he was clear that the principle existed, and indeed he formulated it very broadly:

> By virtue of the principle of reciprocity, and except in the case of the class of [multilateral treaties of the "integral" type … where the force of the obligation is self-existent, absolute and inherent for each party, irrespective and independently of performance by the others], non-performance of a treaty obligation by one party to the treaty will, so long as such non-performance continues, justify an equivalent and corresponding non-performance by the other party or parties.[636]

His commentary was also clear in regarding this as a general principle, not only applicable to treaty obligations:

> [T]here is a general *international law rule of reciprocity* entailing that the failure of one State to perform its international obligations in a particular respect will either *entitle other States to proceed to a corresponding non-performance* in relation to that State, or will at any rate *disentitle that State from objecting to such corresponding non-performance*.[637]

The commentary goes on to mention the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, where ICJ declined to apply the principle to a treaty providing for the constitution of an arbitral commission; the wrongful refusal of one party to the dispute to appoint its own member was held to prevent the constitution of the commission as a whole, on the ground that:

> The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties.[638]

This is reminiscent of Czechoslovakia's attempt, in the case concerning the *Gabčíkovo-Nagymaros Project*, to fashion, by way of "approximate application", a version of the project favourable to it when faced with Hungary's wrongful refusal to proceed. The Court rejected the argument, holding that Hungary's breach of the 1977 Treaty could not be remedied by creating a project which was not the kind of project contemplated by the Treaty.[639]

323. The Commission did not debate Sir Gerald Fitzmaurice's fourth report on the law of treaties, nor did his successor, Sir Humphrey Waldock, address the issue. Under his guidance the scope of the 1969 Vienna Convention was narrowed so as to deal with the treaty as an instrument, leaving to one side most questions of the performance of treaty obligations. These were reserved to the topic of State responsibility by article 73 of the Vienna Convention.

324. The issue of the *exceptio* was addressed by Mr. Willem Riphagen in the context of countermeasures. In his fifth report, he proposed as article 8 of part two the following text:

> Subject to articles 11 to 13, the injured State is entitled, by way of reciprocity, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached.[640]

In the debate, some members pointed to "the fine and somewhat formalistic distinction between [draft article 8] and the suspension of the *performance* of treaty obligations".[641] Mr. Gaetano Arangio-Ruiz likewise dealt with the issue as an aspect of countermeasures, noting that:

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[633] Treitel, *Remedies for Breach of Contract: A Comparative Account*, pp. 310–311, para. 235; for his review, see pages 245–317 ("defence of refusal to perform").

[634] See footnote 492 above.

[635] *Yearbook … 1959* (see footnote 6 above), pp. 44 and 46.

[636] Ibid., p. 46.

[637] Ibid., p. 70, para. 102.

[638] *I.C.J. Reports 1950* (see footnote 34 above), p. 229, cited by Sir Gerald Fitzmaurice, *Yearbook … 1959* (see footnote 6 above), p. 71.

[639] Or, as the Court actually put it:

> "[E]ven if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty …
>
> "It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations … but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse."

(*I.C.J. Reports 1997* (see footnote 51 above), pp. 53–54, paras. 76 and 78)

On the so-called "principle of approximate application", see *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, separate opinion of Sir Hersch Lauterpacht, p. 46, and the discussion by Rosenne, op. cit., pp. 95–101.

[640] *Yearbook … 1984*, vol. II (Part One), document A/CN.4/380, p. 3, and for the draft commentary, see *Yearbook … 1985*, vol. II (Part One), document A/CN.4/389, pp. 10–11. Draft article 11 as proposed by Mr. Riphagen excluded the application of article 8 in cases of obligations arising from multilateral treaties and affecting the collective interests of the States parties. Draft article 12 was a savings clause dealing with *jus cogens*.

[641] *Yearbook … 1984*, vol. II (Part Two), p. 103, para. 373.

The problem here is to see whether practice justifies making a distinction between such "conventional" measures as treaty suspension and termination and countermeasures in general, not only for merely descriptive purposes but in view of the legal regime to be codified or otherwise adopted by way of progressive development. As well as the question of so-called reciprocity in general, the issues relating to these two "conventional" measures—issues connected with the relationship between the law of treaties and the law of State responsibility—will require further study before any draft articles are formulated.[642]

The Commission decided not to consider reciprocal measures "as a distinct category of countermeasures" on the ground that they "did not deserve special treatment".[643]

(iv) *Relationship of the exceptio to other procedures*

325. As this history suggests, in considering whether to include the *exceptio* in chapter V it is first necessary to ask whether its role is not sufficiently performed by two other procedures. The first of these is countermeasures. Almost by definition, where one State has breached a synallagmatic obligation, the other State's refusal to perform that obligation will be a legitimate countermeasure, since it is very unlikely to be disproportionate and may well be the most appropriate response of all. On the other hand, the *exceptio* has a much more limited application than countermeasures, is not subject to the same limitations and is a more specific response to a particular breach, lacking the opprobrium often associated with countermeasures. A legal system might reject countermeasures, self-help other than in self-defence and reprisals but still find a role for the *exceptio*. Although the Commission has already rejected the category of reciprocal countermeasures, for reasons which are valid enough in that context, that rejection does not exclude the possibility of adopting some version of the *exceptio* in chapter V of part one—a possibility the Commission has not yet considered.[644]

326. The second alternative procedure is the suspension of a treaty for breach. Under article 60, paragraph 1, of the 1969 Vienna Convention, a material breach of a bilateral treaty by one party entitles the other to terminate the treaty, but also to suspend it in whole or in part. In the case of a multilateral treaty, the *only* possibility for a party aggrieved by a material breach is to suspend the treaty in its relations with the defaulting State, since termination is a matter for all the parties to the treaty.[645] Overall the Convention gives considerable emphasis to suspension of treaties, no doubt out of a desire to leave open the possibility of a resumption of treaty relations even after a material breach.[646]

327. There are, however, still differences between reliance on the *exceptio* as a circumstance precluding wrongfulness, and the suspension of a treaty under article 60 of the 1969 Vienna Convention or its customary law equivalent. First, article 60 only applies to "material" breaches, rather narrowly defined, whereas the *exceptio* applies to any breach of treaty. Secondly, article 60 allows the suspension of the whole treaty, or (apparently) any combination of its provisions, whereas the *exceptio* only allows non-performance of the same or a closely related obligation. Thirdly, the *exceptio* may also be more readily applied to cases of obligations of simultaneous performance, given the formal procedure for suspension in article 65.[647] And finally, article 60 is of course only concerned with the suspension of treaty obligations, whereas there is no reason to think that the *exceptio*, as it is formulated in the *Factory at Chorzów*[648] dictum, does not apply to all international obligations whatever their origin.

