INTERNATIONAL COURT OF JUSTICE

CERTAIN IRANIAN ASSETS

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

COUNTER-MEMORIAL

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ANNEX 203

BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW

Eighth Edition

BY

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by a discriminatory intention is a breach of the international standard.[81] However, it is well established that the decision of a lower court open to challenge does not constitute a denial of justice and that the claimant must pursue remedies available higher in the judicial system as a matter of substance.[82]

As in other contexts the international standard has been applied ambitiously by tribunals and writers and difficulties have arisen. First, the application of the standard may involve decisions upon fine points of national law and the quality of national remedial machinery.[83] In regard to the work of the courts a distinction is sought to be made between error and 'manifest injustice'.[84] Secondly, the application of the standard in this field seems to contradict the principle that the alien, within some limits at least, accepts the local law and jurisdiction. Thirdly, the concept of denial of justice embraces many instances where the harm to the alien is a breach of local law only and the 'denial' is a failure to reach a non-local standard of competence in dealing with the wrong. Thus the concept of the foreign state wronged in the person of its nationals is extended to cases where the primary wrong is a breach of municipal law alone. This is an eccentric application of the principles of responsibility;[85] and it would be better if such claims were regarded as resting on an equitable basis only. The existence of the rule of admissibility that the alien should first exhaust local remedies is a reflection of the special character of denial of justice claims.[86]

(iii) Expropriation of foreign property[87]

A state may place conditions on the entry of an alien on its territory and may restrict acquisition of certain kinds of property by aliens. Apart from such restrictions, an alien individual, or a corporation controlled by aliens, may acquire title to property within a state under local law. The subject-matter may be shares in enterprises, items such as

[81] Jiménez de Aréchaga, in Friedmann, Henkin & Lissitzyn (eds), *Transnational Law in a Changing Society* (1972) 171, 179, referring to the submissions of both parties in *Barcelona Traction*, ICJ Reports 1970 p 3; 8 Whiteman 727–31. Further: Greenwood, in Fitzmaurice et al (eds), *Issues of State Responsibility before International Judicial Institutions* (2004) 55.

[82] *Loewen Group Inc v US* (2003) 7 ICSID Reports 442, 469–72.

[83] Cf Mann (1967) 42 *BY* 1, 26–9.

[84] McNair, 2 *Opinions* 205; 6 *BD* 287–95.

[85] Cf Parry (1956) 90 Hague *Recueil* 653, 695–6. Further: *Janes* (1926) 3 ILR 218. The application of principles of responsibility is eccentric in the context of international relations: there is no objection of legal principle to extension of responsibility to cases of maladministration.

[86] Further: Ténékidès (1933) 14 *RDILC* 514; de Visscher (1935) 52 Hague *Recueil* 365, 421–32. But see *Saipem SpA v Bangladesh*, 30 June 2009, §§181–2.

[87] Friedman, *Expropriation in International Law* (1953); Bindschedler (1956) 90 Hague *Recueil* 173, 179–306; Wortley, *Expropriation in Public International Law* (1959); García Amador, ILC *Ybk* 1959/II, 2–24; Foighel, *Nationalization and Compensation* (1961); Sohn & Baxter (1961) 55 *AJIL* 545; White, *Nationalisation of Foreign Property* (1961); Domke (1961) 55 *AJIL* 585; Fouilloux, *La Nationalisation et le droit international public* (1962); Petrén (1963) 109 Hague *Recueil* 487, 492–575; 2 *Restatement Third*, §712; 8 Whiteman 1020–185; Amerasinghe, *State Responsibility for Injuries to Aliens* (1967) 121–68; Akinsanya, *The Expropriation of Multinational Property in the Third World* (1980); Dolzer (1981) 75 *AJIL* 553; Higgins (1982) 176 Hague *Recueil* 259; Asante (1988) 37 *ICLQ* 588; Norton (1991) 85 *AJIL* 474; Wälde & Kolo (2001) 50 *ICLQ* 811; Newcombe, in Kahn & Wälde (2007) 391; Sornarajah (3rd edn, 2010) ch 10.

estates or factories, or, on a monopoly basis, major areas of activities such as railways and mining. In a number of countries foreign ownership has extended to proportions of between 50 per cent and 100 per cent of all major industries, resources and services such as insurance and banking.[88] Even in *laissez-faire* economies, the taking of private property for certain public purposes and the establishment of state monopolies have long been familiar. After the Soviet revolution and the extension of the public sector in many economies, socialist and non-socialist, the conflict of interest between foreign investors and their governments and the hosts to foreign capital, seeking to regain control over their economies, became more acute. The terminology of the subject is by no means settled, and in any case form should not take precedence over substance. The essence of the matter is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control.[89] The deprivation may be followed by transfer to the territorial state or to third parties, as in systems of land distribution as a means of agrarian reform. The process is commonly described as expropriation. If compensation is not provided, or the taking is regarded as unlawful, the taking is sometimes described as confiscation. Expropriation of one or more major national resources as part of a general programme of social and economic reform is generally referred to as nationalization.

State measures, prima facie lawful, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, trade restrictions such as quotas,[90] revocation of licences for breach of regulations, or measures of devaluation.[91] While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation. If the state gives a public enterprise special advantages, for example by directing that it charge nominal rates of freight, the resulting *de facto* or quasi-monopoly is not an expropriation of the competitors driven out of business:[92] but it might be otherwise if this were the object of a monopoly regime. Taxation which has the precise object and effect of confiscation is unlawful but high rates of tax, levied on a non-discriminatory basis, are not.[93] In general there is no expectation that tax rates will not change: a foreign investor must obtain a clear commitment to that effect, for example, in a stabilization agreement.

[88] UNCTAD Handbook of Statistics (2009) part 7, available at: www.unctad.org/en/docs/tdstat34_enfr.pdf.

[89] On the various procedures of taking: Sohn & Baxter (1961) 55 *AJIL* 545; Christie (1962) 38 *BY* 307; 8 Whiteman 1006–20; Reisman & Sloane (2003) 74 *BY* 115; Hobér, *Investment Arbitration in Eastern Europe* (2007). Also: *ELSI*, ICJ Reports 1989 p 15, 67–71; *Starrett Housing Corporation v Iran* (1983) 85 ILR 349, 380–93.

[90] Treaties may make such restrictions unlawful: e.g. Energy Charter Treaty, 17 December 1994, 2080 UNTS 95, Art 21.

[91] Currency depreciation is lawful unless it is discriminatory: *Tabar* (1954) 20 ILR 211, 212–13; *Zuk* (1956) 26 ILR 284, 285–6; *Furst* (1960) 42 ILR 153, 154–5; cf *CMS Gas Transmission v Argentina* (2005) 14 ICSID Reports 158, 180; *Suez, Sociedad General de Aguas de Barcelona SA v Argentina*, 30 July 2010, §§125–5.

[92] *Oscar Chinn* (1934) PCIJ Ser A/B No 63, 65. Further: Christie (1962) 38 *BY* 307, 334–6.

[93] *Application to Aliens of the Tax on Mortgagors' Gains* (1963) 44 ILR 149, 153–4.

A constant difficulty is to establish the line between lawful regulatory measures and forms of indirect or creeping expropriation.[94] In *Pope and Talbot v Canada*, the investor argued that a statutory regime of export control involved a form of expropriation.[95] The tribunal held:

> The ... question is whether the Export Control Regime has caused an expropriation of the Investor's investment, creeping or otherwise. Using the ordinary meaning of those terms under international law, the answer must be negative. ... The sole 'taking' that the Investor has identified is interference with the Investment's ability to carry on its business of exporting softwood lumber to the US. While this interference has ... resulted in reduced profits for the Investment, it continues to export substantial quantities of softwood lumber to the US and to earn substantial profits ... [T]he degree of interference with the Investment's operations due to the Export Control Regime does not rise to an expropriation (creeping or otherwise) within the meaning of Article 1110.[96]

In *Metalclad*, another NAFTA case concerning a refusal to grant a construction permit and a change of the regime of land to a national area of protection, the tribunal found that indirect expropriation had taken place, stating in a much quoted paragraph:

> Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[97]

This language has been criticized for its breadth and lack of correspondence to the facts of the case.[98]

(iv) The compensation rule

The rule supported by all leading 'Western' governments and many jurists in Europe and North America is as follows: the expropriation of alien property is only lawful if 'prompt, adequate, and effective compensation'[99] is provided for. In principle, therefore,

[94] Waelde & Kolo (2001) 50 *ICLQ* 811. Further: *Saluka v Czech Republic* (2006) 15 ICSID Reports 250, 326–31.

[95] (2000) 122 ILR 293.

[96] Ibid, 335–7.

[97] *Metalclad Corporation v Mexico* (2000) 5 ICSID Reports 209, 260; also *CME v Czech Republic* (2001) 9 ICSID Reports 121, 236 and for overview of the case-law and definitions: *Generation Ukraine v Ukraine* (2003) 10 ICSID Reports 236, 300–6. But see *Telenor v Hungary*, 13 September 2006, §§65–70, for a narrow definition. For the Energy Charter Treaty: *Nykomb Synergetics AB v Latvia* (2003) 11 ICSID Reports 153, 194. Also US Model BIT 2004, Art 6 (1) & Annex B, available at www.unctadxi.org; OECD Working Paper 4/2004, *Indirect Expropriation and the Right to Regulate in International Investment Law* (2004).

[98] *Mexico v Metalclad* (2001) 125 ILR 468.

[99] The formula appears in a Note from US Secretary of State Cordell Hull to the Mexican government dated 22 August 1938: 3 Hackworth 658–9. The formula appears in most BITs. On the criteria of adequacy, effectiveness, and promptness: García Amador, ILC *Ybk* 1959/II, 16–24; White (1961) 235–43; Jiménez de Aréchaga, ILC *Ybk* 1963/II, 237–44; Cole (1965–66) 41 *BY* 368, 374–9; Schachter (1984) 78 *AJIL*

expropriation, as an exercise of territorial competence, is lawful, but the compensation rule (in this version) makes the legality conditional. The justifications for the rule are based on the assumptions prevalent in a liberal regime of private property and in the principle that foreign owners are to be given the protection accorded to private rights of nationals, provided that this protection involves the provision of compensation for any taking. These assumptions are used to support the compensation principle as yet another aspect of the international minimum standard governing the treatment of aliens. The emphasis is on respect for property rights both as 'acquired rights'[100] and as an aspect of human rights.[101] The principle of acquired rights is unfortunately vague, and the difficulty is to relate it to other principles of law: in short this and other general principles beg too many questions.

Whatever the justifications offered for the compensation rule, it has received considerable support from state practice and international tribunals.[102] Agreements involving provision for some sort of compensation in the form of the 'lump sum settlement' are numerous, but jurists disagree as to their evidential value: many agreements rest on a bargain and on special circumstances.[103] Although some awards were in substance diplomatic compromises,[104] a good number of international tribunals have supported the compensation rule and the principle of acquired rights.[105] Dicta in a number of decisions of the Permanent Court involving treaty interpretation and the effects of state succession on various categories of property, may be regarded as supporting the compensation principle.[106]

121; McLachlan, Shore & Weiniger (2007) ch 9; Marboe, *Calculation of Compensation and Damages in International Law* (2009). See discussion in *Wena Hotels v Egypt* (2000) 6 ICSID Reports 89, 117–30; *AIG v Kazakhstan* (2003) 11 ICSID Reports 7, 83–93; *Kardassopoulos v Georgia*, 3 March 2010, §§501–17.

[100] The statements of the Permanent Court on vested or acquired rights occur in the context of state succession. Also *Lighthouses* (1956) 23 ILR 341.

[101] Cf First Protocol to the ECHR, 20 March 1952, ETS 9, Art 1; also *Lithgow and others v UK* (1986) 75 ILR 438.

[102] The pre-1914 practice included the following cases: *Charlton* (1841) 31 BFSP 1025; *Finlay* (1846) 39 BFSP 40; *King* (1853), in Moore, 6 *Digest* 262; *Savage* (1852), in Moore, 2 *Digest* 1855; *Delagoa Bay Railway* (1900), in La Fontaine, *Pasicrisie international*, 398; *Expropriated Religious Properties* (1920) 1 RIAA 7.

[103] Friedman (1953) 86–101; White (1961) 193–243; Lillich, *The Protection of Foreign Investment* (1965) 167–88; Lillich & Weston (1988) 82 *AJIL* 69; Sacerdoti (1997) 269 Hague *Recueil* 251, 379–411; Lillich, Weston & Bederman, *International Claims* (1999); McLachlan, Shore & Weiniger (2007) 332; Bank & Foltz, 'Lump Sum Agreements' (2009) *MPEPIL*.

[104] *Delagoa Bay Railway Arbitration*, in Moore, 2 *Digest* 1865; *Expropriated Religious Properties* (1920) 1 RIAA 7; Martens, 30 *NRG 2nd Ser* 329.

[105] *Norwegian Ships* (1921) 1 ILR 189; *French Claims against Peru* (1921) 1 ILR 182; *Landreau* (1921) 1 ILR 185; *British Claims in the Spanish Zone of Morocco* (1925) 2 RIAA 615; *Hopkins* (1927) 3 ILR 229; *Goldenberg* (1928) 4 ILR 542; *Hungarian Optants* (1927) 8 *LNOJ* No 10, 1379; *Portugal v Germany* (1930) 5 ILR 150, 151; *Shufeldt* (1930) 5 ILR 179; *Mariposa* (1933) 7 ILR 255; *de Sabla* (1933) 7 ILR 241, 243; *Saudi Arabia v Arabian American Oil Company (Aramco)* (1958) 27 ILR 117, 144, 168, 205; *Amoco International Finance Corporation v Government of the Islamic Republic of Iran* (1987) 83 ILR 500, 541–3. Also: *El Triunfo* (1901) 15 RIAA 467; *Upton* (1903) 63 ILR 211; *Selwyn* (1903) 9 RIAA 380.

[106] *German Interests in Polish Upper Silesia* (1926) PCIJ Ser A No 7, 21–2, 33, 42; *Factory at Chorzów*, Jurisdiction (1927) PCIJ Ser A No 927, 31; *Interpretation of Judgments Nos 7 and 8*, PCIJ Ser A No 13, 19;

There are a number of exceptions to the compensation rule.[107] The most widely accepted are as follows: under treaty provisions; as a legitimate exercise of police power, including measures of defence against external threats; confiscation as a penalty for crimes;[108] seizure by way of enforcement of unpaid taxation or other fiscal measures; loss caused indirectly by health and planning legislation and concomitant restrictions on the use of property; the destruction of property of neutrals as a consequence of military operations; and the taking of enemy property as agreed war reparation.[109]

(v) Expropriation unlawful *per se*

The position may be summarized as follows:

(1) Expropriation for certain public purposes, for example, exercise of police power and defence measures in wartime, is lawful even if no compensation is payable.

(2) Expropriation of property is otherwise unlawful unless there is provision for the payment of effective compensation.

(3) Nationalization, that is, expropriation of a major industry or resource, is unlawful if there is no provision for compensation payable on a basis compatible with the economic objectives of the nationalization, and the viability of the economy as a whole.

Thus expropriation under (2) and (3) is unlawful only *sub modo*, that is, if appropriate compensation is not provided for. The controversial difference between (2) and (3) is the basis on which compensation is assessed. Whatever may be the relation of these two categories, there is evidence of a category of types of expropriation which are illegal apart from a failure to provide for compensation, in which cases lack of compensation is an additional element in, and not a condition of, the illegality. It has been suggested that this category includes interference with the assets of international organizations[110] and taking contrary to binding promises or (perhaps) legitimate expectations.[111] Certainly it includes seizures which are a part of crimes against

Factory at Chorzów, Indemnity (1928) PCIJ Ser A No 17, 46–7; *German Settlers in Poland* (1923) PCIJ Ser B No 6, 23–4, 38; *Peter Pázmány University* (1933) PCIJ Ser A/B No 61, 243.

[107] Herz (1941) 35 *AJIL* 243, 251–2; Friedman (1953) 1–3; Wortley (1959) 40–57; García Amador, ILC *Ybk* 1959/II, 11–12; Sohn & Baxter (1961) 55 *AJIL* 545, 553, 561–2; Bishop, Crawford & Reisman, *Foreign Investment Disputes* (2005) ch 8(I–J); Newcombe, in Kahn & Wälde (2007); Sornarajah (3rd edn, 2010) ch 10(2); Wittich, 'Compensation' (2008) *MPEPIL*.

[108] *Allgemeine Gold- und Silberscheideanstalt v Customs and Excise Commissioners* [1980] 2 WLR 555; Crawford (1980) 51 *BY* 305. Generally: Brower & Brueschke, *The Iran–United States Claims Tribunal* (1998) 463; Meyler (2007) 56 *DePaul LR* 539; Henry (2010) 31 *U Penn JIL* 935.

[109] *AKU* (1956) 23 ILR 21; *Prince Salm-Salm v Netherlands* (1957) 24 ILR 893. This view is controversial, however. Further: *Assets of Hungarian Company in Germany* (1961) 32 ILR 565; *Re Dohnert, Muller, Schmidt & Co* (1961) 32 ILR 570.

[110] Delson (1957) 57 *Col LR* 771.

[111] Friedmann (1956) 50 *AJIL* 475, 505. On estoppel: chapter 18.

humanity or genocide, involve breaches of international agreements,[112] are measures of unlawful retaliation or reprisal against another state,[113] are discriminatory, that is, aimed at particular racial groups or nationals of particular states,[114] or concern property owned by a foreign state and dedicated to public purposes.[115]

The practical distinctions between expropriation unlawful *sub modo* and expropriation unlawful *per se* would seem to be these: the former involves a duty to pay compensation only for direct losses, that is, the value of the property, the latter involves liability for consequential loss (*lucrum cessans*);[116] the former confers a title which is recognized in foreign courts (and international tribunals), the latter produces no valid title.[117] The case-law of the Iran–US Claims Tribunal includes examination of the relevance of the distinction between lawful and unlawful expropriation in the remedial sphere.[118]

(vi) Conclusions on expropriation

The Declaration of 1962 places emphasis on the rights of host states and in a general way contradicts the acquired rights thesis. Its actual formulations tend to cover up the real differences of opinion by the use of such terms as 'appropriate compensation'. But it is significant that the right to compensation, on whatever basis, is recognized in principle.[119] Since 1962, the climate of opinion has shifted, from the Charter of

[112] Cf *German Interests* (1926) PCIJ Ser A No 7; *Factory at Chorzów*, Indemnity (1928) Ser A No 17, 46–7.