(v) *Forms of the exceptio distinguished*

328. There is thus some, but far from complete, overlap between the *exceptio* and the other doctrines discussed, and this supports the view that—regard being had to the weight of authority behind it and to its general good sense—some version of the *exceptio* ought to be recognized in chapter V. However, it is necessary here to distinguish at least two different forms of the *exceptio*. One, expressed in the *Factory at Chorzów* dictum[649] and in article 80 of the United Nations Convention on Contracts for the International Sale of Goods,[650] requires that there be a causal link between the breach of the obligation by State A and its non-performance by State B. The second, broader one is concerned with synallagmatic or interdependent obligations, with each seen as in effect a counterpart of the other: it is as expressed by Judge Hudson in *Diversion of Water from the Meuse*,[651] in article 7.1.3 of the UNIDROIT Principles of International Commercial Contracts[652] and by Sir Gerald Fitzmaurice in his reports.[653] The position taken by the majority in the *Gabčíkovo-Nagymaros Project* case seems to have been different again,[654] although still a manifestation of the

[642] *Yearbook … 1991*, vol. II (Part One), document A/CN.4/440 and Add.1, p. 14, para. 35.

[643] *Yearbook … 1992*, vol. II (Part Two), p. 23, para. 151.

[644] Ibid. See also *Yearbook … 1996*, vol. II (Part Two), p. 67, para. (1) of the commentary to article 47, footnote 200.

[645] See article 60, paragraph 2 (*b*) and (*c*). The rather strict provisions of article 44 on separability do not apply to suspension for breach: see article 44, paragraph 2, presumably on the ground that a State which may terminate the whole treaty for breach may suspend less than the whole. This could however lead to unfair results in practice, if a State were to suspend those provisions which imposed obligations on it, while seeking to maintain in force those that gave it rights.

[646] In the case concerning the *Gabčíkovo-Nagymaros Project*, the Court seems to have taken the view that Hungary suspended the operation of the 1977 Treaty, apart from any express provision of the 1969 Vienna Convention permitting it to do so. It said:

> "The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself …"

(*I.C.J. Reports 1997* (see footnote 51 above), p. 39, para. 48.)

The context suggests that by this it meant that Hungary in substance attempted to suspend the Treaty, despite its own statements that it was acting out of necessity (i.e. on the basis of circumstances precluding wrongfulness). Under article 65 of the 1969 Vienna Convention, suspension (like termination) is a formal act. It is slightly odd to describe a State as suspending a treaty when (*a*) it has never purported to do so; and (*b*) it is not entitled to do so as a matter of law.

[647] On the procedure for invoking circumstances precluding wrongfulness, see paragraph 354 below.

[648] See footnote 620 above.

[649] See paragraph 316 above.

[650] See paragraph 321 above.

[651] See paragraph 317 above.

[652] See paragraph 321 above.

[653] See paragraph 322 above.

[654] See paragraph 319 above.

general principle of law that a party cannot be allowed to benefit from its own wrongful act.

329. Looking first at the broader, synallagmatic idea of the *exceptio*, it is clear that this could only be admitted in chapter V with many qualifications and limitations. These exceptions would include, in Sir Gerald Fitzmaurice's words, multilateral treaties of the "integral" type (i.e. where performance is not premised on reciprocity).[655] It could not justify a breach of the rules relating to the use of force or, more generally, a breach of *jus cogens*, and could not stand against any express or clearly implied excluding effect of the primary rule. It could have no application to obligations *erga omnes*, e.g. obligations in the field of human rights, humanitarian law or international criminal law, as was recognized by ICJ in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, where it said that:

> Bosnia and Herzegovina was right to point to the *erga omnes* character of the obligations flowing from the Genocide Convention … and the Parties rightly recognized that in no case could one breach of the Convention serve as an excuse for another.[656]

It seems that the effect of the *exceptio*, even in its broader form, is strictly relative and bilateral: in Mr. Riphagen's words, it would be limited to breaches which "correspond to, or are directly connected with", the prior breach of the other party.[657]

330. A statement of the synallagmatic form of the *exceptio*, limited in this way, nonetheless presents difficulties of application, as can be seen from the United Nations experience with the monitoring of ceasefire agreements. The difficulties were analysed, for example, in a 1956 report of Secretary-General Dag Hammarskjöld, dealing with the extent to which breaches of any of the Middle East armistice agreements of 1949 could be held to justify a retaliatory breach by the other party (acting other than in immediate self-defence).[658] The report referred to "a chain of actions and reactions … which, unless broken, is bound to constitute a threat to peace and security", and continued:

> [S]ome uncertainty concerning the scope of the obligations of the armistice agreements has, in my view, served to contribute to the unfortunate development …
>
> As a matter of course, each party considers its compliance with the stipulations of an armistice agreement as conditioned by compliance of the other party to the agreement …
>
> Obviously, therefore, the question of reciprocity must be given serious consideration and full clarity sought. The point of greatest significance in this context is: to what extent can an infringement of one or several of the other clauses of an armistice agreement by one party be considered as entitling the other party to act against the cease-fire clause which is to be found in all the armistice agreements …
>
> The very logic of the armistice agreements shows that infringements of other articles cannot serve as a justification for an infringement of the cease-fire article. If that were not recognized, it would mean that any one of such infringements might not only nullify the armistice régime, but in fact put in jeopardy the cease-fire itself. For that reason alone, it is clear that compliance with the said article can be conditioned only by similar compliance of the other party.[659]

Thus in a context in which there was no strictly causal nexus between one breach and the other, the Secretary-General's view was that only an infringement of a cease-fire obligation specified in a given article could justify what would otherwise be an infringement of that article. Indeed it may be that under the Charter of the United Nations, any underlying entitlement to use force is terminated on the conclusion of a permanent ceasefire, and that thereafter the only exception to the ceasefire obligation is provided by the right of self-defence.[660]

331. The underlying problem is that a broad view of the *exceptio* may produce escalating non-compliance, negating for practical purposes the continuing effect of the obligation. For these reasons the Special Rapporteur is firmly of the view that the justification for non-compliance with synallagmatic obligations should be resolved (*a*) by the law relating to the suspension or termination of those obligations (which is sufficient to deal with most problems of treaty obligations); and (*b*) by the law of countermeasures. The question then becomes whether the narrower form of the *exceptio*, as recognized by the Court in the *Factory at Chorzów* dictum,[661] should be included in chapter V. There is certainly a case for doing so, both as a matter of authority or tradition and as a matter of ordinary common sense. To facilitate debate, the Special Rapporteur proposes that chapter V should include a provision to the effect that the wrongfulness of an act of a State is precluded if it has been prevented from acting in conformity with the obligation in question as a direct result of a prior breach of the same or a related international obligation by another State.[662]

(c) *The so-called "clean hands" doctrine*

332. Finally, some brief reference should be made to the so-called "clean hands" doctrine, which has sometimes been relied on as a "defence", or at least as a ground of inadmissibility of a claim, in State responsibility cases—mostly, though not always, in the framework of diplomatic protection. For example, in his dissenting opinion in *Military and Paramilitary Activities in and against Nicaragua*, Judge Schwebel relied on the doctrine as a subsidiary basis for dismissing Nicaragua's claim.[663] The majority did not refer directly to the point.

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[655] See paragraph 322 above.