[113] Netherlands Note to Indonesia, 18 December 1959 (1960) 54 *AJIL* 484; US Notes to Libya, 8 July 1973, *US Digest* 1973, 334–5; 20 June 1974, *US Digest* 1975, 490–1. Also *Banco Nacional de Cuba v First National City Bank* (1961) 35 ILR 2, 42, 45; *Banco Nacional de Cuba v Sabbatino* (1962) 35 ILR 2. An obvious difficulty is to determine when a countermeasure is lawful: in principle it should be a reaction to a prior breach of legal duty, proportionate, and reversible. These conditions will rarely if ever be met in BIT (as distinct from interstate) cases: *Archer Daniels Midland Co and Tate & Lyle v Mexico* (2007) 146 ILR 439, 484–505; *Corn Products International v Mexico* (2008) 146 ILR 581, 624–38; *Cargill Ltd v Mexico* (2009) 146 ILR 642, 752–66; *Mexico—Soft Drinks*, WT/DS308/AB/R, 6 March 2006, §§66–80. Commentary in Paparinskis (2008) 79 *BY* 264.

[114] There is much authority for this: *Banco Nacional de Cuba v Sabbatino* (1962) 35 ILR 2; *In re by Helbert Wagg & Co Ltd* (1955) 22 ILR 480; *Bank Indonesia v Senembah Maatschappij & Twentsche Bank* (1959) 30 ILR 28. The test of discrimination is the intention of the government: the fact that only aliens are affected may be incidental, and, if the taking is based on economic and social policies, it is not directed against particular groups simply because they own the property involved. ICJ Pleadings 1951, *Anglo-Iranian Oil Co*, Memorial of the UK, 97; *Anglo-Iranian Oil Co Ltd v SUPOR Company* (1954) 22 ILR 23, 39–40; 8 Whiteman 1041–57. Also *ELSI*, ICJ Reports 1989 p 15, 71–3.

[115] White (1961) 151–3.

[116] *Amoco International Finance Corporation v Islamic Republic of Iran* (1987) 83 ILR 500, 507–8. Also Ripinsky, in Ripinsky (ed), *Investment Arbitration* (2009) 47.

[117] Municipal courts often recognize measures lawful under the *lex situs*: *Luther v Sagor* [1921] 3 KB 532; *In re Helbert Wagg & Co Ltd* [1956] 1 Ch 323; *NV Verenigde Deli-Maatschappijen v Deutsch-Indonesische Tabak-Handelsgesellschaft mbH* (1959) 28 ILR 16. Cf Staker (1987) 58 *BY* 151.

[118] *Amoco International Finance v Iran* (1987) 83 ILR 500. Generally: Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran–US Claims Tribunal* (1994); Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal* (1996); Brower & Brueschke (1998).

[119] Further: Mann (1981) 52 *BY* 241; Dolzer & Stevens (2005) ch 4; Wittich, 'Compensation' (2008) *MPEPIL*. Cf Energy Charter Treaty, 17 December 1994, 2080 UNTS 95, Art 13 (1)(d); NAFTA, Art

Economic Rights and Duties of States,[120] via the collapse of the USSR, to the BIT 'revolution', still in spate. The position was summarized by the tribunal in *CME v Czech Republic*:

> The requirement of compensation to be 'just' and representative of the 'genuine value of the investment affected' evokes the famous Hull Formula ... That formula was controversial. ... The controversy came to a head with the adoption by the General Assembly of the United Nations of the 'Charter of Economic Rights and Duties of States.' ... But in the end, the international community put aside this controversy, surmounting it by the conclusion of more than 2200 bilateral (and a few multilateral) investment treaties. These treaties ... concordantly provide for payment of 'just compensation', representing the 'genuine' or 'fair market' value of the property taken. ... These concordant provisions are variations on an agreed, essential theme, namely, that when a State takes foreign property, full compensation must be paid ... The determination of the compensation on the basis of the 'fair market value'—to eliminate the consequences of the wrongful act for which the State is responsible—is acknowledged in international arbitration.[121]

In his Separate Opinion, Sir Ian Brownlie concluded with respect to the Declaration on Permanent Sovereignty over Natural Resources and the Charter of Economic Rights and Duties that:

> Whilst caution must be exercised in evaluating these resolutions, there can be no doubt that the Cordell Hull formula no longer reflects the generally accepted international standard ... The standard of appropriate or just compensation carries the strong implication that, in the case of a going concern and more generally, the compensation should be subject to legitimate expectations and actual conditions.[122]

According to Brownlie, three considerations are particularly pertinent to the assessment of compensation in investment law context:

First: the nature of an investment as a form of expenditure or transfer of funds for the precise purpose of obtaining a return.

Secondly: the element of reasonableness, which rules out the compensation of returns which go beyond the legitimate expectations of the investor.

Thirdly: the element which derives from the general principle that merely speculative benefits, based upon unproven economic projections, do not count as investment or as returns.[123]

December 1992 (1993) 32 ILM 289, Art 1110; US Model BIT (2004) Art 6; France Model BIT (2006) Art 6; Germany Model BIT (2008) Art 4; UK Model BIT (2005 as amended 2006) Art 4; cf China Model BIT (1997) Art 4.

[120] GA Res 3281(XXIX), 12 December 1974 (120–6:10). For contemporary comment: Lillich (1975) 69 *AJIL* 359; Jiménez de Aréchaga (1978) Hague *Recueil* 1, 297–310; Brownlie (1979) 162 Hague *Recueil* 245.

[121] *CME v Czech Republic* (2003) 9 ICSID Reports 264, 369–71 referring to the *Compañía del Desarrollo de Santa Elena SA v Costa Rica* (2000) 5 ICSID Reports 157.

[122] *CME v Czech Republic* (2003) 9 ICSID Reports 264, Separate Opinion by Ian Brownlie, 418–19, citations omitted.

[123] Ibid, 419.

ANNEX 204

PRINCIPLES OF PUBLIC INTERNATIONAL LAW

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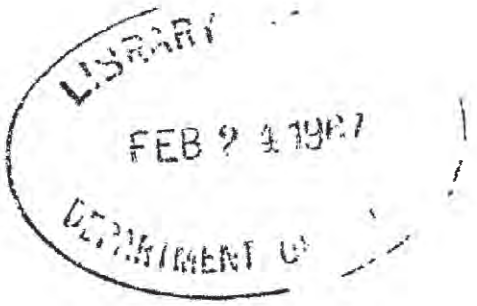

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exhaust local remedies is a partial reflection of the special character of claims by the alien resident against the host state.[1]

Distinct from these problems is the situation where a foreign court acts outside the area of state competence permitted by international law in punishing aliens for breaches of national law; the *ultra vires* act creates responsibility just as much as the illegal acts of other parts of the machinery of state.[2]

9. *Expropriation of Foreign Property*[3]

A state may place conditions on the entry of an alien on its territory and may restrict acquisition of certain kinds of property by aliens. Apart from such restrictions, an alien individual, or a corporation controlled by aliens, may acquire title to property within a state under the local law. The subject-matter may be shares in enterprises, single items such as estates or factories, or, on a monopoly basis, major areas of activities such as railways and mining. In a number of countries foreign ownership has extended to proportions of between fifty and one hundred per cent of all major industries, resources, and services such as insurance and banking. Even in *laisser-faire* economies, the taking of private property for certain public purposes and the establishment of state monopolies have long been familiar. Since the Soviet revolution and the extension of the public sector in many economies, both socialist and non-socialist, the conflict of interest between foreign investors and their governments and the hosts to foreign capital, seeking to obtain control over their own economies, has become more acute. The terminology of the subject is by no means settled, and in any case form should not take precedence over substance. The essence of the matter is the

[1] *Supra*, p. 403. Cp. Guha Roy, 55 *A.J.* (1961), p. 863 at p. 877. See further Ténékidès, 14 *R.D.I.L.C.* (1933), 514–35; de Visscher, 52 Hague *Recueil* (1935, II), 421–32. However, an exception sometimes stated is that there is no need to use local remedies if there are none to exhaust (Moore, *Digest* vi. 677). This involves an invidious approach to the particular system. See further *British Digest* vi. 253.

[2] See McNair, *Opinions* ii. 311, and *supra*, p. 370.

[3] See Fachiri, 6 *B.Y.* (1925), 159–71; id., 10 *B.Y.* (1929), 32–55; Fischer Williams, 9 *B.Y.* (1928), 1–30; Herz, 35 *A.J.* (1941), 243–62; Friedman, *Expropriation in International Law* (1953); Bindschedler, 90 Hague *Recueil* (1956, II), 179–306; Foighel, *Nationalization* (1957); Wortley, *Expropriation in Public International Law* (1959); Gillian White, *Nationalisation of Foreign Property* (1961); Domke, 55 *A.J.* (1961), 585–616; McNair, 6 *Neths. Int. L.R.* (1959), 218–56; Rolin, ibid., pp. 260–75; Verdross, ibid., pp. 278–87; Fouilloux, *La Nationalisation et le droit international public* (1962); Petrén, 109 Hague *Recueil* (1963, II), 492–575; Garcia Amador, *Yrbk., I.L.C.* (1959), ii. 2—24; Int. Law Assoc., Report of the Forty-Eighth Conference, 1958, pp. 130–239; *Annuaire de l'Inst.* 43, i. 42–132; 44, ii. 251–323; American Law Institute, *Foreign Relations Law of the United States*, Tentative Draft no. 5, 1961, Part IV; Delson, 57 *Columbia L.R.* (1957), 755–86. And see the footnotes following.

deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control.[1] The deprivation may be followed by transfer to the territorial state or to third parties, as in systems of land distribution as a means of agrarian reform. The process is commonly described as expropriation. If compensation is not provided, or the taking is regarded as unlawful, then the taking is sometimes described as confiscation. Expropriation of one or more major national resources as part of a general programme of social and economic reform is now generally referred to as nationalization or socialization.

State measures, *prima facie* a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, trade restrictions involving licences and quotas,[2] or measures of devaluation.[3] Whilst special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation. If the state gives a public enterprise special advantages, for example by direction that it charge nominal rates of freight, the resulting *de facto* or quasi-monopoly is not an expropriation of the competitors driven out of business:[4] it might be otherwise if this were the primary or sole object of a monopoly régime.

10. *The Compensation Rule*

The rule supported by all leading 'Western' governments and a majority of jurists in Europe and North America is as follows: the expropriation of alien property is lawful if adequate, effective, and prompt compensation[5] is provided for. In principle, there-

[1] On the various procedures of taking see Sohn and Baxter, 55 *A.J.* (1961), 553, 559; Domke, ibid., pp. 588–90; Christie, 38 *B.Y.* (1962), 307–38. On concession agreements see *infra*, pp. 443–4.

[2] Treaties may make such restrictions unlawful: e.g. under the GATT (*supra*, p. 219), the EFTA Treaty, 1960, and bilateral commercial treaties.

[3] Currency depreciation is lawful unless it is discriminatory: *Tabar claim*, Int. L.R., 20 (1953), p. 211; *Zuk claim*, ibid., 26 (1958, II), p. 284; *British Digest* vi. 350; Wortley, op. cit., pp. 107–9. Treaty obligations exist, *inter alia*, under I.M.F. agreements: Mann, 26 *B.Y.* (1949), pp. 263–70.

[4] See the *Oscar Chinn* case (1934), P.C.I.J., Ser. A/B, no. 63; Green, p. 288. See further Christie, op. cit., pp. 322, 334–6. This decision is also authority for the view that good will is not an item of property separate from an enterprise.

[5] The formula appears in a Note from the U.S. Secretary of State, Cordell Hull, to the Mexican Government dated 22 August 1938: Briggs, p. 559; Bishop, p. 475; Hackworth iii. 658. It is also commonly stipulated that the taking should be 'in the public interest', but see *infra*, p. 441. On the criteria of adequacy, effectiveness, and promptness, see Garcia Amador, *Yrbk., I.L.C.* (1959), ii. 16–24; White, pp. 235–43; Domke, 55 *A.J.* (1961), 603–10; Sohn and Baxter, ibid., pp. 553 (Art. 10/4), 559–60; I.C.J. Pleadings, *Anglo-Iranian Oil Co* case (United Kingdom v. Iran), pp. 100 seq.

ANNEX 205

Responsibility of States for Injuries to the Economic Interests of Aliens: I. Introduction
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RESPONSIBILITY OF STATES FOR INJURIES TO THE ECONOMIC INTERESTS OF ALIENS

By Louis B. Sohn and R. R. Baxter

Of the Board of Editors

I. Introduction

It is the purpose of the law of State responsibility to extend the protection of international law to those who travel or live abroad and to facilitate social and economic ties between States. No State, regardless of its political or economic philosophy, can remain indifferent to mistreatment of its nationals abroad. In an interdependent world the well-being of many countries rests upon an influx of foreign funds and managerial skills, the owners of which must be given effective protection against unjust prosecution or discrimination.

Responding to this need, international law has developed over the last two hundred years standards and procedures designed to protect the life, liberty, and economic security of nationals of one State who live or conduct business activities in another State.[1] The General Assembly of the United Nations decided in 1953 that "it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified," and requested the International Law Commission to undertake this codification.[2] The Commission appointed as *rapporteur* for that subject Dr. F. V. García-Amador, who has submitted to the Commission six excellent reports on various aspects of State responsibility.[3]

At the suggestion of Dr. Yuen-li Liang, the Director of the Codification Division of the Office of Legal Affairs of the United Nations Secretariat, and Secretary of the International Law Commission,[4] the Harvard Law School agreed to revise the draft Convention on Responsibility of States for Damage Done on Their Territory to the Person or Property of Foreigners, which was prepared by Professor Edwin M. Borchard for the Harvard Research in International Law in 1929.[5] The far-reaching developments that had taken place since that period called, however, for something more than a mere revision of the 1929 draft, and the Law School entrusted Pro-

[1] Among the many studies tracing the development of these rules, the following might be mentioned: E. M. Borchard, The Diplomatic Protection of Citizens Abroad (1915); F. S. Dunn, The Protection of Nationals (1932); C. Eagleton, The Responsibility of States in International Law (1928); and A. V. Freeman, The International Responsibility of States for Denial of Justice (1938).

[2] Res. 799 (VIII), Dec. 7, 1953; General Assembly, 8th Sess., Official Records, Supp. No. 17 (U.N. Doc. A/2630), p. 52.

[3] U.N. Docs. A/CN.4/96, 106, 111, 119, 125, and 134 (1956–61).

[4] [1956] I.L.C. Yearbook (Vol. 1) 228. [5] 23 A.J.I.L. Spec. Supp. 133 (1929).

fessors Sohn and Baxter with a complete re-examination of the entire problem. With the help of a distinguished Advisory Committee,[6] the two *rapporteurs* prepared a draft Convention with Explanatory Notes, containing the draftsmen's observations on each Article. It is planned, in addition, to prepare for each Article of the draft a statement of the existing law, which will contain an exhaustive survey of the jurisprudence, treaties, national practice, and legal writings relating to the subject matter of the Article. Two of the prior drafts of the Convention were presented to the International Law Commission and were subject to a short discussion in the Commission;[7] the current twelfth draft will be available to the Commission at its next session.[8]

The draft Convention deals only with such acts and omissions of States as cause an injury to an alien, and it is not concerned with State-to-State responsibility for other injurious acts or for violations of international treaties or of other rules of international law. A State is internationally responsible only if the act or omission is "wrongful," is "attributable" to that State, and causes an "injury" to an alien. All these terms are carefully defined in various articles of the draft Convention, the text of which is reproduced below.

It should also be noted that international responsibility entails a duty of making reparation, a duty which may be discharged through measures designed to re-establish the situation prior to the wrongful act or omission, or through payment of damages, or through a combination of the two.

Before a claim can be presented under the draft Convention, the injured alien must exhaust the local remedies provided by the State against which the claim is made. Of course, if no remedies exist or if they are excessively slow, the alien cannot be required to comply with this provision. The exhaustion of local remedies is considered by the draft to be a matter of procedure or of jurisdiction rather than of substance; it follows in this respect the *Panevezys-Saldutiskis Railway Case*.[9]

[6] That Committee consisted of the following persons: Professor William W. Bishop, Jr., University of Michigan; Professor Herbert W. Briggs, Cornell University; Arthur H. Dean, Esq., of the New York Bar; Professor Roger D. Fisher, Harvard Law School; Alwyn V. Freeman, Esq., Deputy Representative of the International Atomic Energy Agency, United Nations; Charles M. Spofford, Esq., of the New York Bar; I. N. P. Stokes, Esq., of the New York Bar; Professor Quincy Wright, Emeritus, University of Chicago. The late Professor Clyde Eagleton of New York University served on the Committee until his death. Professor Philip C. Jessup of Columbia University was also a member of the Committee prior to his election to the International Court of Justice.

The authors have greatly benefited from the criticisms of the Committee, but it has not always proved possible to incorporate the suggestions of the Committee or of its individual members. Consequently, the views expressed in the text of the draft Convention or in the Explanatory Notes are not to be attributed to the Committee, nor do they necessarily represent the opinions of any individual member thereof.

[7] [1959] I.L.C. Yearbook (Vol. 1) 147–154; [1960] *ibid.* (Vol. 1) 266–270, 276–283.

[8] Previous drafts have been circulated only privately. Extracts from Draft No. 11 (Arts. 1, 9, 10, 11, 12, 27, 31, 32, 33, and 34) were discussed at the Fifty-Fourth Annual Meeting of the American Society of International Law, April 28–30, 1960, and are reproduced in the Proceedings, pp. 102–107.

[9] P.C.I.J., Ser. A/B, No. 76 (1939).

The purpose of the draft Convention is to codify with some particularity the standards established by international law for the protection of aliens and thereby to obviate, as far as possible, the necessity of looking to customary international law. It has been necessary in some cases, however, to incorporate by reference international standards of the principles of law or of justice recognized by the principal legal systems of the world. Examples of such references may be found, for instance, in sub-paragraph 5(c) of Article 10, sub-paragraph 2(b) of Article 11, and sub-paragraph 4(b) of Article 12.

The draft Convention is based on the principle that the treatment of aliens is to be governed by an international minimum standard (Article 2). Nevertheless, the alien should be entitled to the benefit of a municipal standard which is higher than the international one. In particular, international responsibility should arise if there is a "clear" and "discriminatory" violation of the law of the State concerned. The requirement of a "clear" violation precludes the international tribunal from sitting in judgment on close cases of municipal law. International scrutiny should be allowed only in case of a manifest misapplication of law on the national level. The standard of "discriminatory" application of law also acts as a safeguard to the respondent State. Only if some rights or remedies are actually granted to nationals, can they be enjoyed by an alien. The forbidden discrimination may be against aliens in general, a particular group of aliens, or against an individual alien. If discrimination is absent, national treatment may suffice, unless the national standard departs unreasonably from the general principles accepted by the principal legal systems.

While the draft Convention deals with all aspects of State responsibility for injuries to aliens, the excerpts from the Explanatory Notes reproduced below relate only to Articles 9 to 12 of the draft Convention, which are concerned primarily with injuries to the economic interests of an alien. The draft Convention provides for the protection of both individuals and corporations, provided they are not nationals of the State against which the claim is presented. In case of an injury to a corporation which is a national of the respondent State, an alien stockholder may, however, bring a claim if he has himself suffered an injury because of the injury to the corporation and if the corporation has failed to take timely steps to defend the interests of the alien claimant (Article 20, sub-paragraph 2(c)).

The draft Convention allows the private claimant to present his claim directly to any tribunal on which the State alleged to be responsible has conferred jurisdiction with respect to such claims, but it also provides for the traditional method of protecting an alien through a claim brought by the State of which he is a national. If a claim is presented both by a claimant and a State of which he is a national, the right of the individual to present or maintain the claim is suspended while redress is being sought by the State. Should a State decide to waive or settle a claim of its national, such waiver or settlement also binds the private claimant.

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

Draft Convention on the International Responsibility of States for Injuries to Aliens *

SECTION A

GENERAL PRINCIPLES AND SCOPE

Article 1

(Basic Principles of State Responsibility)

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

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

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

Article 2

(Primacy of International Law)

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

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

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

SECTION B

WRONGFUL ACTS AND OMISSIONS

Article 3

(Categories of Wrongful Acts and Omissions)

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

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

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

(c) if it is an act or omission defined in Articles 5 to 12; or

(d) if it violates a treaty.

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

ARTICLE 4

(Sufficiency of Justification)

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

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

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

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

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

ARTICLE 5

(Arrest and Detention)

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

(a) if it is a clear and discriminatory violation of the law of the arresting or detaining State;

(b) if the cause or manner of the arrest or detention unreasonably departs from the principles recognized by the principal legal systems of the world;

(c) if the State does not have jurisdiction over the alien; or

(d) if the arrest or detention otherwise involves a violation by the State of a treaty.

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

(a) to inform him promptly of the cause of his arrest or detention, or to inform him within a reasonable time after his arrest or detention of the specific charges against him;

(b) to grant him prompt access to a tribunal empowered both to determine whether his arrest or detention is lawful and to order his release if the arrest or detention is determined to be unlawful;

(c) to grant him a prompt trial; or

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

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

ARTICLE 6

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

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

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

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

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

ARTICLE 7

(Denial of a Fair Hearing)

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

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

(b) adequate time to prepare his case;

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

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

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

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

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

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

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

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

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

ARTICLE 8

(Adverse Decisions and Judgments)

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

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

(a) if it is a clear and discriminatory violation of the law of the State concerned;

(b) if it unreasonably departs from the principles of justice recognized by the principal legal systems of the world; or

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

Article 9

(Destruction of and Damage to Property)

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

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

(a) a clear and discriminatory violation of the law of the State concerned;

(b) a violation of any provision of Articles 6 to 8 of this Convention;

(c) an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; or

(d) an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

EXPLANATORY NOTE

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

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

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

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

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

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

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

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

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

ARTICLE 10

(Taking and Deprivation of Use or Enjoyment of Property)

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

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

(b) if it is in violation of a treaty.

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

(a) compensation which is no less favorable than that granted to nationals of such State; or

(b) just compensation in terms of the fair market value of the property or of the use thereof unaffected by this or other takings or by conduct attributable to the State and designed to depress the value of the property in anticipation of the taking; or

(c) if no fair market value exists, just compensation in terms of the fair value of such property or of the use thereof.

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

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

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

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

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

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

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

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

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

(a) it is not a clear and discriminatory violation of the law of the State concerned;

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

(c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and

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

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

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

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

Explanatory Note

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Paragraph 3: A State which is desirous not to subject itself to liability to pay compensation for property of an alien which it wishes to secure may attempt to accomplish by indirection what it cannot for financial reasons do directly. There are a variety of methods by which an alien natural or juridical person may have the use or enjoyment of his property limited by State action, even to the extent of the State's forcing the alien to dispose of his property at a price representing only a fraction of what its value

would be had not the alien's use of it been subjected to interference by the State.

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

Whether an interference with the use, enjoyment, or disposal of property constitutes a "taking" or a "taking of use" will be dependent upon the duration of the interference. Although a restriction on the use of property may purport to be temporary, there obviously comes a stage at which an objective observer would conclude that there is no immediate prospect that the owner will be able to resume the enjoyment of his property. Considerable latitude has been left to the adjudicator of the claim to determine what period of interference is unreasonable and when the taking therefore ceases to be temporary.

The unreasonableness of an interference with the use, enjoyment, or disposal of property must be determined in conformity with the general principles of law recognized by the principal legal systems of the world. No attempt has been made to particularize on the expression used in the text, since the matter seems one best worked out by international tribunals. It would be open to such a tribunal to take account of the justifications referred to in paragraph 5 of this Article as a basis for proceeding by analogy to a definition of reasonableness in the context of interferences with the use of property.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 11

(*Deprivation of Means of Livelihood*)

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

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

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

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

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

EXPLANATORY NOTE

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 12

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

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

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

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

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

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

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

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

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

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

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

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

EXPLANATORY NOTE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 13

(Lack of Due Diligence in Protecting Aliens)

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

(a) if the act is criminal under the law of the State concerned; or

(b) the act is generally recognized as criminal by the principal legal systems of the world.

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

SECTION C

INJURIES

ARTICLE 14

(Definitions of Injury and Causation)

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

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

(a) bodily or mental harm;

(b) loss sustained by an alien as the result of the death of another alien;

(c) deprivation of liberty;

(d) harm to reputation;

(e) destruction of, damage to, or loss of property;

(f) deprivation of use or enjoyment of property;

(g) deprivation of means of livelihood;

(h) loss or deprivation of enjoyment of rights under a contract or concession; or

(i) any loss or detriment against which an alien is specifically protected by a treaty.

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

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

(a) if there was no reasonable relation between the facts which made the act or omission wrongful and the loss or detriment suffered by the injured alien; or

(b) if, in the case of an act or omission creating an unreasonable risk of injury, the loss or detriment suffered by the injured alien occurred outside the scope of the risk.

SECTION D

ATTRIBUTION

ARTICLE 15

(Circumstances of Attribution)

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

ARTICLE 16

(Persons and Agencies through Which a State Acts)

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

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

ARTICLE 17

(Levels of Government)

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

(a) the central government of a State;

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

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

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

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

ARTICLE 18

(Activities of Revolutionaries)

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

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

SECTION E

EXHAUSTION OF LOCAL REMEDIES

ARTICLE 19

(When Local Remedies Considered Exhausted)

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

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

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

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

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

SECTION F

PRESENTATION OF CLAIMS BY ALIENS

ARTICLE 20

(Persons Entitled to Present Claims)

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

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

(a) the alien who has suffered an injury;

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

(1) a spouse of the decedent;

(2) a parent of the decedent;

(3) a child of the decedent; or

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

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

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

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

ARTICLE 21

(Definition of Alien, National, and Claimant)

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

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

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

(a) a natural person who possesses the nationality of that State;

(b) a natural person who possesses the nationality of any territory under the mandate, trusteeship, or protection of that State;

(c) a stateless person having his habitual residence in that State; and

(d) a juristic person which is established under the law of that State or of one of the entities referred to in paragraph 1 of Article 17.

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

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

ARTICLE 22

(*Procedure*)

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

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

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

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

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

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

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

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

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

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

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

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

SECTION G

ESPOUSAL AND PRESENTATION OF CLAIMS BY STATES

ARTICLE 23

(Espousal of Claims and Continuing Nationality)

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

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

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

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

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

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

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

ARTICLE 24

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

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

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

Article 25

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

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

SECTION H

DELAY

Article 26

(Claims Barred by Lapse of Time)

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

SECTION I

REPARATION

Article 27

(Form and Purpose of Reparation)

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

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

(b) damages; or

(c) a combination thereof.

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

(a) revocation of the act;

(b) restitution in kind of property wrongfully taken;

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

(d) abstention from further wrongful conduct.

3. Damages are awarded in order to:

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

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

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

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

Article 28

(Damages for Personal Injury or Deprivation of Liberty)

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

(a) harm to the body or mind;

(b) pain, suffering, and emotional distress;

(c) loss of earnings and of earning capacity;

(d) reasonable medical and other expenses;

(e) harm to the property or business of the alien resulting directly from such bodily or mental injury or deprivation of liberty; and

(f) harm to the reputation of the alien resulting directly from such deprivation of liberty.

Article 29

(Damages for Death)

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

Article 30

(Damages for Wrongful Acts of Tribunals and Administrative Authorities)

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

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

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

ARTICLE 31

(Damages for Destruction of and Damage to Property)

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

ARTICLE 32

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

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

ARTICLE 33

(Damages for Deprivation of Means of Livelihood)

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

ARTICLE 34

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

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

ARTICLE 35

(Damages for Failure to Exercise Due Diligence)

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

ARTICLE 36

(Costs)

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

ARTICLE 37

(Subtraction of Damages Obtained through Other Remedies)

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

ARTICLE 38

(Interest)

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

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

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

ARTICLE 39

(Currency and Rate of Exchange)

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

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

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

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

ARTICLE 40

(*Local Taxes Prohibited*)

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

ANNEX 206

CONVENTION

ESTABLISHING THE MULTILATERAL
INVESTMENT GUARANTEE AGENCY

The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) was submitted to the Board of Governors of the International Bank for Reconstruction and Development on October 11, 1985, and went into effect on April 12, 1988. The Convention was amended by the Council of Governors of MIGA effective November 14, 2010.

Schedule A of the Convention lists the original members of MIGA. An up-to-date membership list can be found at www.miga.org.

The Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency can be found at www.miga.org.

Chapter III
Operations

Article 11. Covered Risks

(a) Subject to the provisions of Sections (b) and (c) below, the Agency may guarantee eligible investments against a loss resulting from one or more of the following types of risk:

(i) Currency Transfer

any introduction attributable to the host government of restrictions on the transfer outside the host country of its currency into a freely usable currency or another currency acceptable to the holder of the guarantee, including a failure of the host government to act within a reasonable period of time on an application by such holder for such transfer;

(ii) Expropriation and Similar Measures

any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories;

(iii) Breach of Contract

any repudiation or breach by the host government of a contract with the holder of a

guarantee, when (a) the holder of a guarantee does not have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach, or (b) a decision by such forum is not rendered within such reasonable period of time as shall be prescribed in the contracts of guarantee pursuant to the Agency's regulations, or (c) such a decision cannot be enforced; and

(iv) War and Civil Disturbance

any military action or civil disturbance in any territory of the host country to which this Convention shall be applicable as provided in Article 66.

(b) In addition, the Board, by special majority, may approve the extension of coverage under this Article to specific non-commercial risks other than those referred to in Section (a) above, but in no case to the risk of devaluation or depreciation of currency.

(c) Losses resulting from the following shall not be covered:

(i) any host government action or omission to which the holder of the guarantee has agreed or for which he has been responsible; and

(ii) any host government action or omission or any other event occurring before the conclusion of the contract of guarantee.

ANNEX 207

Restatement (Third) of Foreign Relations Law § 712 (1987)

Restatement of the Law - The Foreign Relations Law of the United States | June 2019 Update

Restatement (Third) of The Foreign Relations Law of the United States

Part VII. Protection of Persons (Natural and Juridical)

Chapter 2. Injury to Nationals of Other States

§ 712 State Responsibility for Economic Injury to Nationals of Other States

A state is responsible under international law for injury resulting from:

(1) a taking by the state of the property of a national of another state that

(a) is not for a public purpose, or

(b) is discriminatory, or

(c) is not accompanied by provision for just compensation;

For compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national;

(2) a repudiation or breach by the state of a contract with a national of another state

(a) where the repudiation or breach is (i) discriminatory; or (ii) motivated by noncommercial considerations, and compensatory damages are not paid; or

(b) where the foreign national is not given an adequate forum to determine his claim of repudiation or breach, or is not compensated for any repudiation or breach determined to have occurred; or

(3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.

Comment:

a. Responsibility under general principles of international law. This section sets forth the responsibility of a state under customary international law for certain economic injury to foreign nationals. A state may have additional obligations under international agreements to which it is party. The remedies available to a state whose national suffered injury, or to the injured

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person, are dealt with in § 713; see also § 906. As to remedies available to the injured person in the courts of the United States, see also § 907, §§ 451- 460 (sovereign immunity) and §§ 443- 444 (act of state).

This section deals with state responsibility under international law. For the obligations of the United States and of the States with respect to aliens and their property under the United States Constitution, see §§ 721 and 722.

A state is responsible under this section for injury to property and other economic interests of private persons who are foreign nationals. Injury by a state to property or economic interests of another state or state instrumentality is covered by general principles of state responsibility, § 206, Comment *e* and Reporters' Note 1. See also the principles of state responsibility to other states in regard to particular matters, such as economic interests in the sea (Part V) or pollution of the environment (Part VI).

b. Expropriation of alien property under international law. Subsection (1) states the traditional rules of international law on expropriation of alien properties and takes essentially the same substantive positions as the previous Restatement, §§ 187- 190. These rules have been challenged in recent years, but this Restatement reaffirms that they continue to be valid and effective principles of international law. In particular, international law requires that when foreign properties are expropriated there must be compensation and such compensation must be just. See Comments *c* and *d*.

c. Requirement and standard of compensation. International law requires that a taking of the property of a foreign national, whether a natural or juridical person, be compensated. There are authoritative declarations that under international law the compensation to be paid must be "appropriate." This Restatement maintains the view that compensation must also be "just." Compare the Fifth Amendment to the United States Constitution: "nor shall private property be taken for public use, without just compensation." See Comment *d*.

The United States Government has consistently taken the position in diplomatic exchanges and in international fora that under international law compensation must be "prompt, adequate and effective," and those terms have been included in United States legislation. See Reporters' Note 2. That formulation has met strong resistance from developing states and has not made its way into multilateral agreements or declarations or been universally utilized by international tribunals, but it has been incorporated into a substantial number of bilateral agreements negotiated by the United States as well as by other capital-exporting states both among themselves and with developing states.

d. Just compensation. The elements constituting just compensation are not fixed or precise, but, in the absence of exceptional circumstances, compensation to be just must be equivalent to the value of the property taken and must be paid at the time of taking or with interest from that date and in an economically useful form.

—There must be payment for the full value of the property, usually "fair market value" where that can be determined. Such value should take into account "going concern value," if any, and other generally recognized principles of valuation.

—Provision for compensation must be based on value at the time of taking; as in United States domestic law, if compensation is not paid at or before the time of taking but is delayed pending administrative, legislative, or judicial processes for fixing compensation, interest must be paid from the time of the taking.

—Compensation should be in convertible currency without restriction on repatriation, but payment in bonds may satisfy the requirement of just compensation if they bear interest at an economically reasonable rate and if there is a market for them through which their equivalent in convertible currency can be realized.

Various forms of payment have been provided in negotiated settlements which would not be held to satisfy the requirements of just compensation, *e.g.*, payment in nonconvertible currency that can be used for investment in productive assets in the taking state, or even payment in kind, as in the case of expropriation of investment in natural resources.

In exceptional circumstances, some deviation from the standard of compensation set forth in Subsection (1) might satisfy the requirement of just compensation. Whether circumstances are so exceptional as to warrant such deviation, and whether in the circumstances the particular deviation satisfies the requirement of just compensation, are questions of international law. An instance of exceptional circumstances that has been specifically suggested and extensively debated, but never authoritatively passed upon by an international tribunal, involves national programs of agricultural land reform. See Reporters' Note 3. A departure from the general rule on the ground of such exceptional circumstances is unwarranted if (i) the property taken had been used in a business enterprise that was specifically authorized or encouraged by the state; (ii) the property was an enterprise taken for operation as a going concern by the state; (iii) the taking program did not apply equally to nationals of the taking state; or (iv) the taking itself was otherwise wrongful under Subsection (1)(a) or (b).

Exceptional circumstances that would permit deviation from the standard of compensation set forth in Subsection (1) might include takings of alien property during war or similar exigency. As to alien enemies in time of war, see § 711, Comment *h*.

When, by an international agreement, a state has undertaken not to expropriate the properties of nationals of another state, or has agreed that in the event of such expropriation it will provide compensation in accordance with a particular standard, any claim of a right to terminate, suspend, or modify that obligation on grounds of special circumstances is governed by the law of international agreements, including the principle of *rebus sic stantibus*. See § 336.

e. Taking for public purpose. The requirement that a taking be for a public purpose is reiterated in most formulations of the rules of international law on expropriation of foreign property. That limitation, however, has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective reexamination by other states. Presumably, a seizure by a dictator or oligarchy for private use could be challenged under this rule.

f. Discriminatory takings. Formulations of the rules on expropriation generally include a prohibition of discrimination, implying that a program of taking that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law. Where discrimination is charged, or where the public purpose is challenged, Comment *e*, there is often also a failure to pay just compensation, and a program of takings that did not meet the requirements of equal treatment and public purpose but did provide just compensation under Subsection (1) might not in fact be successfully challenged.

Discrimination implies unreasonable distinction. Takings that invidiously single out property of persons of a particular nationality would be unreasonable; classifications, even if based on nationality, that are rationally related to the state's security or economic policies might not be unreasonable. Discrimination may be difficult to determine where there is no comparable enterprise owned by local nationals or by nationals of other countries, or where nationals of the taking state are treated equally with aliens but by discrete actions separated in time.

Whether a state can take the property of private persons in response to a violation of international law by their state of nationality, even in retaliation for unlawful takings of private property by that state, is doubtful. See previous Restatement § 200. For other forms of response to a violation of international law, see § 905, Comments *b* and *f* and Reporters' Note 2. As to the taking of the property of enemy aliens during war, see § 711, Comment *h*.

g. Expropriation or regulation. Subsection (1) applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation"). A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory. Depriving an alien of control of his property, as by an order freezing his assets, might become a taking if it is long extended. A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory, Comment *f*, and is not designed to cause the alien to abandon the property to the state or sell it at a

distress price. As under United States constitutional law, the line between "taking" and regulation is sometimes uncertain. See Reporters' Note 6.

h. Repudiation or breach of contract by state. A state party to a contract with a foreign national is liable for a repudiation or breach of that contract under applicable national law, but not every repudiation or breach by a state of a contract with a foreign national constitutes a violation of international law. Under Subsection (2), a state is responsible for such a repudiation or breach only if it is discriminatory, Comment *f*, or if it is akin to an expropriation in that the contract is repudiated or breached for governmental rather than commercial reasons and the state is not prepared to pay damages. A state's repudiation or failure to perform is not a violation of international law under this section if it is based on a bona fide dispute about the obligation or its performance, if it is due to the state's inability to perform, or if nonperformance is motivated by commercial considerations and the state is prepared to pay damages or to submit to adjudication or arbitration and to abide by the judgment or award.