[656] *I.C.J. Reports 1997* (see footnote 241 above), p. 258, para. 35. See also, and more emphatically, the dissenting opinion of Judge Weeramantry (ibid., pp. 292–294). The Court went on to hold that nonetheless a counterclaim for genocide could be brought under article 80 of the Rules of Court "in so far [as] the two Parties pursue, with their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of the Genocide Convention" (ibid., p. 258, para. 35).

[657] See paragraph 324 above.

[658] *Official Records of the Security Council, Eleventh Year, Supplement for April, May and June 1956*, document S/3596, pp. 30–66, cited by Rosenne, op. cit., pp. 111–115.

[659] Ibid., pp. 112–113, paras. 12 and 15–18.

[660] See the discussion by Lobel and Ratner, "Bypassing the Security Council: ambiguous authorizations to use force, cease-fires and the Iraqi inspection regime", pp. 144–152, with references to earlier literature. For the Secretary-General the problem was partly jurisdictional, since his specific authority in the Middle East was to supervise the armistice agreements as such.

[661] See paragraph 316 above.

[662] For the proposed provision, see paragraph 358 below.

[663] *I.C.J. Reports 1986* (see footnote 68 above), pp. 392–394.

333. The doctrine has hardly been referred to in the Commission's previous work on State responsibility. The Special Rapporteur, Mr. F. V. García Amador, dealt with it only in relation to "Fault on the part of the alien", which is now subsumed in part two, article 42, paragraph 2, as a basis for limiting the amount of reparation due.[664] To the extent that "clean hands" may sometimes be a basis for rejecting a claim of diplomatic protection,[665] the doctrine appears to operate as a ground of inadmissibility rather than as a circumstance precluding wrongfulness or responsibility, and it can be left to be dealt with under the topic of diplomatic protection.

334. Even within the context of diplomatic protection, the authority supporting the existence of a doctrine of "clean hands", whether as a ground of admissibility or otherwise, is, in Salmon's words, "fairly long-standing and divided".[666] It deals largely with individuals involved in slave-trading and breach of neutrality, and in particular a series of decisions of the United States-Great Britain Mixed Commission set up under a Convention of 8 February 1853 for the settlement of shipowners' compensation claims. According to Salmon, in the cases where the claim was held inadmissible:

> In any event, it appears that these cases are all characterized by the fact that *the breach of international law by the victim was the sole cause of the damage claimed*, [and] that *the cause-and-effect relationship between the damage and the victim's conduct was pure, involving no wrongful act by the respondent State*.
>
> When, on the contrary, the latter has in turn violated international law in taking repressive action against the applicant, the arbitrators have never declared the claim inadmissible.[667]

335. It is true that legal principles based on the underlying notion of good faith can play a role in international law. These include the principle (which underlines the *exceptio*) that a State may not rely on its own wrongful conduct, and the principle *ex turpi causa non oritur actio*. Such principles may be capable of generating new legal consequences within the field of responsibility, as the former appears to have done in the case concerning the *Gabčíkovo-Nagymaros Project*.[668] But this does not mean that new and vague maxims such as the "clean hands" doctrine should be recognized in chapter V. According to Fitzmaurice:

> [A] State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short, were provoked by it. In some cases, the principle of legitimate reprisals will remove any aspect of illegality from such counter-action.[669]

But chapter V is not concerned with such procedural questions as *locus standi*, or with the admissibility of claims. And it is significant that even in the above passage it is not suggested that the illegal conduct of an injured State (still less its lack of "clean hands") is a distinct circumstance precluding the wrongfulness of the conduct which caused injury to that State.

336. For these reasons there is in the Special Rapporteur's view no basis for including the clean hands doctrine as a new "circumstance precluding wrongfulness", distinct from the *exceptio* or from countermeasures. On the contrary, the conclusion reached by Rousseau seems still to be valid: "[I]t is not possible to consider the 'clean hands' theory as an institution of general customary law".[670]

5. Procedural and other incidents of invoking circumstances precluding wrongfulness

337. The only provision in chapter V which deals with the incidents or consequences of invoking a circumstance precluding wrongfulness is article 35. This contrasts with the rather elaborate provisions in the 1969 Vienna Convention dealing with the consequences of invoking a ground for invalidity, termination or suspension of a treaty. A number of different issues need to be considered, beginning with article 35 itself.

(a) *Compensation for losses in cases where chapter V is invoked*

338. The terms of article 35 have already been set out.[671] As its title suggests, the article is a reservation as to questions of possible compensation for damage in certain cases covered by chapter V. It does not confer any rights to compensation, although in relation to the two cases not mentioned, countermeasures and self-defence, by clear implication it excludes any such rights.

339. The brief commentary to article 35 notes that the issue of a reservation with respect to damage first arose in 1979 in the discussion of article 31 dealing with force majeure. Because such a proviso was relevant to other provisions of chapter V it was set aside and only reconsidered in 1980. Although the possibility of compensation was argued "forcefully" in connection with the state of necessity,[672] article 35 was eventually included as "a reservation in quite general terms", applicable to all the circumstances in chapter V except self-defence and countermeasures.[673] But it was emphasized that the inclusion of article 35 did not "prejudge any of the questions of principle that might arise in regard to the matter, either

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[664] *Yearbook … 1958*, vol. II, document A/CN.4/111, pp. 53–54, paras. 16–21.

[665] As was the case in two awards cited by Judge Schwebel, *I.C.J. Reports 1986* (see footnote 68 above), pp. 393–394, para. 270: viz. the *Clark* claim (1865), in Moore, op. cit., vol. III, pp. 2738–2739, and the *Pelletier* claim, *Papers relating to the Foreign Relations of the United States, for the Year 1887* (Washington, Government Printing Office, 1888), p. 607. A similar argument was raised in the *Barcelona Traction* case: see *I.C.J. Pleadings, Barcelona Traction, Light and Power Company, Limited (New Application: 1962)*, Vol. X, p. 11, but was not discussed by the Court itself in either phase of that case.

[666] Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", p. 249.

[667] Ibid., p. 259. See also Garcia-Arias, "La doctrine des 'clean hands' en droit international public", p. 18; and Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux".

[668] See paragraph 319 above.

[669] Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law, p. 119, quoted by Judge Schwebel, *I.C.J. Reports 1986* (see footnote 68 above), p. 394, para. 271.

[670] Rousseau, *Droit international public*, p. 177, para. 170.

[671] See paragraph 305 above.

[672] *Yearbook … 1980*, vol. II (Part Two), commentary to article 35, p. 61, para. (3).

[673] Ibid., para. (4).