With respect to any repudiation or breach of a contract with a foreign national, a state may be responsible for a denial of justice under international law if it denies to the alien an effective domestic forum to resolve the dispute and has not agreed to any other forum; or if, having committed itself to a special forum for dispute settlement, such as arbitration, it fails to honor such commitment; or if it fails to carry out a judgment or award rendered by such domestic or special forum. See Comment *j*.

A breach of contract by a state may sometimes constitute "creeping expropriation," Comment *g*, for example, if the breach makes impossible the continued operation of the project that is the subject of the contract.

i. Other economic injury. Under Subsection (1), a state is responsible for expropriation of alien property without just compensation even if property of nationals is treated similarly, but economic injuries that fall within Subsection (3) are generally unlawful because they involve discrimination or are otherwise arbitrary. An alien enterprise that has been lawfully established is protected by international law against changes in the rules governing its operations that are discriminatory, Comment *f*, or are so completely without basis as to be arbitrary in the international sense, *i.e.*, unfair. In general, in the absence of international agreement to the contrary, a state may deny to foreign nationals the right to acquire property or to invest within the state. See § 711, Comment *d*. Compare § 722, Comments *f* and *g*.

Under bilateral treaties of friendship, commerce, and navigation, nationals of both states are usually accorded rights to establish businesses, to invest, and to engage in trade or a profession, often on a most-favored-nation basis, sometimes equally with nationals. Such treaties generally permit each state to exclude the other's nationals from sensitive industries. Some foreign nationals enjoy extensive rights under multilateral arrangements, such as those of the European Economic Community. Such favorable treatment is not unlawful discrimination against aliens who do not have comparable treaty rights.

j. Economic injury and denial of justice. Economic injury to foreign nationals is often intertwined with a denial of domestic remedies. If no effective administrative or judicial remedy is available to the alien to review the legality under international law of an action causing economic injury, the state may be liable for a denial of justice, as well as for the violation of economic rights. See § 711, Comment *a*. In the case of a taking of property, Subsection (1), an impartial determination is required by international law, particularly as to whether the compensation provided is just. In the case of repudiation or breach of a contract with an alien, Subsection (2)(b), an impartial determination is required to review the adequacy of the asserted justification for the repudiation or breach and to assess damages if appropriate. Such a determination might be made by an independent domestic tribunal, an *ad hoc* or previously agreed arbitration, or an international tribunal. In the case of other acts that impair the economic interests of aliens, Subsection (3), the denial of an adequate remedy may confirm the arbitrary or discriminatory character of the act.

Reporters' Notes

*1. Status of international law on expropriation.*Subsection (1) restates the traditional principles of international law on expropriation. Early in this century these principles were settled law. See, *e.g.*, The Factory at Chorzow, P.C.I.J. ser. A, No.

17 (1928). See also Case Concerning German Interests in Polish Upper Silesia, P.C.I.J. ser. A, No. 7, at 32 (1926). Compare Schachter, "Compensation for Expropriation," 78 Am.J.Int'l L. 121, 122-24 (1984).

The first major challenge to these principles was posed by the U.S.S.R., which rejected the traditional rule, claiming that an alien enters the territory of another state or acquires property there subject wholly to local law. The principles were challenged also by Latin American governments. In 1938, in a famous exchange between Secretary of State Hull and the Minister of Foreign Relations of Mexico, the United States insisted that property of aliens was protected by an international standard under which expropriation was subject to limitations, notably that there must be "prompt, adequate and effective compensation." In contrast, the Government of Mexico insisted that international law required only that foreign nationals be treated no less favorably than were nationals, at least in the case of "expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of land." 3 Hackworth, Digest of International Law 655-61 (1942).

After the Second World War, with the coming of many new states and the rise of the "Third World" to influence, opposition to the traditional view received widespread support. For the new majority of states, a people's right to dispose of its national resources became "economic self-determination," and was designated a "human right" and placed at the head of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. See § 701, Reporters' Note 6. In 1962, however, the United Nations General Assembly declared that in cases of expropriation of natural resources "the owner shall be paid appropriate compensation … in accordance with international law." G.A. Res. 1803, Permanent Sovereignty over Natural Resources, 17 U.N. GAOR, Supp. 17, at 15; the United States voted in favor of that resolution. See Reporters' Note 2. See Schwebel, "The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources," 49 A.B. A.J. 463 (1963).

Divisions became sharper in 1974 when the United Nations General Assembly adopted the Charter of Economic Rights and Duties of States, which dealt with the subject without making any reference to international law. The Charter declared that every state has the right

> to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals … [unless otherwise agreed].

The Charter was adopted by 120 in favor, 6 against, and 10 abstentions, the vote reflecting the views of the majority as developing states, with the United States among the dissenters and the other developed Western states either dissenting or abstaining. *Compare* Brower and Tepe, "The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?," 9 Int'l Law. 295 (1975), *with* Weston, "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Wealth," 75 Am.J.Int'l. L. 437 (1981).

The United States and other capital exporting states have rejected the challenge by developing states, have refused to agree to any change in the traditional principles, and have denied that these have been replaced or modified in customary law by state practice. See, *e.g.*, Clagett, "The Expropriation Issue Before the Iran-United States Claims Tribunal: Is 'Just Compensation' Required by International Law or Not?" 16 L. & Pol'y in Int'l Bus. 813, 818 (1984). Those states have taken the position that the traditional requirements are solidly based on both the moral rights of property owners and on the needs of an effective international system of private investment. Moreover, they argued, whatever objections might be made to the traditional rules as applied to investments established during the colonial era, the traditional rules should clearly apply to arrangements made between investors and independent governments negotiated on a commercial basis. That view was supported by the arbitrator in Texas Overseas Petroleum Co. v. Libyan Arab Republic (1977), 17 Int'l Leg. Mat. 1, 27-30 (1978), who concluded that the traditional rule prevailed, if only because the capital exporting states had not assented to its undoing or modification. Other arbitrations

under agreements between states and foreign investors, as well as judgments of an Iran-United States Claims Tribunal, Reporters' Note 2, have also supported the traditional rule.

Both before and after the adoption of the Charter of Economic Rights and Duties of States, many states, including many developing states that supported the Charter (though not generally states in Latin America), concluded bilateral agreements that included provisions for compensation in the case of expropriation. Some of those provisions are contained in treaties of friendship, commerce, and navigation, as part of broader accommodations for foreign trade and investment. See, *e.g.*, Art. IV(3) of the Convention of Establishment between the United States and France, 1959, 11 U.S.T. 2398, T.I.A.S. No. 4625. Others appear in agreements aimed particularly at the security of foreign investment, *e.g.*, Agreement between Egypt and the United Kingdom, 1975, 14 Int'l Leg.Mat. 1470, and Agreement between Singapore and the United Kingdom, 1975, 15 Int'l Leg.Mat. 591. For a comprehensive listing of such agreements, numbering about 200 (as of 1986), see International Chamber of Commerce, Bilateral Treaties for International Investment (1977), updated. The United States began a program of negotiating such bilateral agreements in 1980 and as of 1986 had signed, but not ratified, agreements with some 10 countries, including Egypt, Panama, and Turkey. See Gann, "The U.S. Bilateral Investment Treaties Program," 21 Stan. J. Int'l L. 373 (1986). Some provisions for compensation appear in arrangements whereby a state guarantees the investments of its nationals against loss due to expropriation, after agreement with the state host to the investment. See, *e.g.*, Agreement between the United States and Indonesia, 1967, 18 U.S.T. 1850, T.I. A.S. No. 6330. It has been argued that the growing network of such agreements constitutes state practice that provides further support for the rule of compensation set forth in this section. See Dolzer, "New Foundations of the Law of Expropriation of Alien Property," 75 Am.J.Int'l L. 553, 565-66 (1981). An effort under the aegis of the OECD to conclude a multilateral agreement, which provided for just compensation, defined as "the genuine value of the property affected", failed to achieve consensus. See Schwarzenberger, Foreign Investments in International Law, 153-59 (1969).

There have been numerous settlements by aliens or their governments with expropriating states, but these do not provide persuasive evidence as to what the parties to the settlement believed the relevant law to be. Such settlements are often made for political or larger economic reasons, and it is uncertain whether the expropriating state is paying with a sense of international legal obligation to compensate, or what view as to the required measure of compensation is reflected in the amount of the settlement. See the discussion of the settlement in 1974 by the Government of Chile with the Kennecott Copper Co. in Steiner and Vagts, Transnational Legal Problems 522-24 (3d ed.1986); the agreement between the United States and Peru resolving the Marcona Mining Company Expropriation, 1976, 27 U.S.T. 3993, T.I.A.S. No. 8417; Gantz, "The Marcona Settlement," 71 Am.J.Int'l L. 474 (1977). (In the *Marcona* settlement, however, the United States Department of State declared that the settlement satisfied the requirement of just compensation. See Contemporary Practice, 71 Am.J.Int'l L. 139 (1977).) Lumpsum settlement agreements are also ambiguous. It has been argued that, while they may be some evidence of a sense of legal obligation to compensate, they suggest that only modest compensation need be paid. However, the International Court of Justice, in the Case concerning Barcelona Traction Light and Power Co. (Belgium v. Spain), [1970] I.C.J. Rep. 4, 40, stated that such settlements "are sui generis and provide no guide" as to general international practice. See also Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F.Supp. 412, 433 (S.D.N.Y.1980), *modified*, 658 F.2d 875 (2d Cir.1981) ("Such settlements are all influenced and distorted by the relative political and economic power of the parties, and their desire to regularize disrupted relationships, factors which are not relevant in attempting to set forth neutral principles of international law.") Domestic national practice, which might be relevant as "general principles common to the major legal systems" (§ 102(4) and Comment *l* to that section), also varies widely. See Lowenfeld, ed., Expropriation in the Americas (1971).

In 1964, the Supreme Court of the United States stated: "there are few if any issues in international law today on which opinion seems to be so divided as the limitations of a state's power to expropriate the property of aliens." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428, 84 S.Ct. 923, 940, 11 L.Ed.2d 804 (1964). See also Banco Nacional de Cuba v. Chase Manhattan Bank, *supra*, at 658 F.2d 888. Since 1974, the controversy as to the state of customary law has been dormant, and investing states have come to rely on bilateral agreements, though Latin American states generally have not concluded such agreements. International arbitral tribunals have consistently applied the traditional rule as set forth in Subsection (1) but they have differed in their formulation of the standard of compensation to be applied. See Reporters' Note 2.

Even those who have challenged the traditional rule as to compensation for nationalization programs generally accept it as to "a discrete expropriation of particular items of property." See Sedco, Inc. v. National Iranian Oil Co., _ Iran-U.S. C.T.R. _ (1986), 25 Int'l Leg.Mat. 636 (1986).

*2. Standard of compensation.*The 1962 Resolution of the United Nations General Assembly, Reporters' Note 1, affirming that a taking of property of foreign nationals required compensation, declared that compensation had to be "appropriate." The United States had proposed the phrase "prompt, adequate and effective" compensation, the formula asserted by Secretary of State Hull in 1938, see Reporters' Note 1, but it accepted and voted for the 1962 resolution; it declared that in its view the word "appropriate" was the equivalent of "prompt, adequate and effective." UN Doc. A/C.2/S.R. 850 at 327 (1962). On the other hand, Mexico asserted that "appropriate compensation" was satisfied by the standard it had applied in 1938, *i.e.*, if aliens were compensated to the same extent as nationals. See UN Doc. A/PV. 1194, at 1136. A Soviet amendment which would have had the Resolution refer to the inalienable right to "unobstructed … expropriation" was defeated. U.N. Doc. A/PV. 1193 at 1131. The Charter of Economic Rights and Duties of States also adopted "appropriate" compensation as the standard, but only as required by the law of the expropriating state, rejecting by implication any obligation of compensation under international law.

International tribunals have differed in their formulation of the standard of compensation to be applied, although their phraseology may be intended to have equivalent meaning. In Libyan American Oil Co. v. Libyan Arab Republic, (1977) 20 Int'l Leg.Mat. 1, 86 (1982), the arbitrator adopted "equitable compensation" with "the classical formula of 'prompt, adequate and effective compensation' remaining as a maximum and a practical guide." In Kuwait v. American Independent Oil Co. (1982), 21 Int'l Leg.Mat. 976, 1033 (1982), the arbitrators used "appropriate" compensation, "determined by means of an enquiry into all the circumstances." The Iran-United States Claims Tribunal in American Int'l Group v. Islamic Rep. of Iran, 4 Iran-U.S. C.T.R. 96, 105, 109 (1983), held as "a general principle of public international law" that foreign nationals are entitled to "the value of the property taken," and referred to the need to determine "the going concern or fair market value" of the property. Subsequently, in Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, 6 Iran-U.S. C.T.R. 219, 225 (1984), the Tribunal stated the Standard of Compensation to be "the full value" of the property of which the claimant was deprived. See also, Sedco, Inc. v. National Iranian Oil Co., _ Iran-U.S. C.T.R. _, 25 Int'l Leg.Mat. 629, 635 (1986) and *id.* at 636, 647 (separate opinion of Judge Brower). The Tribunal has also applied the 1957 Treaty of Amity between Iran and the United States, 8 U.S.T. 900, T.I. A.S. No. 3853, calling for the payment of "just compensation" defined in part as "the full equivalent of the property taken". Phelps Dodge Corp. v. Islamic Rep. of Iran, 25 Int'l Leg. Mat. 619, 626-27 (1986). The network of bilateral agreements, Reporters' Note 1, uses different formulae, with a substantial number of them providing for all or some of the terms "prompt, adequate and effective" compensation. See generally Schachter, Reporters' Note 1.

The Executive Branch and the Congress of the United States have held resolutely to the view that international law requires compensation that is "prompt, adequate and effective." In the First Hickenlooper Amendment, Congress referred to the obligation of states taking property of United States citizens as including "speedy compensation in convertible foreign exchange equivalent to the full value thereof, as required by international law." 22 U.S.C. § 2370(e)(1). That standard is presumably incorporated by reference in the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2). See § 444, Comment *c*. United States representatives to international financial institutions are directed to oppose loans to countries that have expropriated property of United States citizens without prompt, adequate, and effective compensation, in the absence of certain exceptional circumstances. See *e.g.*, 22 U.S.C. §§ 283r, 285***o***, 290g-8. The benefits of the generalized system of tariff preferences for less-developed countries may be denied to countries that fail to compensate in accordance with that standard. 19 U.S.C. § 2462(b)(4). The President and the State Department frequently reiterate the traditional formula in general policy statements. See, *e.g.*, 66 Dept.State Bull. 152-54 (1972); [1975] Digest of U.S. Practice in Int'l L. 488; [1978] *id.* 1226-27; 19 Weekly Comp.Pres.Docs. No. 36 (Sept. 12, 1983), at 1217.

*3. Just compensation.*No formula defining just compensation can suit all circumstances. In interpreting the requirement of just compensation in the United States Constitution, the Supreme Court said:

> The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The political ethics reflected in the Fifth Amendment

> reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined.

United States v. Cors. 337 U.S. 325, 332, 69 S.Ct. 1086, 1090, 93 L.Ed. 1392 (1949). Compare United States v. Commodities Trading Corp., 339 U.S. 121, 123, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950):

> This Court has never attempted to prescribe a rigid rule for determining just compensation under all circumstances and in all cases. Fair market value has normally been accepted as a just standard. But when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned or applied other standards.

—*Valuation*. In the absence of exceptional circumstances, just compensation requires payment of full value, usually "fair market value." Comment *d*. Compare Olson v. United States, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934) (for purposes of the Fifth Amendment, just compensation is normally to be measured by "the market value of the property at the time of the taking contemporaneously paid in money"), reaffirmed in United States v. 50 Acres of Land, 469 U.S. 24, 105 S.Ct. 451, 83 L.Ed.2d 376 (1984). Such market value would include the "going concern" value of the enterprise, since a willing buyer would be receiving that value. Where the foreign national's property is unique—a mine or large manufacturing entity—it may be hard to find comparable assets or a willing buyer, and hence difficult to find a market value. Another method of valuation that would capture going concern value is to calculate the present value of the future earnings of the enterprise. When a taking arises out of a revolutionary situation that might affect the prospects of the enterprise in the eyes of a hypothetical purchaser, the situation should be taken into account in evaluating the property for purposes of compensation. See Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981); American Int'l Group v. Islamic Republic of Iran, Reporters' Note 2.

—*Time*. The First Hickenlooper Amendment, Reporters' Note 2, requires the expropriating state to take appropriate steps to fix compensation within a reasonable time (six months). The payment is generally regarded as having been timely if compensation is tendered at the time of the taking or if compensation plus interest from that time is paid at a later date. Compare Kirby Forest Indus. v. United States, 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), on remand 635 F.Supp. 705 (E.D.Tex.1986), holding that just compensation requires only that interest be paid from the date the government acquired title to land, not from the date on which condemnation proceedings were commenced.

—*Usable form*. Payment meets the requirement of just compensation if it is in a form that is usable by the alien. This includes deferred payments, as by bonds, provided that they bear interest realistically related to market rates. Compare the decision of the Constitutional Council of France that the provision in the Declaration of the Rights of Man and of the Citizen of 1789, incorporated into the French Constitution, which provides that property can be taken only "on condition of a just and prior indemnification," was satisfied by compensation otherwise just but payable in negotiable interest bearing bonds to be paid on the average in 7 1/2 years, Jour. Off. 17 Jan. 1982, at 299.

—*Exceptional circumstances*. Subsection (1) sets forth the elements constituting just compensation in the absence of exceptional circumstances. Compare United States v. Commodities Trading Corp., quoted above; also suggestion in that case, 339 U.S. at 126, that "exceptional circumstances" might warrant different standard for compensation under the Fifth Amendment; United States v. Virginia Electric & Power Co., 365 U.S. 624, 633, 81 S.Ct. 784, 790, 5 L.Ed. 2d 838 (1961) ("fair market value" not "an absolute standard"). The limitations on the exception for "exceptional circumstances" set forth in Comment *d* derive from the previous Restatement § 188.

One exception that has been frequently asserted involves expropriation as part of a national program of agricultural land reform. Such land reform programs, unlike, for example, nationalizations of investments in natural resources, would often not be possible

if full compensation had to be paid. From the time of the exchange of notes between Mexico and the United States in 1938, see Reporters' Note 1, Latin American countries in particular have insisted that full compensation was not payable in such cases if the state could not afford full payment so long as aliens were treated equally with nationals. It may be with a view to such programs that Latin American countries generally have refrained from concluding bilateral investment agreements promising full compensation. See Reporters' Note 1. The United States has consistently rejected the exception, from the exchange of notes with Mexico in 1938, Reporters' Note 1, through exchanges with Guatemala (1953) and Cuba (1959). See 8 Whiteman, Digest of International Law 1156-63, 1167-70 (1967). United States military government authorities in Japan insisted upon the exclusion of property of allied nationals from a land reform program, the constitutionality of which, as applied to Japanese landowners, was sustained by the Supreme Court of Japan even though it provided less than full compensation. *Id.* at 1152-55.

The land reform exception was accepted by some scholars in developed states, see 1 Oppenheim, International Law 352 (8th ed. Lauterpacht 1955), but rejected by others. See the varying views expressed in 43(1) Annuaire de l'Institut de Droit International 42 (1950). The land reform exception has been supported on the ground that takings of agricultural land, unlike takings of mineral resources or of a going business concern, typically do not generate funds from which the government could make compensation. If a requirement of compensation fully in accord with the standard set forth in Subsection (1) would prevent the program, the obligation to compensate might be satisfied by a lower standard. Latin American states that have framed this exception have not denied that aliens had to be treated no less favorably than nationals as to compensation. As of 1987, no international tribunal had passed upon this exception.

As to exceptional circumstances generally, see dicta in separate opinions in cases before the Iran-U.S. Claims Tribunal by Judges Lagergren and Holtzmann in INA Corp. v. Islamic Republic of Iran (Sept. 15, 1985) and by Judge Brower in Sedco, Inc. v. National Iranian Oil Co., ___ Iran-U.S. C.T.R. ___, 25 Int'l Leg.Mat. 636, 647, n. 31 (1986).

*4. Expropriation for public purpose.*In the controversy as to the current state of the international law on expropriation of alien property, Reporters' Note 1, there has been little specific challenge to the traditional requirement that expropriation be for a public purpose. The public purpose requirement is included in the typical United States treaty of friendship, commerce, and navigation and was declared in the 1962 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources, Reporters' Note 1. However, case law applying or interpreting the rule has been scarce and the few cases have also involved a denial of compensation by the taking state. Walter Fletcher Smith, 1929, 2 R. Int'l Arb.Awards 913; Finlay Claim, 39 Br. & For. State Papers 410 (1849); Banco Nacional de Cuba v. Sabbatino, 193 F.Supp. 375, 381 (S.D.N.Y.1961), *affirmed*, 307 F.2d 845 (2d Cir.1962), *reversed on other grounds*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). As the general understanding of "public purpose" broadens, the likelihood of a successful challenge on that basis grows smaller. Compare the requirement in the Fifth Amendment to the United States Constitution that takings be for a "public use." There appears to be no case in which a taking by the United States Government was successfully challenged as not being for a public use. Compare Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954) (taking for aesthetic purposes); United States ex rel. TVA v. Welch, 327 U.S. 546, 551-52, 66 S.Ct. 715, 717, 90 L.Ed. 843 (1946) (deference to judgment of Congress and federal agency). A broad interpretation of public purpose has been accepted also in respect of takings by States of the United States, to which a similar standard applies through the due process clause of the Fourteenth Amendment. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 184 (1984) (taking of fee simple for purpose of dispersing land ownership). Compare the decision of the Constitutional Council of France, Reporters' Note 3, that the legislative judgment as to the public necessity for nationalization cannot be reviewed in the absence of manifest error.

*5. Discriminatory expropriation.*Discrimination has not been a prominent objection if the expropriating state paid compensation, but the expropriation of United States properties by Cuba was held to be in violation of international law because, *inter alia*, its purpose was to retaliate against United States nationals for acts of their Government, and was directed against United States nationals exclusively. Banco Nacional de Cuba v. Farr, 243 F.Supp. 957 (S.D.N.Y.1965), *affirmed*, 383 F.2d 166 (2d Cir.1967), *certiorari denied*, 390 U.S. 956, 88 S.Ct. 1038, 19 L.Ed.2d 1151 (1968). See also the arbitration in Texas Overseas Petroleum Co. v. Libyan Arab Republic (1977), 17 Int'l Leg. Mat. 1 (1978), in which investors referred to the Libyan statement that expropriation had been undertaken as a "cold slap in the insolent face" of the investors' government; and BP Exploration Co. v.

Libyan Arab Republic (1974), 53 Int'l L. Rep. 297 (1979), in which the investor cited the Libyan statement that expropriation had been undertaken as retaliation for political action of the investor's government directed at a third state. For a finding that nationalizing one company but not another did not violate international law when there was no discrimination on the basis of the nationality of the two companies and there were "adequate reasons" for distinguishing between them, see the decision of the tribunal in the arbitration between Kuwait and the American Independent Oil Co. (1982), 21 Int'l Leg.Mat. 976, 1019-1020 (1982).

Expropriation programs that discriminate in favor of aliens do not violate this section. Compare the decision of the French Constitutional Council, Reporters' Note 3, that the constitutional principle of equality is not violated when largely domestic banks are nationalized while largely foreign banks are not.

*6. Taking or regulation.*It is often necessary to determine, in the light of all the circumstances, whether an action by a state constitutes a taking and requires compensation under international law, or is a police power regulation or tax that does not give rise to an obligation to compensate even though a foreign national suffers loss as a consequence. In general, the line in international law is similar to that drawn in United States jurisprudence for purposes of the Fifth and Fourteenth Amendments to the Constitution in determining whether there has been a taking requiring compensation. *Compare*Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1927); United States v. Pewee Coal Co., 341 U.S. 114, 71 S.Ct. 670, 95 L.Ed. 809 (1951); and Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) (finding government actions constituted takings), *with*Goldblatt v. City of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); and Penn-Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (finding government actions constituted regulations, not takings). See also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). See generally Greenawalt, "United States of America," in Lowenfeld, ed., Expropriation in the Americas: A Comparative Law Study 307 (1971).

International cases addressing the problem of distinguishing expropriation from regulation include Harza Engineering Co. v. Islamic Rep. of Iran, 1 Iran-U.S. C.T.R. 499 (1982), in which a panel of the tribunal dismissed a claim that the Iranian state bank had in effect expropriated claimant's bank accounts by dishonoring claimant's check and frustrating its attempts to authenticate its officer's signature; Sedco, Inc. v. National Iranian Oil Co., _ Iran-U.S. C.T.R. _, 25 Int'l Leg.Mat. 636 (1985), holding that the appointment by Iran of "temporary directors" *prima facie* fixed the date of expropriation; Parsons (Great Britain v. United States), 1925, 6 R.Int'l Arb.Awards 165, in which an arbitrator rejected a British claim for compensation for the destruction of a British national's stock of liquor during a rebellion in the Philippines; and Kügele v. Polish State, [1931-32] Ann.Dig.Int'l L. 69, in which the Upper Silesian Arbitral Tribunal dismissed a claim that a series of license fees imposed by Poland had forced the claimant to close his brewery, and Poland had therefore taken that property. See Christie, "What Constitutes a Taking of Property Under International Law,"[1962] Brit.Y.B.Int'l L. 307. Compare the majority and concurring opinions in Starrett Housing Corp. v. Islamic Rep. of Iran, 4 Iran-U.S. C.T.R. 122, 23 Int'l Leg.Mat. 1090 (1984).

One test suggested for determining whether regulation and taxation programs are intended to achieve expropriation is whether they are applied only to alien enterprises. In many instances, however, particularly in developing countries, there may be no comparable locally-owned enterprise. Another test, emphasized in connection with OPIC insurance, § 713, Reporters' Note 7, is the degree to which the government action deprives the investor of effective control over the enterprise. In other cases, however, though the government does not assume control it makes it impossible for the firm to operate at a profit, and the alien (or his government) claims that the purpose is to effect expropriation. A challenged regulation might be compared with the practice of major legal systems; the fact that a given regulation is supported by guidelines adopted by an international agency to guide the behavior of multinationals may be seen as evidence of its legitimacy. See § 213, Reporters' Note 7.

A temporary deprivation of control, as by a freezing of assets under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701, is probably not a taking but may become one if deprivation is for an extended or indefinite period. See Comment *g*. See Sardino v. Federal Res. Bank, 361 F.2d 106, 111 (2d Cir.), *certiorari denied*, 385 U.S. 898, 87 S.Ct. 203, 17 L.Ed.2d 130 (1966). Thus, government appointment of an "interventor" or "receiver" to manage the enterprise might constitute

a taking. A temporary deprivation of an alien's control over his property may in some cases cause significant injury and give rise to a claim for damages. Compare First English Evangelical Lutheran Church v. County of Los Angeles, _ U.S. _, 107 S.Ct. 2378 (1987) (requiring payment for temporary takings of property.) As to the freezing of the private assets of a foreign national in response to a violation of international law or agreement by the state of the alien's nationality, see § 905, Comment *b* and Reporters' Note 2.

*7. "Creeping expropriation."*Formal expropriation involves a taking by the state and transfer of title to the state, but a state may seek to achieve the same result by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned. In some cases the owner, faced with the prospect of continuing losses, sells to the government, accepting a modest price, but later asserts that the transaction was, in fact, not a sale but a taking. See Weston, "Constructive Takings under International Law," 16 Va.J.Int'l L. 103 (1975); Vagts, "Coercion and Foreign Investment Rearrangements," 72 Am.J.Int'l L. 17 (1978).

*8. Repudiation or breach of state contract with foreign national.*The term "repudiate" has been interpreted as meaning an outright disclaimer by the state of any liability under the contract. Matter of Revere Copper & Brass Co. and Overseas Private Investment Corp., 14 Int'l Leg.Mat. 1321, 1345 (1978) (interpreting OPIC insurance policy); [1979] Digest of U.S. Practice in Int'l L. 1217 (interpreting Second Hickenlooper Amendment). The prevailing view is that, in principle, international law is not implicated if a state repudiates or breaches a commercial contract with a foreign national for commercial reasons as a private contractor might, *e.g.*, due to inability of the state to pay or otherwise perform, or because performance has become uneconomical; or because of controversy about the contractor's performance. In such circumstances, the state is liable for damages under applicable law and remedies are usually available in some forum. It is a violation of international law if, in repudiating or breaching the contract, the state is acting essentially from governmental motives (akin to those that operate in cases of expropriation) rather than for commercial reasons, and fails to pay compensation or to accept an agreed dispute settlement procedure.

The protection provided in Subsection (2) is sometimes stated as a rule that a state is responsible for "arbitrary" repudiation of a contract. It is not clear whether any breach or repudiation would be deemed "arbitrary" unless it violated the principles of Subsection (2), or constituted expropriation or creeping expropriation, Comment *g*. In any case, failure of a state to afford an adequate remedy to determine an asserted breach of contract is a denial of justice in violation of international law. Comment *j*.

Some commentators consider "arbitrary" any unreasonable departure from principles recognized by the principal legal systems of the world in their law of government contracts. See Sohn and Baxter, Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 12(a), 55 Am. J.Int'l L. 545 (1961). However, the propriety of governmental action affecting rights under state contracts has been uncertain under national law, too. See, for example, the cases applying the clause in the United States Constitution forbidding States to impair the obligation of contracts (Article I, Section 10). *Compare*El Paso v. Simmons, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965), *with*United States Trust Co. v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

A state is generally responsible in international law for wrongs done by local subdivisions, see § 207(b), but there is authority that such responsibility does not extend to breach by local subdivisions of contracts with foreign contractors. See Sohn and Baxter, *supra*, Art. 12(1), and previous Restatement § 193, Comment *l*.

*9. "Internationalization" of concession or development agreements.*Repudiations by governments have resulted in controversy particularly in respect of concession or development agreements involving the exploitation of natural resources, since such contracts have sometimes become symbols of interference with the state's sovereignty over its natural resources. On the other hand, recovery of the alien's large capital investment requires a long period of contractual security. The 1962 Resolution of the General Assembly on Permanent Sovereignty over Natural Resources, Reporters' Note 1, recognized in Article 8 that "[f]oreign investment agreements freely entered into by or between sovereign states shall be observed in good faith."

The rights of the alien may depend on the form of the concession or development contract. The rights of the investor may be greater if the contract includes a provision that it shall be governed by "general principles of the law of nations" or "principles of the law of [the state party] not inconsistent with international law." Even if the contract provides that it shall be governed by local law, the contract is subject to the principles of Subsection (2).

The significance of such a clause has been disputed. Private parties to agreements containing such clauses have sometimes claimed that the clause converts the agreement into an international agreement, and breach of the contract into a violation of international law; that by such a clause, it is argued, a state submits its actions to international law and should be held to its bargain. On the other hand, some developing states have viewed such a clause as without effect because it derogates from the state's inalienable sovereignty, particularly its sovereign rights over its natural resources. Under an intermediate view, followed in this Restatement, such a clause authorizes courts or arbitrators to develop a body of rules for the resolution of disputes under such contracts, either modeled after the rules governing international agreements (Part III of this Restatement), or distilled from relevant general principles of various national legal systems. Such a clause does not, however, render the contract an international agreement subject to the rules of Part III, or to international remedies under Part IX.

Breaches of development or concession contracts are similar to, and often allied with, expropriations, Subsection (1), and international law tends to treat the two similarly. The law of the United States does so, too. The First Hickenlooper Amendment, Reporters' Note 2, made both such breaches and expropriations cause for the termination of aid. See § 444, Comment *c*. Legislation authorizing investment guarantees by the Overseas Private Investment Corporation (see § 713, Reporters' Note 7) defines "expropriation" to include "any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor … where such abrogation, repudiation, or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project."22 U.S.C. § 2198(b).

*10. State contracts other than development agreements.*The principles of international law restated in Subsection (2) are relevant for international contract practice to different extents in respect of different types of contract disputes. For example:

(a) A state having entered into a contract to deliver goods of a certain quality, the foreign buyer claims that the product delivered was inferior. Such disputes are typically resolved by arbitration according to commercial rules, or in the ordinary or administrative courts of the contracting state or of the state of the private party's nationality. No issue of international law arises unless the contracting state interferes with the normal course of remedies.

(b) A state, having borrowed money abroad, fails to meet an installment of interest when it falls due. Such cases are typically adjusted by direct negotiation between the state and the lenders, with an international institution such as the International Monetary Fund acting as intermediary. The bond or loan agreement frequently contains a waiver of the state's immunity to suit in the courts of other states. See § 467, Reporters' Notes 3 and 4. In such cases, issues of state responsibility under international law or of international remedy rarely arise in modern practice. See Case of Certain Norwegian Loans (France v. Norway), [1957] I.C.J. Rep. 9, where the issue was raised but the Court decided it had no jurisdiction.

(c) A state, having entered into a long-term development (concession) agreement for a mining project, cancels the agreement in order to operate the project through a state agency. The state's action disrupts an established economic activity and is equivalent to a taking of property. Such action is sometimes intertwined in fact with a formal taking of property. The rules as to taking (Subsection (1)) generally apply. For cases in which arbitrators considered repudiations of concession agreements as takings, see Libyan American Oil Co. v. Libyan Arab Republic, (1977), 20 Int'l Leg.Mat. 1 (1981); Kuwait v. American Independent Oil Co. (1982), 21 Int'l Leg. Mat. 976 (1982); Texaco Overseas Petroleum Co. v. Libyan Arab Republic (1977), 17 Int'l Leg.Mat. 1 (1978).

(d) A state, having entered into a long term contract with a foreign national, then changes its tax or regulatory laws, bringing about a sharp reduction of the expected economic value of the contract to the foreign party. If the contract is one of many, the principle of international law forbidding discriminatory treatment requires similar treatment for all and will tend to discourage

radical measures. Where the foreign contractor is virtually the only party affected, however, discrimination may not be the issue, and an international rule against discrimination may not provide the remedy. The private party may obtain a provision in the contract that "internationalizes" the contract, Reporters' Note 9, or a provision that expressly or by implication purports to "stabilize" the arrangement by barring the state from passing certain types of legislation during the term of the contract. If coupled with an arbitration clause, such a stabilization clause will be given effect by the arbitrator. For discussion of stabilization clauses, see the majority and concurring opinions in Kuwait v. American Independent Oil Co., (1982), 21 Int'l Leg.Mat. 976 (1982). Inclusion of such clauses may be resisted by some states, however, on the ground that they constitute a derogation from the state's sovereignty. Under Subsection (2), a state violating its obligation under a contract would be responsible, even in the absence of such a clause, if the repudiation or breach violated Subsection (2)(a) or if no remedy were provided, Subsection (2)(b).

In each of these types of disputes a state would incur responsibility under international law if it failed to provide access to an adequate forum for dispute resolution or failed to carry out a determination by a forum thus provided. Subsection (2)(b); see § 713.

11. "Arbitrary" economic injury."Arbitrary" in Subsection (3) is used in a sense analogous to its use in connection with repudiation of contracts, Reporters' Note 8. It refers to an act that is unfair and unreasonable, and inflicts serious injury to established rights of foreign nationals, though falling short of an act that would constitute an expropriation under Comment *g*.

*12. Economic injury and rights under international agreements.*Particularly among the developed countries, there is a network of bilateral international agreements that provide for extensive rights for the nationals of one state party within the territory of the other. These include the right to establish oneself in business or to invest in enterprises controlled by others, subject to the right of the host state to exclude aliens from certain "sensitive" businesses such as communications, air transport, banking, and natural resources. Once such enterprises are established, they are generally entitled to the same treatment as nationals of the host state, subject to narrow exceptions. Within the European Economic Community, extensive rights of establishment have been conferred upon nationals of the member states, and the Commission was authorized to develop a timetable for the removal of remaining restrictions on entry. In 1976, the member states of the Organization for Economic Cooperation and Development signed a Declaration on International Investment and Multinational Enterprises, 75 Dep't State Bull. 83, which stated that each member state should afford enterprises owned or controlled by nationals of other member states treatment "no less favourable than that accorded in like situations to domestic enterprises." Whether a treaty gives private persons rights and remedies under the national law of the parties depends on interpretation of the treaty and on the domestic law of the state where the right or remedy is sought to be asserted. See § 111, Reporters' Note 4; § 713(2) and Comment *h* to that section; § 906.

*13. Previous Restatement.*The previous Restatement dealt with economic injuries to aliens in §§ 184- 196. The subject is treated here in fewer sections, and is sometimes distributed differently among black letter, Comment, and Reporters' Notes, but without major change in substance. Thus, the standard of "just compensation" for a taking of property of a foreign national, §§ 187-90 in the previous Restatement, is dealt with here in Subsection (1), Comment *d*, and Reporters' Notes 2 and 3. Breach by a state of a contract with a foreign national, § 193 in the previous Restatement, is treated here in Subsection (2), Comment *h* and Reporters' Notes 8-10. Remedies for economic injury to foreign nationals are made more explicit in this Restatement, in § 713; see also § 906.

Case Citations - by Jurisdiction

U.S.
C.A.2
C.A.7
C.A.7,
C.A.9

Annex 207

C.A.11,
C.A.D.C.
C.D.Cal.
D.D.C.
S.D.N.Y.
E.D.Pa.

U.S.