CHECKLIST OF DOCUMENTS OF THE FIFTY-FIRST SESSION

Document	*Title*	*Observations and references*
A/CN.4/478/Rev.1	Fourth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur, annex: Bibliography	Reproduced in the present volume.
A/CN.4/492	State responsibility: comments and observations received from Governments	Idem.
A/CN.4/493 [and Corr.1]	Nationality in relation to the succession of States: comments and observations from Governments	Idem.
A/CN.4/494 and Add.1–2	Filling of casual vacancies (article 11 of the statute): note by the Secretariat	Idem.
A/CN.4/495	Provisional agenda	Mimeographed. For agenda as adopted, see *Yearbook … 1999*, vol. II (Part Two), pp. 14–15, para. 12.
A/CN.4/496	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-third session of the General Assembly	Mimeographed.
A/CN.4/497	Nationality in relation to the succession of States: memorandum by the Secretariat	Reproduced in the present volume.
A/CN.4/498 and Add.1–4	Second report on State responsibility, by Mr. James Crawford, Special Rapporteur	Idem.
A/CN.4/499	Fourth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	Idem.
A/CN.4/500 and Add.1	Second report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	Idem.
A/CN.4/501	Second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur	Idem.
A/CN.4/L.572	Nationality in relation to the succession of States: report of the Working Group	Mimeographed.
A/CN.4/L.573 [and Corr.1]	Nationality in relation to the succession of States. Titles and texts of draft articles adopted by the Drafting Committee on second reading	Text reproduced in *Yearbook … 1999*, vol. I, summary record of the 2579th meeting, pp. 81–84, para. 4.
A/CN.4/L.574 [and Corr.1 and 3]	State responsibility. Titles and texts of draft articles adopted by the Drafting Committee: articles 16 to 26 *bis* (chapter III), 27 to 28 *bis* (chapter IV) and 29 to 35 (chapter V)	Idem, summary record of the 2605th meeting, pp. 275–276, para. 4.
A/CN.4/L.575	Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee: guidelines 1.1.1 [1.1.4], 1.1.5 [1.1.6], 1.1.6, 1.2, 1.2.1 [1.2.4], 1.2.2 [1.2.1], 1.3 [1.3.1]. 1.3.1 [1.2.2], 1.3.2 [1.2.3], 1.4, 1.4.1 [1.1.5], 1.4.2 [1.1.6], 1.4.3 [1.1.7], 1.4.4 [1.2.5], 1.4.5 [1.2.6], 1.5, 1.5.1 [1.1.9], 1.5.2 [1.2.7], 1.5.3 [1.2.8] and 1.6	Idem, summary record of the 2597th meeting, pp. 213–214, para. 1.
A/CN.4/L.576	Report of the Working Group on jurisdictional immunities of States and their property	Mimeographed. For the adopted text, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10). The final text appears in *Yearbook … 1999*, vol. II (Part Two), annex, p. 149.

Document	*Title*	*Observations and references*
A/CN.4/L.577 and Add.1	Report of the Planning Group: programme, procedures and working methods of the Commission, and its documentation	Mimeographed.
A/CN.4/L.578 [and Corr.1]	Draft report of the International Law Commission on the work of its fifty-first session: chapter I (Organization of the session)	Idem. For the adopted text, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10). The final text appears in *Yearbook … 1999*, vol. II (Part Two), p. 13.
A/CN.4/L.579	Idem: chapter II (Summary of the work of the Commission at its fifty-first session)	Idem, p. 16.
A/CN.4/L.580	Idem: chapter III (Specific issues on which comments would be of particular interest to the Commission)	Idem, p. 18.
A/CN.4/L.581 and Add.1	Idem: chapter IV (Nationality in relation to the succession of States)	Idem, p. 19.
A/CN.4/L.582 and Add.1–4	Idem: chapter V (State responsibility)	Idem, p. 48.
A/CN.4/L.583 and Add.1–5	Idem: chapter VI (Reservations to treaties))	Idem, p. 89.
A/CN.4/L.584 and Add.1	Idem: chapter VII (Jurisdictional immunities of States and their property)	Idem, p. 127.
A/CN.4/L.585 and Add.1	Idem: chapter VIII (Unilateral acts of States)	Idem, p. 129.
A/CN.4/L.586	Idem: chapter IX (International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)).	Idem, p. 140.
A/CN.4/L.587 and Add.1	Idem: chapter X (Other decisions and conclusions of the Commission)	Idem, p. 142.
A/CN.4/L.588	Unilateral acts of States: report of the Working Group	Mimeographed.
A/CN.4/L.589	Long-term programme of work: interim report of the Working Group	Idem.
A/CN.4/SR.2565–A/CN.4/SR.2611	Provisional summary records of the 2565th to 2611th meetings	Idem. The final text appears in *Yearbook … 1999*, vol. I.

A/CN.4/SER.A/2001/Add.1 (Part 2)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2001

Volume II
Part Two

Report of the Commission to the General Assembly on the work of its fifty-third session

UNITED NATIONS
New York and Geneva, 2007

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook* …, followed by the year (for example, *Yearbook … 2000*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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Annex 191

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Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)

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* Initially distributed as *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10.*

Annex 191

ABBREVIATIONS

ASEAN	Association of South-East Asian Nations
ECE	Economic Commission for Europe
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
ITLOS	International Tribunal for the Law of the Sea
NAFO	Northwest Atlantic Fisheries Organization
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
UNCC	United Nations Compensation Commission
UNEP	United Nations Environment Programme
UNHCR	Office of the United Nations High Commissioner for Refugees
WCO	World Customs Organization
WHO	World Health Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

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AJIL	*American Journal of International Law*
BYBIL	*British Year Book of International Law*
Collected Courses ...	*Collected Courses of the Hague Academy of International Law*
Eur. Court H.R.	*European Court of Human Rights*
I.C.J. Reports	ICJ, *Reports of Judgments, Advisory Opinions and Orders*
ILM	*International Legal Materials* (Washington, D.C.)
ILR	*International Law Reports*
Iran-U.S. C.T.R.	*Iran-United States Claims Tribunal Reports*
Lapradelle-Politis	A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pedone, 1923)
Moore, *Digest*	J. B. Moore, *Digest of International Law* (Washington, D.C.)
Moore, *History and Digest*	J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C.)
NYIL	*Netherlands Yearbook of International Law*
P.C.I.J., Series A	PCIJ, *Collection of Judgments* (Nos. 1–24: up to and including 1930)
P.C.I.J., Series A/B	PCIJ, *Judgments, Orders and Advisory Opinions* (Nos. 40–80: beginning in 1931)
Recueil des cours...	*Recueil des cours de l'Académie de droit international de la Haye*
RGDIP	*Revue générale de droit international public*
UNRIAA	United Nations, *Reports of International Arbitral Awards*

*
* *

In the present volume, the "International Tribunal for the Former Yugoslavia" refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and the "International Tribunal for Rwanda" refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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* *

MULTILATERAL INSTRUMENTS CITED IN THE PRESENT VOLUME

	Source
Pacific settlement of international disputes	
Covenant of the League of Nations	*The Covenant of the League of Nations with a Commentary Thereon, Miscellaneous No. 3, 1919* (London, HM Stationery Office, 1921), p. 1.
Revised General Act for the Pacific Settlement of International Disputes (Lake Success, New York, 28 April 1949)	United Nations, *Treaty Series*, vol. 71, No. 912, p. 101.
European Convention for the Peaceful Settlement of Disputes (Strasbourg, 29 April 1957)	*Ibid*., vol. 320, No. 4646, p. 243.
Diplomatic and consular relations	
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid*., vol. 596, No. 8638, p. 261.
Human rights	
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	*Ibid*., vol. 213, No. 2889, p. 221.
Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952)	*Ibid*.
Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994)	Council of Europe, *European Treaty Series*, No. 155.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	United Nations, *Treaty Series*, vol. 660, No. 9464, p. 195.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	*Ibid*., vol. 993, No. 14531, p. 3.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid*., vol. 999, No. 14668, p. 171.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid*., vol. 1144, No. 17955, p. 123.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	*Ibid*., vol. 1465, No. 24841, p. 85.
Nationality and stateless persons	
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	*Ibid*., vol. 360, No. 5158, p. 117.