U.S.2004. Cit. in conc. op. American citizen sued Republic of Austria and state-owned Austrian Gallery, alleging that she owned valuable paintings under her uncle's will and that Gallery obtained paintings through wrongful conduct during and after World War II. District court denied defendants' motion to dismiss, and court of appeals affirmed. This court affirmed, holding that Foreign Sovereign Immunities Act of 1976 applied to conduct, like defendants' wrongdoing, that occurred prior to the Act's enactment and prior to the State Department's adoption in 1952 of a restrictive theory of sovereign immunity. Concurring opinion argued that statutes of limitations, personal jurisdiction and venue requirements, and doctrine of forum non conveniens would limit number of suits brought in American courts. Number of suits would be limited if lower courts were correct that Act's reference to violation of international law did not cover expropriations of property belonging to country's own nationals. Republic of Austria v. Altmann, 541 U.S. 677, 713, 124 S.Ct. 2240, 2262, 159 L.Ed.2d 1.

C.A.2

C.A.2, 2000. Cit. in disc. Canadian citizens and their Egyptian corporation sued Delaware corporations that had either purchased or leased plaintiffs' commercial property that had been seized by the Egyptian government, arguing that defendants had full knowledge that the property had been confiscated for the unlawful reason that individual plaintiffs were Jewish. Reversing the district court's dismissal of the action and remanding, this court held, inter alia, that the district court had jurisdiction by reason of the parties' diversity of citizenship; jurisdiction, however, did not lie under the Alien Tort Claims Act because there was no allegation that defendants were involved in the taking of plaintiffs' property or complicit in the Egyptian government's alleged violation of international law. Bigio v. Coca Cola Co., 239 F.3d 440, 448, on remand 2005 WL 287397 (S.D.N.Y.2005).

C.A.2, 1989. Subsec. (2) cit. in disc., com. (h) cit. in disc., Rptr.'s Note 8 cit. in disc. Antigua's ambassador to the United Nations borrowed $250,000 from an American bank and defaulted on repayments. The bank received a default judgment against Antigua and then entered into a consent order with the ambassador by which Antigua's sovereign immunity was waived. Antigua petitioned the district court to set aside the judgment or, otherwise, to vacate the consent order. The district court denied the motion, holding that Antigua was not immune because the loan fell within the commercial activity exception of the Foreign Sovereign Immunities Act (FSIA). Reversing and remanding, this court vacated the default judgment, concluding that an ambassador's actions under color of authority do not automatically bind the state he represents. The court stated that agency law provided a proper context in which to resolve the factual issue of whether the ambassador had apparent authority to bind his government in the settlement of a lawsuit arising from purely commercial transactions with a nonsovereign third party and to waive his country's sovereign immunity. Antigua was given a chance to defend the suit on the merits, since the court believed that issues of substance and procedure are interwoven in any FSIA case, and default judgments against foreign sovereigns are disfavored. First Fidelity Bank v. Gov. of Antigua & Barbuda, 877 F.2d 189, 193.

C.A.2, 1987. Subsecs. (1) and (2), com. (f), and Rptr's Note 5 cit. in sup. (citing § 712 of T.D. No. 7, 1986. § 712 has since been revised; see Official Text). The Republic of Cuba nationalized an electric utility owned by an American corporation and did not pay the utility's debts to certain American banks. The American banks held the assets of various Cuban banks against the unpaid loans, and when the national bank of Cuba sued to recover the funds, the American banks counterclaimed for the money owed to them. The district court found for the defendants, and this court affirmed, holding that Cuba was liable because its policy of nationalization and nonpayment of debts discriminated against United States nationals and constituted a taking that was compensable under international law. Banco Nacional de Cuba v. Chemical Bank N.Y. Trust, 822 F.2d 230, 237.

Annex 207

C.A.7

C.A.7, 2015. Cit. in sup., subsec. (1) cit. in sup. Holocaust survivors and heirs of Holocaust victims sued Hungarian national railway, Hungarian national bank, and several private banks, alleging that defendants expropriated property from Holocaust survivors and victims and used it to finance the continued German war effort and the Hungarian genocide. The district court granted defendants' motions to dismiss. Affirming, this court held, among other things, that plaintiffs failed to show that they had exhausted any available Hungarian remedies, or that there was a legally compelling reason to excuse such an effort. The court reasoned, in part, that the text and structure of Restatement Third, The Foreign Relations Law of the United States §§ 712 and 713 supported the general requirement that exhaustion of domestic remedies was required as a matter of comity with respect to any takings claim under international law. Fischer v. Magyar Allamvasutak, 777 F.3d 847, 856, 857, 858.

C.A.7,

C.A.7, 2012. Subsec. (1) quot. in sup. and cit. in ftn. Holocaust survivors and heirs of other Holocaust victims sued Hungarian banks and the Hungarian national railway, alleging that defendants participated in expropriating property from Hungarian Holocaust survivors and victims. The district court denied defendants' motions to dismiss. This court vacated and remanded with instructions, holding, among other things, that jurisdiction over plaintiffs' claims was not barred by the domestic-takings rule, under which a sovereign could expropriate the property of its own nationals within its own territory without violating international law, because the alleged expropriations were an integral part of an overall genocidal plan that violated international law notwithstanding the rule. Abelesz v. Magyar Nemzeti, 692 F.3d 661, 674, 676.

C.A.9

C.A.9, 2010. Cit. in sup., cit. and quot. in ftn., quot. in diss. op. U.S. citizen whose grandmother's Pissarro painting was allegedly confiscated in 1939 by the Nazi government in Germany because she was a Jew brought suit under the expropriation exception to the Foreign Sovereign Immunities Act (FSIA) to recover the painting, or damages, from the Kingdom of Spain and a foundation that was an instrumentality of Spain and claimed to own the painting. The district court denied defendants' motions to dismiss. Affirming in part, this court held that the expropriation exception to the FSIA applied such that the district court had subject-matter jurisdiction over the action. The court concluded that the FSIA did not require that the foreign state against which suit was brought be the foreign state that took the property at issue in violation of international law. The dissent argued that the position that a taking by Nazi Germany in violation of international law waived the sovereign immunity of some innocent nation that later came upon the property through legitimate means was unacceptable under international law. Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1027, 1031, 1043.

C.A.9, 1992. Subsec. (1) quot. in sup., com. (f) cit. in sup. Argentine man who was threatened and tortured by a military junta gathered his family, sold their land, arranged for someone to oversee the family business, and fled to America to live with their daughter, a United States citizen. Junta then seized family business, altered property records, and sought assistance of American courts to prosecute the man. Family sued Argentine government, inter alia, for expropriation of property, among other claims. California federal district court dismissed the torture claims and dismissed the expropriation claims on the basis of the act of state doctrine. Reversing and remanding, this court held, in part, that district court should first have considered the issue of subject matter jurisdiction under the Foreign Sovereign Immunities Act. The daughter, an American citizen during the property taking, was eligible to invoke clause two of the international takings exception because the family business was seized for personal profit and because junta officials had a discriminatory motivation based on the family's Jewish ethnicity. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 712, cert. denied 507 U.S. 1017, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993).

C.A.9, 1987. Com. (c) cit. in sup. (citing § 712 of T.D. No. 7, 1986. § 712 has since been revised; see Official Text). Investors sued state-owned foreign banks for violations of federal securities laws and for the taking of property in violation of international law. The trial court granted summary judgment for the banks. Affirming, this court held that exchange controls instituted by

the foreign country were not unlawful under international law providing for the surrender of foreign funds against payment in local currency at the official rate of exchange even when the local currency is less valuable than the funds surrendered. The court dismissed the investors' claim that they did not receive compensation equivalent to the full market value of their property, reasoning that as there had been no taking, there was no question as to whether the banks had made appropriate compensation. West v. Multibanco Comermex, S.A., 807 F.2d 820, 833, cert. denied 482 U.S. 906, 107 S.Ct. 2483, 96 L.Ed.2d 375 (1987), rehearing denied 483 U.S. 1040, 108 S.Ct. 10, 97 L.Ed.2d 800 (1987).

C.A.11,

C.A.11, 2018. Subsec. (a)(1) cit. in disc.; com. (f) cit. in disc., quot. in case quot. in disc. Foreign owners of Venezuelan company that operated as part of a state-owned network of distributors for the petrochemical industry brought an action under the expropriation exception of the Foreign Sovereign Immunities Act (FSIA) against Venezuela and its state-owned business, alleging that Venezuela initiated criminal proceedings and sought to arrest plaintiffs as pretext for the illicit seizure of their company and its assets. The district court dismissed the complaint for lack of subject-matter jurisdiction. This court reversed, holding that the heightened standard for establishing federal-court jurisdiction under the FSIA over a foreign sovereign required the district court to resolve any disputed factual allegations and find a legally valid claim that plaintiffs' property rights were taken away in violation of international law. The court quoted Restatement Third of Foreign Relations Law § 712 for the ways that a taking could violate international law. Comparelli v. Republica Bolivariana De Venezuela, 891 F.3d 1311, 1326, 1327.

C.A.D.C.

C.A.D.C.2016. Cit. in sup.; subsec. (1) cit. in sup. Hungarian Holocaust survivors brought various claims against the Republic of Hungary and the Hungarian state-owned railway arising from defendants' alleged participation in and perpetration of the Holocaust. The district court granted defendants' motion to dismiss for lack of subject-matter jurisdiction, finding that defendants were immune from suit under the Foreign Sovereign Immunities Act (FSIA). This court reversed in part and remanded, holding that defendants' genocidal expropriations of plaintiffs' property were takings in violation of international law for purposes of the FSIA's expropriation exception. The court cited Restatement Third of Foreign Relations § 712 in concluding that the domestic-takings rule, under which a plaintiff could not establish jurisdiction under the FSIA based on an intrastate taking, did not apply, because plaintiffs' argument for jurisdiction was not premised on the prohibition against uncompensated takings, but rather, on genocide, which was a violation of international law when perpetrated by a state against its own nationals as well as those of another state. Simon v. Republic of Hungary, 812 F.3d 127, 141, 144, 148.

C.A.D.C.2015. Cit. in sup.; com. (f) quot. in sup.; Rptr's Note quot. in sup. U.S. company and its Venezuelan subsidiary asserted jurisdiction under the expropriation exception to the Foreign Sovereign Immunities Act (FSIA) in order to bring a claim for a taking of property in violation of international law against the Bolivarian Republic of Venezuela, alleging that defendant forcibly seized plaintiffs' property in Venezuela. The district court granted in part defendant's motion to dismiss. Reversing in part, this court held that plaintiffs sufficiently stated a takings claim so as to survive a motion to dismiss under the FSIA. The court rejected defendant's argument that plaintiffs could not claim an international law violation because subsidiary was a Venezuelan national. The court explained that a "discriminatory takings" exception to the domestic-takings rule, as set out in Restatement Third of Foreign Relations Law § 712, could apply here, where defendant purportedly committed the taking as a result of its anti-American sentiment and its desire to discriminate against company because of its nationality. Helmerich & Payne Intern. Drilling Co. v. Bolivarian Republic of Venezuela, 784 F.3d 804, 813, 814.

C.A.D.C.2012. Cit. in case cit. in disc. (general cite). American company sued the Islamic Republic of Iran, alleging that after the Islamic Revolution, the government of Iran expropriated company's interest in an Iranian dairy and withheld its dividend payments. Following numerous stages of litigation, the district court determined that plaintiff had jurisdiction to bring his claim under the commercial activities exception to the Foreign Sovereign Immunities Act (FSIA), and concluded that plaintiff had a cause of action under both customary international law and Iranian law. Affirming in part and reversing in part, this court held that, while the language and history of the FSIA did not support the creation of a private right of action for expropriation

based on customary international law, the 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States, construed under Iranian law, provided plaintiff with a private right of action against the government of Iran. The court further held that Iran was liable for the expropriation and failure to pay plaintiff dividends. McKesson Corp. v. Islamic Republic of Iran, 672 F.3d 1066, 1075.

C.A.D.C.1984. Cit. in ftn. to diss. op. (citing § 712 of T.D. No. 3, 1982. § 712 has since been revised; see Official Text). A United States citizen sued the federal government, alleging that his privately owned ranch in Honduras had been illegally occupied. The district court dismissed the action as a nonjusticiable issue. This court originally affirmed the lower court, but on an en banc rehearing it reversed and remanded. The court held that the citizen had standing to sue, and that a resolution passed by the Honduran government to expropriate certain lands did not amount to a state action barring the citizen's complaint. The dissent argued that the resolution did amount to a state action, and that it was unnecessary to find a formal taking of the property by the Honduran government. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1570, certiorari granted and judgment vacated, 471 U.S. 1113, 105 S.Ct. 2353, 86 L.Ed.2d 255 (1985), on remand 788 F.2d 762 (D.C.Cir.1986).

C.D.Cal.

C.D.Cal.2015. Cit. in case quot. in sup. (general cite). Relatives of Armenian and Turkish citizens who owned property in Turkey that was seized and expropriated by the Republic of Turkey or its predecessor, the Ottoman Empire, following the end of World War I filed a proposed class action against the Republic of Turkey and Turkish banks, seeking to recover the property. This court granted banks' motion to dismiss for lack of jurisdiction under the Foreign Sovereign Immunities Act. Although Restatement Third of the Foreign Relations Law of the United States § 712 provided that a taking contravened international law if it did not serve a public purpose, if it discriminated against or singled out aliens for regulation by the state, or if the foreign government did not pay just compensation, the court explained that the expropriation exception to sovereign immunity normally did not apply where the plaintiff was a citizen of the defendant country at the time of the expropriation. In this case, the Armenians whose property was taken were citizens of the Ottoman Empire when their property was expropriated. Davoyan v. Republic of Turkey, 116 F.Supp.3d 1084, 1099.

C.D.Cal.2006. Cit. in sup. (general cite). Grandson of prior owner of French Impressionist painting brought suit to recover the painting against the Kingdom of Spain and foundation that loaned the painting to Spain, on grounds that the painting was extorted from his grandmother by the Nazis in 1939 as a condition to issuing her an exit visa from Spain. Denying defendants' motions to dismiss but certifying this matter for interlocutory appeal, this court held, inter alia, that plaintiff had shown a sufficient basis for the court's exercise of subject-matter jurisdiction under the "expropriation" or "takings" exception to the Foreign Sovereign Immunities Act, in part because the taking was discriminatory and without just compensation such that it could have been "in violation of international law." Cassirer v. Kingdom of Spain, 461 F.Supp.2d 1157, 1170.

D.D.C.

D.D.C.2017. Cit. in disc.; subsec. (1) cit. in disc. Legal successors to the estates of members of an art-dealer consortium brought an action under the Foreign Sovereign Immunities Act (FSIA) against the Republic of Germany and its instrumentality, alleging wrongful possession of a medieval relic collection that was obtained by a coerced sale in 1935 during the Nazi persecution of German Jews. This court denied in part defendants' motion to dismiss, holding, inter alia, that plaintiffs adequately pleaded a violation of international law in describing the taking of the collection as part of the Holocaust genocide in order to satisfy the expropriation exception of the FSIA, and international comity did not require dismissal of plaintiffs' claims due to a failure to exhaust remedies in Germany. The court rejected defendants' argument that the coerced sale amounted to a domestic taking under Restatement Third of Foreign Relations Law § 712(1) and fell outside of the expropriation exception, explaining that genocide perpetuated by a state against its nationals amounted to a violation of international law for jurisdictional purposes. Philipp v. Federal Republic of Germany, 248 F.Supp.3d 59, 72, 81.

D.D.C.2016. Subsec. (1) cit. in sup. Descendants of Jewish Hungarian art collector asserted jurisdiction under the Foreign Sovereign Immunities Act (FSIA) to bring a claim against, among others, the Republic of Hungary, alleging that defendant breached its bailment agreement entered into after World War II by refusing to return to plaintiffs pieces from their ancestor's art collection that had been seized by defendant during the Holocaust. This court granted in part and denied in part defendant's motion to dismiss for lack of subject-matter jurisdiction, holding that it had jurisdiction to adjudicate plaintiffs' claim based upon the expropriation exception to immunity contained within the FSIA, but lacked jurisdiction based upon the FSIA's commercial-activity exception. The court cited Restatement Third of Foreign Relations § 712(1) in concluding that plaintiffs' claim for breach of the bailment agreement, while not an expropriation claim on its face, did fit within the expropriation exception of the FSIA. de Csepel v. Republic of Hungary, 169 F.Supp.3d 143, 156.

D.D.C.2011. Cit. in disc. American and Italian descendants of Jewish-Hungarian art collector sued the nation of Hungary, Hungarian museums and others, alleging that defendants breached bailment agreements entered into after World War II when they refused to return collector's confiscated artwork. Denying in part defendants' motion to dismiss for lack of jurisdiction under the Foreign Sovereign Immunities Act (FSIA), this court held that the expropriation exception to the FSIA applied. The court reasoned that plaintiffs clearly alleged substantial and non-frivolous claims that the artwork was taken without just compensation and for discriminatory purposes as part of a larger campaign of asset seizure and genocide. Moreover, because the Hungarian government had de facto stripped Jews of their citizenship rights at the time of the confiscations, defendants' argument that no international laws were violated when a government confiscated the property of its own citizens, was inapplicable. de Csepel v. Republic of Hungary, 808 F.Supp.2d 113, 128.

D.D.C.2010. Quot. in case cit. in sup. American investor sued Islamic Republic of Iran, alleging that defendant expropriated its interest in an Iranian dairy and illegally withheld dividends. This court entered judgment for plaintiff, and assessed prejudgment interest, compounded annually, on the amount due. The court held, inter alia, that customary international law and a 1955 treaty between the United States and Iran, which incorporated such law, provided for prejudgment interest; furthermore, Iranian law had adopted the principles of customary international law concerning the payment of interest as a component of full compensation for the expropriation of a foreign investment in Iran. McKesson Corp. v. Islamic Republic of Iran, 752 F.Supp.2d 12, 21.

D.D.C.2000. Cit. and quot. in sup., cit. in case cit. in sup., Rptr's Note 3 quot. in ftn., Rptr's Note 5 cit. in sup., com. (d) cit. in sup. Shareholder in an Iranian dairy company sued Iran, alleging that Iran had wrongfully withheld from shareholder the payment of dividends declared by the company in 1981 and 1982. District court granted shareholder's motion for summary judgment on the issue of liability. This court awarded the shareholder damages in the amount of over $20 million. The court held, inter alia, that under both customary international law and the Treaty of Amity, shareholder was entitled to damages equivalent to the full value of the property expropriated, including prejudgment interest on both the expropriated equity and two dividends. McKesson Corp. v. Islamic Republic of Iran, 116 F.Supp.2d 13, 32, 35, 36, 38, 40, 42, affirmed in part, reversed in part 539 F.3d 485 (C.A.D.C. 2008).

D.D.C.1998. Cit. in disc. United States citizens of Greek descent sued the Republic of Turkey for damages, alleging that defendant had wrongfully taken real property to which plaintiffs held title on the island of Cyprus. On remand, this court dismissed on the ground that it did not have subject-matter jurisdiction under the Foreign Sovereign Immunities Act. The court stated that, although plaintiffs sufficiently alleged that the property was taken in violation of international law, they failed to set forth any facts that demonstrated that defendant's operation or control of the property was related to any commercial activity undertaken by defendant in the United States. Crist v. Republic of Turkey, 995 F.Supp. 5, 11.

S.D.N.Y.

S.D.N.Y.2012. Com. (h) quot. in case quot. in sup. Assignees of debt owed to creditors sued the Democratic Republic of Congo (DRC) and its central bank, seeking payment of the outstanding principal and interest due under a credit agreement between the parties' predecessors. Denying plaintiffs' motion for summary judgment, this court held, inter alia, that limited discovery was

necessary on the issue of whether two DRC officials had apparent authority to bind the DRC and its central bank by signing a letter renewing and guaranteeing the DRC's time-barred obligation to make payments under the original credit agreement. Because courts, in assessing whether an act of a government official bound a sovereign on the basis of apparent authority, had to consider whether the affected parties reasonably considered the action to be official, it was important to understand whether the generally recognized duties of the DRC officials at issue included entering into and/or renewing financial obligations on behalf of their principals, and how their responsibilities were communicated to persons outside of the DRC. Themis Capital, LLC v. Democratic Republic of Congo, 881 F.Supp.2d 508, 526.

E.D.Pa.

E.D.Pa.2014. Cit. in disc. and in ftn.; subsec. (1) and com. (a) quot. in disc. Parents of a deceased marine brought, inter alia, an action alleging a taking in violation of international law against the nation of Greece, among others, alleging that staff at a Greek public hospital mishandled the decedent's body by performing an autopsy over the objection of the United States, and by removing, and then failing to replace, the decedent's heart. Granting defendant's motion to dismiss, this court held that the activity plaintiffs alleged was not commercial within the meaning of the commercial-activity exception to the Foreign Sovereign Immunities Act (FSIA), and thus the court lacked subject-matter jurisdiction on the ground of Greece's sovereign immunity. In the course of its discussion, the court cited extensively to Restatement Third of Foreign Relations § 712 on the issue of whether the commercial-activity exception was limited to economic injuries, but ultimately declined to decide that issue here. LaLoup v. U.S., 29 F.Supp.3d 530, 547-49.

ANNEX 208

Part IV Guide to Key Substantive Issues, 22 Indirect Expropriation and the Right to Regulate: Has the Line Been Drawn?

Katia Yannaca-Small

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(p. 562) 22 Indirect Expropriation and the Right to Regulate

Has the Line Been Drawn?

I. Introduction

22.01 It is a well-recognized rule in international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation.[1] Four decades ago, disputes before courts and the discussions in academic literature focused mainly on the standard of compensation and measuring expropriated value. Divergent views of (p. 563) developed and developing countries[2] raised issues regarding the formation and evolution of customary law.

22.02 Today disputes on direct expropriation—which were essentially related to the nationalizations that marked the 1970s and 1980s—have been replaced by disputes related to foreign investment regulation and 'indirect expropriation'. Largely prompted by the numerous cases brought under the North American Free Trade Agreement (NAFTA), the Energy Charter Treaty (ECT), and the approximately 3,300 bilateral investment treaties and free trade agreements with investment chapters, the debate has shifted to indirect expropriation in the context of regulatory measures aimed at protecting the environment, health, and other welfare interests of society. The question that arises is to what extent a government may affect the value of property by regulation, either general in nature or by specific actions in the context of general regulations, for a legitimate public purpose without effecting a 'taking' and having to compensate a foreign owner or investor for this

act. Defining indirect expropriation in this context has become one of the dominant issues in international investment law.[3]

22.03 An increasing number of arbitral cases and a growing body of literature have shed light on the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation. While case-by-case consideration remains necessary,[4] certain criteria for determining whether an indirect expropriation requiring compensation has occurred have emerged through international agreements and arbitral decisions.

22.04 Although the present chapter will focus on the way arbitral tribunals have dealt with indirect expropriation claims based on investment agreements, it would also be useful to look at the cross-fertilization with two other sources of jurisprudence which deal with similar issues, under different circumstances and different legal bases, that is, the US–Iran Claims Tribunal and the European Court of Human Rights (ECtHR).

22.05 This chapter presents the issues at stake and (i) describes the basic concepts of the obligation to compensate for indirect expropriation; (ii) reviews whether and how legal instruments and (p. 564) other texts articulate the difference between indirect expropriation and the right of the governments to regulate without compensation; and (iii) identifies a number of criteria which emerge from jurisprudence and state practice for determining whether an indirect expropriation has occurred, and compensation is due.

II. Basic Concepts of the Obligation to Compensate for Expropriation

22.06 Customary international law does not preclude host states from expropriating foreign investments provided certain conditions are met. The conditions for a 'lawful' expropriation are that the taking of the investment is for a public purpose, as provided by law, in a non-discriminatory manner and with compensation.

22.07 Expropriation or 'wealth deprivation'[5] can take different forms. It could be direct where an investment is nationalized or otherwise expropriated[6] through formal transfer of title or outright physical seizure. In addition to 'expropriation', terms such as 'dispossession', 'taking', 'deprivation', or 'privation' are also used.[7] Expropriation or deprivation of property could also occur through interference by a state in the use of that property or with the enjoyment of the benefits even where the property is not seized and the legal title to the property is not affected. Such measures taken by the state have a similar effect to expropriation or nationalization and are generally termed 'indirect', 'creeping',[8] or '*de facto*' expropriation or measures 'tantamount' to expropriation.

22.08 However, under international law, not all state measures interfering with property constitute expropriation. As Ian Brownlie has stated, 'state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. The assets may be subject to seizure in execution of judgments or liens. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation'.[9]

22.09 It is an accepted principle of customary international law that, where economic injury results from a bona fide non-discriminatory regulation within the police powers of the state, (p. 565) compensation is not required. A state measure will be discriminatory if it results 'in an actual injury to the alien … with the intention to harm the aggrieved alien to favour national companies'.[10]

22.10 The Restatement (Third) of Foreign Relations Law recognizes the nondiscrimination rule: 'One test suggested for determining whether regulation and taxation programs are intended to achieve expropriation is whether they are applied only to alien enterprises'.[11]

22.11 Specifying what distinguishes indirect expropriation from non-compensable regulation, is a question of great significance to both investors and governments:

> To the investor, the line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations (that require compensation) may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation (either from the host State or from an insurance contract). For the host State, the definition determines the scope of the State's power to enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due. It may be argued that the State is prevented from taking any such measures where these cannot be covered by public financial resources.[12]

22.12 As R. Higgins wrote in her study on the taking of property by the state, the issue can be further refined as the determination of who is to pay the economic cost of attending to the public interest involved in the measure in question. Is it to be the society as a whole, represented by the state, or the owner of the affected property?[13]

III. The Notion of 'Property'

22.13 In the context of international law, 'property' refers to both tangible and intangible property. Under Article 1139 of the NAFTA, the definition of 'investment' covers, among other things, 'real estate or other property, *tangible or intangible* [emphasis supplied], acquired in the expectation or used for the purpose of economic benefit or other business purposes'. Similarly, most BITs contain a relatively standard definition of investment[14] that also covers intangible forms of property: 'intellectual property and contractual rights'. The US Free Trade Agreements (FTAs) with Australia, Chile, Colombia, the Dominican Republic, Central America, Korea, Morocco, Oman, Peru, and Singapore provide: 'An action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment'.[15]

22.14 One of the first instances in which the violation of an intangible property right was held to be an expropriation was the *Norwegian Shipowners' Claims* case. Although the United States contended that it had requisitioned only ships and not the underlying contracts, the tribunal (p. 566) found that a taking of property rights ancillary to those formally taken had occurred and required compensation.[16]

22.15 In the 1926 case of German Interests in Polish Upper Silesia—the Chorzów Factory case—the Permanent Court of International Justice found that the Polish government's seizure of a factory plant and machinery was also an expropriation of the closely interrelated patents and contracts of the management company, although the Polish government at no time claimed to expropriate these.[17]

22.16 However, certain intangible property rights or interests, by themselves, may not be capable of being expropriated but may be viewed instead as elements of value of business. In the 1934 *Oscar Chinn* case, the Permanent Court did not accept the contention that good will is a property right capable, by itself, of being expropriated. The Permanent Court of International Justice (PCIJ) found that a granting of a de facto monopoly did not constitute a violation of international law, stating that 'it was unable to see in [Claimant's] original position—which was characterised by the possession of customers—anything in the nature

(p. 593) **22.122** Until a few years ago, only a handful of international agreements had articulated this difference. A new generation of investment agreements, including investment chapters of free trade agreements, have introduced specific language and established criteria to assist in determining whether an indirect expropriation requiring compensation has occurred. These criteria are consistent with those emerging from arbitral decisions.

Footnotes:

[*] The author is grateful to Evelyn Wiese, Legal Adviser with CARECEN SFN, former Associate with the International Arbitration Group of Shearman & Sterling LLP until March 2017, for her research and comments on this chapter.

[1] *See generally*, J. Paulsson and Z. Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES 145–58 (N. Horn ed., 2004); M. Reisman & R. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, *in* THE BRITISH YEAR BOOK OF INTERNATIONAL LAW (2003); A. Reinisch, *Expropriation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 407–58 (P. Muchlinski, F. Ortino & C. Schreuer eds., 2008); T. Wälde & A. Kolo, *Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law*, 50 INT'L & COMP. L.Q. 811 (2001); C. Schreuer, *The Concept of Expropriation under the ECT and other Investment Protection Treaties*, *in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 108–58 (C. Ribeiro ed., 2006); K. Yannaca-Small, *Comment on C. Schreuer's Rapport: Indirect Expropriation and the Right of the Governments to Regulate: Criteria to Articulate the Difference*, *in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 159–68 (C. Ribeiro ed., 2006); A. NEWCOMBE & L. PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009); C. MCLACHLAN, L. SHORE & M. WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION, SUBSTANTIVE PRINCIPLES (2017).

[2] A number of developed countries endorsed the 'Hull formula', first articulated by the United States Secretary of State Cordell Hull in response to Mexico's nationalization of American petroleum companies in 1936. Hull claimed that international law requires 'prompt, adequate and effective' compensation for the expropriation of foreign investments. Developing countries supported the Calvo doctrine during the 1960s and 1970s as reflected in major United Nations General Assembly resolutions. In 1962, the General Assembly adopted its Resolution on Permanent Sovereignty over Natural Resources, which affirmed the right to nationalize foreign-owned property and required only 'appropriate compensation'. This compensation standard was considered an attempt to bridge differences between developed and developing states. In 1974, the UN General Assembly decisively rejected the Hull formula in favour of the Calvo doctrine in adopting the Charter of Economic Rights and Duties of States. While Article 2(c) repeats the 'appropriate compensation' standard, it goes on to provide that in 'any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising state and by its tribunals …'. Nowadays, the Hull formula and its variations are often used and accepted and considered as part of customary international law.

[3] R. Dolzer, *Indirect Expropriations: New Developments*, 11 ENVTL L.J. 64 (2002) (Article of the Colloquium on Regulatory Expropriation organized by New York University, Apr. 25–27, 2011).

[4] *See* J. Paulsson, 'Indirect Expropriation: Is the Right to Regulate at Risk?' Presentation at the Symposium 'Making the Most of International Investment Agreements: A Common Agenda', co-organized by ICSID, OECD, and UNCTAD (Dec. 12, 2005), OECD Paris: ('[i]nternational investment agreements that promise compensation for measures tantamount to expropriation will be hopelessly unreliable unless it is accepted that the competent international tribunals have the authority to exercise their judgment in each

case. There is no magical formula, susceptible to mechanical application that will guarantee that the same case will be decided the same way irrespective of how it is presented and irrespective of who decides it. Nor is it possible to guarantee that a particular analysis will endure over time; the law evolves, and so do patterns of economic activity and public regulation').

5 'Wealth deprivation' is a term that, according to Burns Weston, avoids most, if not all, of the major ambiguities and imprecision of the traditional terminology. *See* B. Weston, *'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'*, 16 VA. J. INT'L L. 103, 112 (1975).

6 In general, expropriation applies to individual measures taken for a public purpose while nationalization involves large-scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain.

7 R. Dolzer & M. Stevens, BILATERAL INVESTMENT TREATIES 98 (1995) [hereinafter DOLZER & STEVENS].

8 On this point, Dolzer notes that, ' "creeping expropriation" suggests a deliberate strategy on the part of the state, which may imply a negative moral judgment'. *See* Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID REV.-FILJ 41, 44 (1986). Reisman and Sloane, *supra* note 1, note that: 'A creeping expropriation … denotes … an expropriation accomplished by a cumulative series of regulatory acts or omissions over a prolonged period of time, no one of which can necessarily be identified as the decisive event that deprived the foreign national of the value of its investment. Moreover, they may be interspersed with entirely lawful state regulatory actions. By definition, then, creeping expropriations lack the vividness and transparency not only of formal expropriations, but also of many regulatory or otherwise indirect expropriations, which may be identified more closely with a few discrete events. The gradual and sometimes furtive nature of the acts and omissions that culminate in a creeping expropriation tends to obscure what tribunals ordinarily denominate the "moment of expropriation" '.

9 I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 509 (6th ed. 2003).

10 DOLZER & STEVENS, *supra* note 7.

11 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Vol. 1, § 712 (1987).

12 DOLZER & STEVENS, *supra* note 7, at 99.

13 R. Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 276 (1982).

14 See K. Yannaca-Small & D. Katsikis, *The Meaning of 'Investment' in Investment Treaty Arbitration*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES ch. 11 (K. Yannaca-Small ed., 2018).

15 *See, e.g.*, U.S.–Australia Free Trade Agreement, signed on March 1, 2004 [Annex 11-B(2)2]; U.S.–Chile Free Trade Agreement, signed on June 6, 2003 [Annex 10-D(2)]; U.S.–Dominican Republic–Central America Free Trade Agreement, signed on August 5, 2004 [Annex 10-C(2)].

16 Norwegian Shipowners' Claims (Nor. v. U.S.), Permanent Court of Arbitration (PCA) (Oct. 13 1922), Reports of International Arbitral Awards, Vol. I, 307–46, United Nations (2006), http://legal.un.org/riaa/cases/vol_I/307-346.pdf (last visited Nov. 15, 2017).

ANNEX 209

WHAT CONSTITUTES A TAKING OF PROPERTY UNDER INTERNATIONAL LAW?*

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I

IN this article it is proposed to examine the question what constitutes a taking of the kind that brings into operation the widely recognized rule of international law that the property of aliens cannot normally be taken, whether for public purposes or not, without adequate compensation.[1] This question is especially important when trying to decide what measures are open to an alien and his Government for protecting his interest in property which has been allegedly seized in contravention of international law. Thus, for example, it was for a time a highly relevant question after the first Cuban measures against foreign (mostly American) sugar and oil properties in the spring and summer of 1960. Many of these properties were seized under decrees authorizing what was called 'intervention' of the property in question.[2] These decrees did not purport to affect title to the properties; but they did direct agents of the Cuban Government to take over the assets of the companies and to take complete charge of the operations of the companies in the national interest. The Cuban Government's action recalled President Truman's unsuccessful attempt to seize the American steel mills in April 1952 to avoid the crippling effects of a threatened nation-wide steel strike; this attempt to take over the operation of the mills was held to be illegal, but no one seriously argued that the United States Government was 'expropriating' the steel mills.[3] In the event, counsels' struggles over whether the Cuban measures constituted an expropriation justifying an immediate claim for full compensation were

[1] There is no intention or desire to become involved in the controversy whether those expropriations which might be called 'nationalization' should be accorded different treatment with respect to the requirement of compensation of aliens. Wortley, in *Expropriation in Public International Law* (1959), states that the prevailing view is that full compensation must be paid, regardless of whether the taking is a nationalization or not, and cites authorities for the majority and minority views (ibid., at pp. 34–35). See also Foighel, *Nationalization* (1957), at pp. 75–85; White, *Nationalization of Foreign Property* (1961), at pp. 183 et seq. For the purposes of this paper it will be unnecessary to enter this controversy.

[2] See, for example, Resolution No. 195, 20 July 1960, National Agrarian Reform Institute, concerning sugar properties. As to the earlier 'intervention' of oil properties, see *Department of State Bulletin*, 43 (1960), p. 141.

[3] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). There was, of course, a taking of the *use* of the steel mills. Cf. *Division 1287, Motor Coach Employees* v. *Missouri*, 374 U.S. 74 (1963); *Tate* v. *Philadelphia Transp. Co.*, 190 A. 2d, 316 (Pa. 1963).

shortly brought to an end by the Cuban Government's decision officially and expressly to expropriate the properties involved.[1]

The Cuban controversy is by no means the only occasion in recent times in which the question whether a State's interference with alien property amounted to expropriation assumed major significance. The property of Dutch nationals in Indonesia was first seized in December 1957 under the authority of various provisions of Dutch law, retained by Indonesia, which authorized seizure of property in times of national emergency.[2] The Indonesian Government contended that the property had not been nationalized and pointed out that the decree authorizing the seizure mentioned only a 'temporary taking'.[3] This ceased to be a practical issue when the Dutch property was formally nationalized in December 1958.[4]

The question has also arisen in cases concerning the effect of legislation and administrative decrees of eastern European countries, where the measures have severely restricted the uses to which real property might be put but did not purport to affect title to the land;[5] for instance, such measures might fix maximum rents, would frequently regulate the uses to which property might be put, the type of tenants to which it might be let and the amount of space, if any, the landlord might reserve for his own purposes. Do such restrictions taken together amount to expropriation?

The answer to this question may be important in determining the nature and timing of diplomatic protest, the local remedies to be sought and the adequacy of these remedies, and in relation to the question of damages. If the offending Government's actions amount only to a sequestration, then the complaining alien must ask for his property back and may claim damages only for unlawful detention. There may be occasions where the alien because of changed conditions does not want his property back but would rather treat it as expropriated and so possibly, in certain circumstances, become entitled to full compensation in lieu of restitution.[6] There may be a further question: assuming that the offending Government has merely sequestered, or otherwise only interfered with the use of, the property in question, after what passage of time does this sequestration or other in-

[1] Executive Power Resolution No. 1, 6 August 1960, issued by Fidel Castro under Cuban Law No. 851, 6 July 1960, cited and quoted in *Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d, 845, 849 (2d Cir. 1962); cert. granted, 372 U.S. 905 (1963).

[2] *Netherlands International Law Review*, 5 (1958), at pp. 227–47.

[3] Ibid., for a refutation of this thesis.

[4] See Indonesian Acts and decrees cited in McNair, 'The Seizure of Property and Enterprises in Indonesia', *Netherlands International Law Review*, 6 (1959), p. 218.

[5] See below, pp. 313–16.