	Source
Convention on the Reduction of Statelessness (New York, 30 August 1961)	*Ibid*., vol. 989, No. 14458, p. 175.
Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (Strasbourg, 6 May 1963)	*Ibid*., vol. 634, No. 9065, p. 221.
European Convention on Nationality (Strasbourg, 6 November 1997)	Council of Europe, *European Treaty Series*, No. 166.
Private international law	
Convention on Bills of Exchange and Promissory Notes (The Hague, 23 July 1912)	League of Nations, *International Conference for the Unification of the Law on Bills of Exchange, Promissory Notes and Cheques, Preparatory Documents* (C.234. M.83.1929.II), p. 42.
Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930)	League of Nations, *Treaty Series*, vol. CXLIII, No. 3313, p. 257.
Convention providing a Uniform Law for Cheques (Geneva, 19 March 1931)	*Ibid*., No. 3316, p. 355.
Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques (Geneva, 19 March 1931)	*Ibid*., No. 3317, p. 407.
European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959)	United Nations, *Treaty Series*, vol. 472, No. 6841, p. 185.
Convention concerning the powers of authorities and the law applicable in respect of the protection of infants (The Hague, 5 October 1961)	*Ibid*., vol. 658, No. 9431, p. 143.
Convention concerning the International Administration of the Estates of Deceased Persons (The Hague, 2 October 1973)	Hague Conference on Private International Law, *Collection of Conventions (1951-2003)*, p. 169.
Convention on the Law Applicable to Matrimonial Property Regimes (The Hague, 14 March 1978)	*Ibid*., p. 227.
Convention on the Law Applicable to Succession to the Estates of Deceased Persons (The Hague, 1 August 1989)	*Ibid*., p. 339.
Narcotic drugs and psychotropic substances	
Convention on Psychotropic Substances (Vienna, 21 February 1971)	United Nations, *Treaty Series*, vol. 1019, No. 14956, p. 175.
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	*Ibid*., vol. 1582, No. 27627, p. 95.
International trade and development	
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, *Treaty Series*, vol. 55, No. 814, p. 187.
Protocol of Provisional Application of the General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	*Ibid*., p. 308.
Customs Convention on the Temporary Importation of Packings (Brussels, 6 October 1960)	*Ibid*., vol. 473, No. 6861, p. 131.

	Source
Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, D.C., 18 March 1965)	*Ibid*., vol. 575, No. 8359, p. 159.
Convention on Transit Trade of Land-locked States (New York, 8 July 1965)	*Ibid*., vol. 597, No. 8641, p. 3.
Agreement establishing a Food and Fertiliser Technology Centre for the Asian and Pacific Region (Kawana, 11 June 1969)	*Ibid*., vol. 704, No. 10100, p. 17.
Food Aid Convention, 1971 (opened for signature at Washington, D.C., from 29 March until 3 May 1971)	*Ibid*., vol. 800, No. 11400, p. 162.
Customs Convention on Containers, 1972 (Geneva, 2 December 1972)	*Ibid*., vol. 988, No. 14449, p. 43.
Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974), as amended by the Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 11 April 1980)	*Ibid*., vol. 1511, No. 26121, p. 99.
United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)	*Ibid*., vol. 1489, No. 25567, p. 3.
Navigation	
Convention on a Code of Conduct for Liner Conferences (Geneva, 6 April 1974)	United Nations, *Treaty Series*, vol. 1334, No. 22380, p. 15 and vol. 1365, p. 360.
International Convention on Arrest of Ships, 1999 (Geneva, 12 March 1999)	A/CONF.188/6.
Penal matters	
European Convention on Extradition (Paris, 13 December 1957)	United Nations, *Treaty Series*, vol. 359, No. 5146, p. 273.
European Convention on Information on Foreign Law (London, 7 June 1968)	*Ibid*., vol. 720, No. 10346, p. 147.
Additional Protocol to the European Convention on Information on Foreign Law (Strasbourg, 15 March 1978)	*Ibid*., vol. 1160, No. A-10346, p. 529.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973)	*Ibid*., vol. 1035, No. 15410, p. 167.
European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977)	*Ibid*., vol. 1137, No. 17828, p. 93.
International Convention Against the Taking of Hostages (New York, 17 December 1979)	*Ibid*., vol. 1316, No. 21931, p. 205.
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988)	*Ibid*., vol. 1678, No. 29004, p. 201.
Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)	*Ibid*., vol. 2051, No. 35457, p. 363.
International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997)	*Ibid*., vol. 2149, No. 37517, p. 256.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	A/CONF.183/9.
International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)	*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 49*, vol. I, resolution 54/109, annex.

	Source
Law of the sea	
Geneva Conventions on the Law of the Sea (Geneva, April 1958)	
Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	United Nations, *Treaty Series*, vol. 516, No. 7477, p. 205.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid*., vol. 1833, No. 31363, p. 3.
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995)	*International Fisheries Instruments with Index* (United Nations publication, Sales No. E.98. V.11), sect. I; see also A/CONF.164/37.
Law applicable in armed conflict	
Conventions respecting the Laws and Customs of War on Land: Convention II (The Hague, 29 July 1899) and Convention IV (The Hague, 18 October 1907)	J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918), p. 100.
Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907)	*Ibid*.
Convention relative to the Laying of Automatic Submarine Contact Mines (Convention VIII) (The Hague, 18 October 1907)	*Ibid*., p. 151.
Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919)	*British and Foreign State Papers, 1919*, vol. CXII (London, HM Stationery Office, 1922), p. 1.
Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye) (Saint-Germain-en-Laye, 10 September 1919)	*Ibid*., p. 317.
Convention relative to the Treatment of Prisoners of War (Geneva, 27 July 1929)	League of Nations, *Treaty Series*, vol. CXVIII, No. 2734, p. 343.
Geneva Conventions for the protection of war victims (Geneva, 2 August 1949)	United Nations, *Treaty Series*, vol. 75, Nos. 970-973, pp. 31 et seq.
Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention)	*Ibid*., No. 972, p. 135.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	*Ibid*., vol. 1125, Nos. 17512-17513, pp. 3 and 609.
Law of treaties	
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	*Ibid*., vol. 1946, No. 33356, p. 3.

	Source
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Liability	
Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960)	United Nations, *Treaty Series*, vol. 956, No. 13706, p. 251.
Convention on International Liability for Damage Caused by Space Objects (London, Moscow, Washington, D.C., 29 March 1972)	*Ibid*., vol. 961, No. 13810, p. 187.
Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)	Council of Europe, *European Treaty Series*, No. 150.
Telecommunications	
European Agreement on the Protection of Television Broadcasts (Strasbourg, 22 June 1960)	United Nations, *Treaty Series*, vol. 546, No. 7951, p. 247.
Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (Washington, D.C., 20 August 1971)	*Ibid*., vol. 1220, No. 19677, p. 21.
Environment and natural resources	
International Convention for the Prevention of Pollution of the Sea by Oil (London, 12 May 1954)	United Nations, *Treaty Series*, vol. 327, No. 4714, p. 3.
International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels, 29 November 1969)	*Ibid*., vol. 970, No. 14049, p. 211.
Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo, 15 February 1972)	*Ibid*., vol. 932, No. 13269, p. 3.
Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow, Washington, D.C., 29 December 1972)	*Ibid*., vol. 1046, No. 15749, p. 120.
International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention) (London, 2 November 1973), as amended by the Protocol of 1978 (London, 17 February 1978)	*Ibid*., vol. 1340, No. 22484, p. 61.
Convention on the Protection of the Environment and Protocol (Stockholm, 19 February 1974)	*Ibid*., vol. 1092, No. 16770, p. 279.
Convention for the Prevention of Marine Pollution from Land-based Sources (Paris, 4 June 1974)	*Ibid*., vol. 1546, No. 26842, p. 103.
Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 February 1976)	*Ibid*., vol. 1102, No. 16908, p. 27.
Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources (Athens, 17 May 1980)	*Ibid*., vol. 1328, No. 22281, p. 105.
Convention on the Protection of the Rhine against Pollution from Chlorides (Bonn, 3 December 1976)	*Ibid*., vol. 1404, No. 23469, p. 59.
Additional Protocol to the Convention on the Protection of the Rhine against Pollution from Chlorides (Brussels, 25 September 1991)	*Ibid*., vol. 1840, No. A-23469, p. 372.
Agreement for the Protection of the Rhine against Chemical Pollution (Bonn, 3 December 1976)	*Ibid*., vol. 1124, No. 17511, p. 375.

	Source
Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976)	*Ibid*., vol. 1108, No. 17119, p. 151.
Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution (Kuwait, 24 April 1978)	*Ibid*., vol. 1140, No. 17898, p. 133.
Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (NAFO Convention) (Ottawa, 24 October 1978)	*Ibid*., vol. 1135, No. 17799, p. 369.
Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979)	*Ibid*., vol. 1302, No. 21623, p. 217.
Regional Convention for the Conservation of the Environment of the Red Sea and Gulf of Aden (Jeddah, 14 February 1982)	UNEP, *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, Grotius, 1991), vol. 2, p. 144.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)	United Nations, *Treaty Series*, vol. 1513, No. 26164, p. 293.
ASEAN Agreement on the Conservation of Nature and Natural Resources (Kuala Lumpur, 9 July 1985)	UNEP, *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, Grotius, 1991), vol. 2, p. 343.
Convention on Early Notification of a Nuclear Accident (Vienna, 26 September 1986)	United Nations, *Treaty Series*, vol. 1439, No. 24404, p. 275.
Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea, 25 November 1986)	ILM (Washington, D.C.), vol. 26, No. 1 (January 1987), p. 38.
Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988)	*Ibid*., vol. 27, No. 4 (July 1988), p. 859.
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989)	United Nations, *Treaty Series*, vol. 1673, No. 28911, p. 57.
International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 (London, 30 November 1990)	*Ibid*., vol. 1891, No. 32194, p. 51.
Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, 30 January 1991)	*Ibid*., vol. 2101, No. 36508, p. 177.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	*Ibid*., vol. 1989, No. 34028, p. 309.
Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992)	*Ibid*., vol. 1936, No. 33207, p. 269.
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	*Ibid*., vol. 2105, No. 36605, p. 457.
Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 9 April 1992)	United Nations, *Law of the Sea Bulletin*, No. 22 (January 1993), p. 54.

	Source
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	*Ibid*., vol. 1760, No. 30619, p. 79.
Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	*Official Records of the General Assembly, Fifty-first session, Supplement No. 49*, vol. III, resolution 51/229, annex.
Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998)	ECE/CEP/43.
Fiscal matters	
Convention on Mutual Administrative Assistance in Tax Matters (Strasbourg, 25 January 1988)	Council of Europe, *European Treaty Series*, No. 127.
General international law	
Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 12 October 1929)	League of Nations, *Treaty Series*, vol. CXXXVII, p. 13.
Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (The Hague, 28 September 1955)	United Nations, *Treaty Series*, vol. 478, No. 6943, p. 371.
Treaty establishing the European Community (Rome, 25 March 1957) as amended by the Treaty on European Union	European Union, *Selected Instruments taken from the Treaties*, book I, vol. I (Luxembourg, Office for Official Publications of the European Communities, 1995), p. 101.
Antarctic Treaty (Washington, D.C., 1 December 1959)	United Nations, *Treaty Series*, vol. 402, No. 5778, p. 71.
Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991)	ILM (Washington, D.C.), vol. 30, No. 6 (November 1991), p. 1461.
Indus Waters Treaty, 1960 (Karachi, 19 September 1960)	United Nations, *Treaty Series*, vol. 419, No. 6032, p. 125.
Declaration on the Neutrality of Laos (Geneva, 23 July 1962)	*Ibid*., vol. 456, No. 6564, p. 301.
European Convention on the Protection of the Archaeological Heritage (London, 6 May 1969)	*Ibid*., vol. 788, No. 11212, p. 227.
Convention for the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972)	*Ibid*., vol. 1037, No. 15511, p. 151.
Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992)	*Ibid*., vol. 1757, No. 30615, p. 3.
Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994)	*Ibid*., vols. 1867-1869, No. 31874.

	Source
Energy Charter Treaty (Lisbon, 17 December 1994)	*Ibid*., vol. 2080, No. 36116, p. 100.
Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Amsterdam, 2 October 1997)	*Official Journal of the European Communities*, No. C 340, vol. 40 (10 November 1997), p. 1.
Consolidated version of the Treaty on European Union (Amsterdam, 2 October 1997)	*Ibid*., p. 145.
Consolidated version of the Treaty establishing the European Community (Amsteram, 2 October 1997)	*Ibid*., p. 173.

Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission held the first part of its fifty-third session from 23 April to 1 June 2001 and the second part from 2 July to 10 August 2001 at its seat at the United Nations Office at Geneva.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei ADDO (Ghana)

Mr. Husain AL-BAHARNA (Bahrain)

Mr. João Clemente BAENA SOARES (Brazil)

Mr. Ian BROWNLIE (United Kingdom of Great Britain and Northern Ireland)

Mr. Enrique CANDIOTI (Argentina)

Mr. James CRAWFORD (Australia)

Mr. Christopher John Robert DUGARD (South Africa)

Mr. Constantin ECONOMIDES (Greece)

Mr. Nabil ELARABY (Egypt)

Mr. Giorgio GAJA (Italy)

Mr. Zdzislaw GALICKI (Poland)

Mr. Raul Ilustre GOCO (Philippines)

Mr. Gerhard HAFNER (Austria)

Mr. Qizhi HE (China)

Mr. Mauricio HERDOCIA SACASA (Nicaragua)

Mr. Kamil IDRIS (Sudan)

Mr. Jorge ILLUECA (Panama)

Mr. Peter KABATSI (Uganda)

Mr. Maurice KAMTO (Cameroon)

Mr. James Lutabanzibwa KATEKA (United Republic of Tanzania)

Mr. Mochtar KUSUMA-ATMADJA (Indonesia)

Mr. Igor Ivanovich LUKASHUK (Russian Federation)

Mr. Teodor Viorel MELESCANU (Romania)

Mr. Djamchid MOMTAZ (Islamic Republic of Iran)

Mr. Didier OPERTTI BADAN (Uruguay)

Mr. Guillaume PAMBOU-TCHIVOUNDA (Gabon)

Mr. Alain PELLET (France)

Mr. Pemmaraju Sreenivasa RAO (India)

Mr. Víctor RODRÍGUEZ CEDEÑO (Venezuela)

Mr. Robert ROSENSTOCK (United States of America)

Mr. Bernardo SEPÚLVEDA (Mexico)

Mr. Bruno SIMMA (Germany)

Mr. Peter TOMKA (Slovakia)

Mr. Chusei YAMADA (Japan)

B. Officers and the Enlarged Bureau

3. At its 2665th meeting, on 23 April 2001, the Commission elected the following officers:

Chairman: Mr. Peter Kabatsi
First Vice-Chairman: Mr. Gerhard Hafner
Second Vice-Chairman: Mr. Enrique Candioti
Chairman of the Drafting Committee: Mr. Peter Tomka
Rapporteur: Mr. Qizhi He

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[1] and the Special Rapporteurs.[2]

5. On the recommendation of the Enlarged Bureau the Commission set up a Planning Group composed of the following members: Mr. Gerhard Hafner (Chairman), Mr. Emmanuel Akwei Addo, Mr. João Clemente Baena Soares, Mr. Ian Brownlie, Mr. Zdzislaw Galicki, Mr. Kamil Idris, Mr. Maurice Kamto, Mr. Mochtar Kusuma-Atmadja, Mr. Alain Pellet, Mr. Robert Rosenstock, Mr. Chusei Yamada and Mr. Qizhi He (*ex officio*).

C. Drafting Committee

6. At its 2666th, 2669th and 2679th meetings, on 24 April, 27 April and 23 May 2001 respectively, the Com-

[1] Mr João Clemente Baena Soares, Mr. Zdzislaw Galicki, Mr. Alain Pellet, Mr. Pemmaraju Sreenivasa Rao and Mr. Chusei Yamada.

[2] Mr. James Crawford, Mr. Christopher John Robert Dugard, Mr. Alain Pellet, Mr. Pemmaraju Sreenivasa Rao and Mr. Víctor Rodríguez Cedeño.

mission established a Drafting Committee, composed of the following members for the topics indicated:

(*a*) International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities): Mr. Peter Tomka (Chairman), Mr. Pemmaraju Sreenivasa Rao (Special Rapporteur), Mr. João Clemente Baena Soares, Mr. Ian Brownlie, Mr. Giorgio Gaja, Mr. Zdzislaw Galicki, Mr. Gerhard Hafner, Mr. Mauricio Herdocia Sacasa, Mr. James Lutabanzibwa Kateka, Mr. Teodor Viorel Melescanu, Mr. Didier Opertti Badan, Mr. Víctor Rodríguez Cedeño, Mr. Robert Rosenstock, Mr. Chusei Yamada and Mr. Qizhi He (*ex officio*);

(*b*) State responsibility: Mr. Peter Tomka (Chairman), Mr. James Crawford (Special Rapporteur), Mr. Ian Brownlie, Mr. Enrique Candioti, Mr. Christopher John Robert Dugard, Mr. Constantin Economides, Mr. Giorgio Gaja, Mr. Zdzislaw Galicki, Mr. Igor Ivanovich Lukashuk, Mr. Djamchid Momtaz, Mr. Guillaume Pambou-Tchivounda, Mr. Alain Pellet, Mr. Robert Rosenstock, Mr. Bruno Simma, Mr. Chusei Yamada and Mr. Qizhi He (*ex officio*);

(*c*) Reservations to treaties: Mr. Peter Tomka (Chairman), Mr. Alain Pellet (Special Rapporteur), Mr. Husain Al-Baharna, Mr. Enrique Candioti, Mr. Constantin Economides, Mr. Giorgio Gaja, Mr. Gerhard Hafner, Mr. Maurice Kamto, Mr. Teodor Viorel Melescanu, Mr. Víctor Rodríguez Cedeño, Mr. Robert Rosenstock, Mr. Bruno Simma and Mr. Qizhi He (*ex officio*).

7. The Drafting Committee held a total of 34 meetings on the three topics indicated above.

D. Working groups

8. At its 2673rd, 2688th and 2695th meetings, on 4 May, 12 July and 25 July 2001 respectively, the Commission also established the following working groups composed of the members indicated:

(*a*) State responsibility:

(i) Commentaries: Mr. Teodor Viorel Melescanu (Chairman), Mr. Ian Brownlie, Mr. Enrique Candioti, Mr. James Crawford, Mr. Christopher John Robert Dugard, Mr. Constantin Economides, Mr. Giorgio Gaja, Mr. Djamchid Momtaz, Mr. Guillaume Pambou-Tchivounda, Mr. Bernardo Sepúlveda, Mr. Peter Tomka and Mr. Qizhi He (*ex officio*);

(ii) Outstanding issues: open-ended informal consultations chaired by the Special Rapporteur;

(*b*) Diplomatic protection: open-ended informal consultations chaired by the Special Rapporteur, Mr. Christopher John Robert Dugard;

(*c*) Unilateral acts of States: open-ended working group chaired by the Special Rapporteur, Mr. Víctor Rodríguez Cedeño.

E. Secretariat

9. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Mr. George Korontzis and Mr. Renan Villacis, Legal Officers, and Mr. Arnold Pronto and Ms. Ruth Khalastchi, Associate Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

10. At its 2665th meeting, on 23 April 2001, the Commission adopted an agenda for its fifty-third session consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. Diplomatic protection.
4. Unilateral acts of States.
5. Reservations to treaties.
6. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities).
7. Programme, procedures and working methods of the Commission, and its documentation.
8. Cooperation with other bodies.
9. Date and place of the fifty-fourth session.
10. Other business.

other provisions of these articles" is a reference, *inter alia*, to article 23 (*Force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that chapter IV in no way precludes the issue of its responsibility in that regard.

(3) Thirdly, article 19 preserves the responsibility "of any other State" to whom the internationally wrongful conduct might also be attributable under other provisions of the articles.

(4) Thus, article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance, or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II.

Chapter V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Commentary

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (art. 20), self-defence (art. 21), countermeasures (art. 22), *force majeure* (art. 23), distress (art. 24) and necessity (art. 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistent with the approach of the present articles, the circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided,[305] they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by ICJ in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obligations under the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System was precluded by necessity. In dealing with the Hungarian plea, the Court said:

> The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that ... it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.[306]

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, "the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present".[307]

(3) This distinction emerges clearly from the decisions of international tribunals. In the *"Rainbow Warrior"* arbitration, the tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force, including the question whether the wrongfulness of the conduct in question was precluded.[308] In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

> [E]ven if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but—unless the parties by mutual agreement terminate the treaty—it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.[309]

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the 1969 Vienna Convention, the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory

[305] For example, by a treaty to the contrary, which would constitute a *lex specialis* under article 55.

[306] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 39, para. 48.

[307] *Yearbook … 1959*, vol. II, p. 41, document A/CN.4/120.

[308] *"Rainbow Warrior"* (see footnote 46 above), pp. 251–252, para. 75.

[309] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 101; see also page 38, para. 47.

Committee of the 1930 Hague Conference. Among its Bases of discussion,[310] it listed two "[c]ircumstances under which States can decline their responsibility", self-defence and reprisals.[311] It considered that the extent of a State's responsibility in the context of diplomatic protection could also be affected by the "provocative attitude" adopted by the injured person (Basis of discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces "in the suppression of an insurrection, riot or other disturbance" (Basis of discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by ILC in its work on international responsibility for injuries to aliens[312] and the performance of treaties.[313] In the event, the subject of excuses for the non-performance of treaties was not included within the scope of the 1969 Vienna Convention.[314] It is a matter for the law on State responsibility.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, i.e. those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are recognized by many legal systems, often under the same designation.[315] On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in chapter V have been developed independently.

(8) Just as the articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law.[316] Certain other candidates have been excluded. For example, the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.[317] The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.[318] The so-called "clean hands" doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.[319]

Article 20. Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Commentary

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part One. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of

[310] *Yearbook ... 1956*, vol. II, pp. 219–225, document A/CN.4/96.

[311] *Ibid*., pp. 224–225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

[312] *Yearbook ... 1958*, vol. II, p. 72. For the discussion of the circumstances by Special Rapporteur García Amador, see his first report on State responsibility, *Yearbook ... 1956*, vol. II, pp. 203–209, document A/CN.4/96, and his third report on State responsibility, *Yearbook ... 1958*, vol. II, pp. 50–55, document A/CN.4/111.

[313] See the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote 307 above), pp. 44–47, and his comments, *ibid*., pp. 63–74.

[314] See article 73 of the Convention.

[315] See the comparative review by C. von Bar, *The Common European Law of Torts* (Oxford University Press, 2000), vol. 2, pp. 499–592.

[316] For the effect of contribution to the injury by the injured State or other person or entity, see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

[317] Cf. *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 4, especially at pp. 50 and 77. See also the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote 307 above), pp. 43–47; D. W. Greig, "Reciprocity, proportionality and the law of treaties", *Virginia Journal of International Law*, vol. 34 (1994), p. 295; and for a comparative review, G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988), pp. 245–317. For the relationship between the exception of non-performance and countermeasures, see below, paragraph (5) of commentary to Part Three, chap. II.

[318] See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above), p. 31; cf. *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 67, para. 110.

[319] See J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10 (1964), p. 225; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 392–394.

CHECKLIST OF DOCUMENTS OF THE FIFTY-THIRD SESSION

Documents	*Title*	*Observations and references*
A/CN.4/512	Provisional agenda	Mimeographed. For agenda as adopted, see p. 16, para. 10 above.
A/CN.4/513	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-fifth session of the General Assembly	Mimeographed.
A/CN.4/514 [and Corr.1]	Second report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur	Reproduced in *Yearbook … 2001*, vol. II (Part One).
A/CN.4/515 and Add.1–3	State responsibility: comments and observations received from Governments	*Idem.*
A/CN.4/516	International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities): comments and observations received from Governments	*Idem.*
A/CN.4/517 and Add.1	Fourth report on State responsibility, by Mr. James Crawford, Special Rapporteur	*Idem.*
A/CN.4/518 and Add.1–3	Sixth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	*Idem.*
A/CN.4/519	Fourth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	*Idem.*
A/CN.4/L.601 [and Corr.1 and 2]	International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities). Draft preamble and draft articles adopted by the Drafting Committee on second reading	Reproduced in *Yearbook … 2001*, vol. I, summary record of the 2675th meeting (para. 3).
A/CN.4/L.602/Rev.1	State responsibility. Titles and texts of the draft articles adopted by the Drafting Committee on second reading	Mimeographed. For the final text, see p. 26 above.
A/CN.4/L.603 [and Corr.1 and 2]	Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee: guidelines 2.2.1, 2.2.2 [2.2.3], 2.2.3 [2.2.4], 2.3.1, 2.3.2, 2.3.3, 2.3.4, 2.4.3, 2.4.4 [2.4.5], 2.4.5 [2.4.4], 2.4.6 [2.4.7] and 2.4.7 [2.4.8]	Reproduced in *Yearbook … 2001*, vol. I, summary record of the 2694th meeting (para. 1).
A/CN.4/L.604	Draft report of the International Law Commission on the work of ts fifty-third session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10). For the final text, see p. 15 above.
A/CN.4/L.605	*Idem*: chapter II (Summary of the work of the Commission at its fifty-third session)	*Idem*, see p. 17 above.
A/CN.4/L.606 and Add.1–2	*Idem*: chapter III (Specific issues on which comments would be of particular interest to the Commission)	*Idem*, see p. 18 above.

Documents	*Title*	*Observations and references*
A/CN.4/L.607 and Add.1 [and Corr.1]	*Idem*: chapter IV (International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities))	*Idem*, see p. 144 above.
A/CN.4/L.608 [and Corr.1] and Add.1 [and Corr.1] and Add. 2–10	*Idem*: chapter V (State responsibility)	*Idem*, see p. 20 above.
A/CN.4/L.609 and Add.1–5	*Idem*: chapter VI (Reservations to treaties)	*Idem*, see p.171 above.
A/CN.4/L.610	*Idem*: chapter VII (Diplomatic protection)	*Idem*, see p. 196 above.
A/CN.4/L.611	*Idem*: chapter VIII (Unilateral acts of States)	*Idem*, see p. 202 above.
A/CN.4/L.612	*Idem*: chapter IX (Other decisions and conclusions of the Commission)	*Idem*, see p. 206 above.
A/CN.4/SR.2665 A/CN.4/SR.2710	Provisional summary records of the 2665th to 2710th meetings	Mimeographed. The final text appears in *Yearbook … 2001*, vol. I.