[6] Wortley argues that when an alien's property has been expropriated in contravention of the principles of international law the alien's primary right is restitution (op. cit., above, in n. 1, p. 307, at p. 94; see also ibid., at pp. 100–1). The claim for damages arises only when restitution is inadequate or impossible. The learned author criticizes the view that the offending State can discharge its obligations under international law merely by offering and paying damages (ibid.). This is another controversy into which for the purpose of this paper it is unnecessary to enter.

terference come to be considered an expropriation? On the determination of this issue will depend not only the question when and how to protest but also, in appropriate cases, questions as to the date from which damages are to be assessed and from which interest is to run. Further, the determination of the exact date at which a seizure ripens into an expropriation may be important for deciding whether a particular delict is covered by an arbitration treaty with a fixed date limit on claims that can be pursued under it.[1] Finally, with the increasing tendency of certain States to conclude bilateral treaties guaranteeing the property of their nationals against expropriation except for a public purpose and then only upon payment of prompt compensation, the question as to what amounts to expropriation will for the future assume importance in the interpretation of these treaties.[2]

Thus, the problem is not without practical significance.

II

Such cases as there are recognize the principle laid down by the commentators,[3] that interference with an alien's property may amount to expropriation even when no explicit attempt is made to affect the legal title to the property, and even though the respondent State may specifically disclaim any such intention. But, while the principle may be clear, its application to particular situations of fact is not. There will, of course, be some easy cases, but there will be many difficult cases as well.

The precedents are relatively sparse, mainly for a reason already indicated, namely that the question of what constitutes a taking amounting to expropriation may be of great importance in the short run, yet it may often become less and less important as events take their course. But decisions of international tribunals and the related practice of States are, as we shall shortly see, of some help. Fortunately, there is also another very suggestive source of case law on the question. A great many 'typical'

[1] This possibility is suggested by the *Mariposa Development Co.* case (*United States* v. *Panama*), where the question arose whether claimant's land had been confiscated during the period covered by the arbitration treaty under which the Commission in question was operating. Claimant claimed its property was confiscated as soon as the law which authorized the confiscation was enacted. The Commission concluded otherwise. Whiteman, *Damages* (1937), vol. 2, p. 1361. See also *Sabine G. Helbig*, Decision No. Hung.-941 (1958), *Tenth Semiannual Report to the Congress for the Period Ending June 30, 1959*, Foreign Claims Settlement Commission of the U.S., at p. 51.

[2] See, for example, Treaties of Friendship, &c., of the United States with Ethiopia (1951), *United Nations Treaty Series*, vol. 206, pp. 41, 68; with Iran (1955), ibid., vol. 284, pp. 93, 114; and with Germany (1957), ibid., vol. 273, pp. 3, 8. See also Article 3 of Draft Multinational Convention on Protection of Foreign Property, prepared by the Organization for Economic Co-operation and Development, *International Legal Materials*, 2 (1963), pp. 241, 248.

[3] See, for example, Wortley, op. cit., above, n. 1, p. 307, at p. 50 and sources cited therein; Herz, 'Expropriation of Foreign Property', *American Journal of International Law*, 35 (1941), pp. 243, 248. See also Commissioner Nielsen in a memorandum presented to the Turkish members of the Turkish-American Claims Commission in 1934. American-Turkish Commission, *American-Turkish Settlement, Opinions and Report* (1937), p. 78.

situations of fact have been considered in the United States by the International Claims Commission and its successor, the Foreign Claims Settlement Commission. These were domestic American tribunals established to rule on the validity of claims of American nationals based on war damage and on the nationalization[1] of property in Russia, Yugoslavia, Czechoslovakia, Roumania, Hungary, Poland, and Bulgaria. The payment of these claims has often been provided for by an agreement between the United States and these countries. Often the funds to be distributed were funds belonging to the Governments of these eastern European countries which had been frozen by the United States Government and which funds, under the terms of these agreements, were transferred into accounts for the payment of American claims against the Governments. In setting up these Commissions, Congress evidenced an intention that claims were to be decided first in accordance with the terms of the particular agreements involved and, if the agreements in question were silent on the point, then the Commission was to look to 'international law' and finally to the principles of 'justice and equity'.[2] Subsequent legislation extending the jurisdiction of the Commission has retained reference to international law as a source of decision.[3]

It will be convenient now to consider first the decisions of international tribunals and the practice of States, and then to turn to the jurisprudence of the Foreign Claims Settlement Commission.

There are several well-known international cases in which it has been recognized that property rights may be so interfered with that it may be said that to all intents and purposes those property rights have been expropriated even though the State in question has not purported to expropriate. In the litigation concerning the dispute between Germany and Poland over *German Interests in Polish Upper Silesia*, a considerable part of the dispute centred on the seizure by Poland of a nitrate factory in Chorzów. This factory had at one time belonged to the German Government, which had arranged for a German company to operate the factory on its behalf. In 1919 the German Government transferred the factory to a German corporation set up for the specific purpose of acquiring title to this property and, at the same time, the company which had been operating the factory entered into a management contract with the company holding title to the property, whereby the operating company undertook to con-

[1] The International Claims Act of 1949, as well as the subsequent amendments to that Act in 1954 and 1958, provide for compensation 'for the nationalization or other taking' of the property of American nationals (64 Stat. 12, as amended, 22 U.S.C., §§ 1621, et seq.).

[2] This was the wording of the 1949 Act. In subsequent acts extending the jurisdiction of the Commission to cover claims against more countries, the Commission was directed to decide in accordance with 'applicable substantive law, including international law'. See preceding note for citations. See also H. Rep. No. 770, 81st Congress, 1st session, 6 (1949); S. Rep. No. 800, 81st Congress, 1st session, 9 (1949).

[3] See above, n. 1, at p. 310.

tinue to manage the factory and to utilize, in the course of its management, certain patents, experiments and commercial contracts which it possessed. The Permanent Court of International Justice ruled that, by seizing the factory and its machinery, the Polish Government also expropriated the patents and contract rights of the management company, even though the Polish Government did not purport to expropriate these particular items of property.[1] Compensation for these items was therefore adjudged in favour of the management company.

A similar case is the *Norwegian Claims* case.[2] That case involved a question of compensation for Norwegians who had shipbuilding contracts with American concerns at the time the United States declared war on the Central Powers. In the summer of 1917, the United States had issued orders to practically all American shipbuilders to the effect that all ships then under construction and all materials, machinery and equipment pertaining to these ships, were requisitioned by the United States and were to be completed on its behalf. The United States claimed that all it had requisitioned was the partially constructed ships, and that, accordingly, it was only required to pay compensation for the value of whatever partial payments and purchases of materials had been made by Norwegian shipowners. The international tribunal, which was set up to arbitrate the claim under the special agreement between the two countries of 30 June 1921, declared that the United States had in fact requisitioned the shipbuilding contracts themselves and not merely partially completed ships. Accordingly, the Norwegian shipowners were entitled to the fair market value of their shipbuilding contracts, which, at the time of requisition, were of considerable value owing to the extreme shortage of shipping and the very high prices which any kind of shipping obtained. The United States paid the arbitration award, although it refused to regard the award as an authoritative precedent.[3]

The *Norwegian Claims* and the *German Interests in Polish Upper Silesia* cases show that a State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention. More important, the two cases taken together illustrate that even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them. Nor is it only ancillary rights which may be 'expropriated' in substance in this way, while the intention to expropriate is disclaimed. And

[1] *German Interests in Polish Upper Silesia*, Judgment No. 7, *P.C.I.J.*, Series A, No. 7; Hudson, *World Court Reports*, 1 (25 May 1926), pp. 510, 541 (merits).

[2] *Norway* v. *United States*, Scott, *The Hague Court Reports* (2nd series), p. 39, *United Nations Arbitration Reports*, 1 (1922), p. 307.

[3] Scott, op. cit., above, n. 2, this page, at p. 40; *United Nations Arbitration Reports*, 1 (1922), pp. 344–6.

it would also appear that there may be some types of what might be called 'property rights' with which a State may interfere with impunity. As a first step, therefore, towards determining what sort of interference will render property rights so useless that they will be deemed to have been expropriated, and what types of property rights may be expropriated in this way, it will be instructive to examine cases in which claimant's ownership and right to possession of land has been interfered with to such an extent that the land may be said to have been confiscated. In some of these cases there was an express disclaimer of intention to expropriate; in others there was not.

Cases involving real property

It will be useful to begin with the protracted negotiations between the Government of the United States and the Government of Greece over the affairs of the *Reverend Jonas P. King*,[1] who at times also functioned as United States Consul, and had bought two tracts of land on the outskirts of Athens. Afterwards, the Greek Government decided that Athens would soon be expanding in population and importance as a seat of government and accordingly embarked on several improvements. As a result, portions of Dr. King's land were requisitioned in order to build a national church. Finally, when Dr. King attempted to build on the remaining portion of the land he was prevented from doing so by the Greek Government. Nevertheless, during the years in which the controversy dragged on none of these projected public works was actually started and, apparently, Dr. King remained in full possession of all the property.

Mr. Marsh, the American Minister at Constantinople, received instructions from the State Department in which it was stated that '. . . It is evident that Dr. King has been and is deprived of the free use of his land, for public purposes, by the authority of the government; and that no compensation has been made to him for the losses which he has thereby sustained. . . .'[2] After years of negotiation the Greek Government finally agreed to pay an indemnity to Dr. King, in return for which Dr. King agreed formally to convey title to the land to the Greek Government. While the Greek Government never expressly denied that Dr. King's property had been taken for public use, the controversy is interesting because it does indicate that land may be considered to have been confiscated even though the public authorities have not entered upon it and begun to construct the proposed public works, and even though the claimant is still in full possession of the land. In a case of this kind an express intention to expropriate will, understandably enough, help to resolve any remaining doubt against the offending State.

[1] Whiteman, *Damages* (1937), vol. 2, pp. 1387–91.

[2] Ibid., at p. 1388.

A similar case is the *De Sabla*,[1] a claim by an American citizen against the Panamanian Government which was decided by a Commission established under the terms of the conventions between the United States and Panama of 28 July 1926 and 17 December 1932. The Panamanian Government had made conveyances of portions of the claimant's land to Panamanian citizens on the ground that all the land in question was public land. It had also granted licences for the cultivation of a large part of the claimant's remaining land.

Panama argued that since the claimant had failed to intervene in the proceedings in which all the land was found to be public land and portions of it conveyed to Panamanian citizens, the claimant could not now assert her title. The Commission held, however, that the notice and protest provisions had been inadequate and that, in addition, the Panamanian authorities had knowledge of the claimant's title. Thus, the alleged ignorance of the fact that title was held by an alien could not relieve the Panamanian Government of liability for its actions. It is important to observe that, although the claimant still had a registered title to the property, the Commission held that, since for the land conveyed by the Panamanian Government to Panamanian citizens there now existed conflicting registered titles, the Commission must consider that portion of claimant's property which had been so treated as 'permanently lost to the claimant'. Accordingly, the Commission awarded an indemnity for the full value of this land. The Commission, however, also awarded an indemnity of one-half its value with respect to the land over which Panama had granted cultivation licences. These damages included not only payments for the use and deprivation of the land but also compensation for the fact that it had not proved very easy to dispossess the licensees.[2] This suggests that, had it proved impossible to dispossess the so-called licensees, Panama would have been held to have wrongly taken the land, however much it might have protested that it no longer regarded the licences as valid. Presumably a failure to evict squatters, however they got there, should lead to the same result, although this would admittedly be a harder case.

It has already been mentioned that a great many cases involving real property were considered by the United States Foreign Claims Settlement Commission. In the case of *Jeno Hartmann*[3] the Commission found that the

[1] The case was decided on 29 June 1933. It is reported *in toto* in *American Journal of International Law*, 28 (1934), p. 602.

[2] Herz, in his article, 'Expropriation of Foreign Property', loc. cit., above, n. 3, p. 309, at p. 248, n. 18, states that the Claims Commission, in the *De Sabla* case, found that 'The whole procedure . . . amounted to expropriation, although it was neither styled, nor intended to be, expropriation'. While expropriation was not intended in *De Sabla*, the Panamanian Government did, of course, intend to grant complete title to the land to Panamanian citizens.

[3] Decision No. Hung.–717 (1958), *Tenth Semiannual Report to the Congress for the Period Ending June 30, 1959*, at p. 45 (hereafter cited as *Tenth Semiannual Report*).

claimant was the owner of a plot of land which had been improved by a building containing living quarters and a bakery, the latter with installed equipment and furnishings all of which belonged to the claimant landowner, although the business was conducted by other persons to whom the profits belonged. The Hungarian Government stated that title to the real property had not been taken into State ownership. In this respect the case differs from the *De Sabla* case where there were conflicting registered titles to the land. The Foreign Claims Settlement Commission nevertheless ruled that the claimant's property had been nationalized or otherwise taken. It relied on the fact that claimant was not receiving any compensation for the use being made of his property, and it stressed that claimant could not use or enjoy the property as he saw fit, nor could he alienate it. In this situation, the fact that claimant still enjoyed the formal *indicia* of ownership could not prevent the conclusion that the claimant's property had been taken from him.

Similarly, in the case of *Albert Bela Reet*,[1] the claimant complained of the nationalization or other taking of his property in Hungary. The record showed that in 1950 the Government of Hungary had prohibited the sale, the placing of liens upon, or the occupancy of, a dwelling house and courtyard in which claimant had an interest. The Commission ruled that it was clear that the claimant was precluded from the free and unrestricted use of his property, and the fact that the recorded title to his property had not been transferred to the State was of little moment. It concluded that the claimant's property had been taken from him without compensation.

In addition to these specific decisions the Commission has also rendered certain Panel Opinions for the guidance of its staff in the processing of Czechoslovakian claims.[2] These Opinions have often given more general application to the principles underlying the earlier decisions; sometimes, however, they have enunciated principles going beyond those implicit in the previously decided cases.

The Commission declared in one Opinion that where claims are based on the taking of farm land, if the claimant cannot establish transfer of title but there are indications that the land was turned over to a 'farm cooperative' (collective farm), the land in question should be considered to have been 'taken'.[3] Here the Commission was following its previous decisions. Indeed, in one of the Hungarian claims it had considered an

[1] Decision No. Hung.–1625 (1958), ibid., at p. 61.

[2] These 'panel' opinions are taken from the *Eleventh Semiannual Report to the Congress for the Period Ending December 31, 1959*, Foreign Claims Settlement Commission of the U.S. (hereafter cited as the *Eleventh Semiannual Report*). They are reprinted in the *Fourteenth Semiannual Report to the Congress for the Period Ending June 30, 1961*, Foreign Claims Settlement Commission of the U.S. (hereafter cited as the *Fourteenth Semiannual Report*).

[3] Panel Opinion No. 4, *Eleventh Semiannual Report*, at pp. 21–23; *Fourteenth Semiannual Report*, at pp. 130–4.

almost exactly similar situation. The claimant's land had been absorbed into a Hungarian 'farmers' co-operative' and there had been no formal transfer of title.[1] In the Panel Opinion the Commission went on to say that, if there is no record of the transfer of title to the co-operative, the date of the physical transfer of the property to the control of the farm co-operative should be used as the date of taking. But it will be necessary later on to say more on the question what should be considered the date of taking when the initial seizure is not expressly termed an expropriation or nationalization.[2]

The Commission would appear to have gone beyond the decided cases when it responded to the staff's request for an opinion whether the restrictions placed on certain privately owned dwellings by the Government of Czechoslovakia should be considered a 'constructive taking'.[3] The Czechoslovakian Government had required owners of leased buildings with an annual gross rental income over 15,000 koruna to deposit the rent in a special account, from which account real estate taxes of from 45 to 50 per cent. of the gross rent were to be deducted. At least 30 per cent. of the gross rent was then to be transferred to a building repair account. Other legislation had previously been enacted under which owners were to register all available dwelling space with a Government agency, and the owners were then compelled to rent to persons selected by such agencies. Relying heavily on its earlier decision in the *Albert Bela Reet* case, discussed above, the Commission concluded that private real property having an annual gross rental income above 15,000 koruna should be considered as having been 'taken' by the Government of Czechoslovakia as from the effective date of the law requiring the deposit of rentals with the Government. The Commission noted that the requirement of depositing rentals, when coupled with the requirements of prior laws giving the Government the right to select tenants for such dwellings, amounted to confiscation. The Commission declared:

> 'Thus in Czechoslovakia the owner of a building larger than a one-family dwelling having a gross rental income of 15,000 Koruna or more is precluded from the free and unrestricted use of such realty and its fruits, and even though he remains the record owner he is to all intents and purposes practically a managing and collecting agent for the government.'[4]

This is a most important Opinion which was followed by the Commission in subsequent cases involving this kind of situation.[5] It appears to extend

[1] *Marvin Klein*, Decision No. Hung.–1123 (1958), *Tenth Semiannual Report*, at p. 53; cf. *Estate of Siegfried Arntd*, Decision No. Rum.–810 (1959), ibid., at p. 131.

[2] See below, pp. 322–4.

[3] Panel Opinion No. 7, *Eleventh Semiannual Report*, at pp. 31–32; *Fourteenth Semiannual Report*, at pp. 136–7.

[4] *Eleventh Semiannual Report*, at p. 32; *Fourteenth Semiannual Report*, at pp. 136–7.

[5] See, for example, *Ida Pick*, Proposed Decision No. CZ–2,295 (1961), *Fourteenth Semiannual*

the doctrine of what has been called 'constructive taking' beyond the limits to which it had been carried by the previous decisions and opinions either of the Commission or of international tribunals. Moreover, of all the cases and opinions considered in this paper, it perhaps comes the closest to devising a general test for distinguishing allowable restrictions on the use of private property from restrictions which amount to expropriation. Whether the test proposed is a good one is another matter which will be explored at greater length below.[1]

In another Opinion, however, the Commission had been asked whether there had been a 'taking' of property where property was placed under 'national administration'.[2] The Commission expressed the view that Czechoslovakia's placing of certain property under national administration in 1945 did not constitute a 'taking', since a 'reading of the decree' disclosed that placement under national administration was originally considered by the Czechoslovakian Government as a temporary action to be terminated after the Government had ascertained whether such property should be returned to the original owner or confiscated, nationalized or disposed of in some other manner. The Panel Opinion concluded, on the other hand, that where a 'national administrator' was specifically appointed to liquidate the business, then the placing of such property under national administration would be considered to be a 'taking'. But even in circumstances where the placing of property under national administration did not by itself constitute a 'taking', such action could ripen into a taking where there was a continued failure to return the property in question.[3]

Cases involving property other than land

In the *German Interests in Polish Upper Silesia* and the *Norwegian Claims* cases discussed above,[4] contract rights were held to have been expropriated by the action of States which disclaimed any intention to expropriate such rights. In those cases, it will be recalled, the respondent States, by taking over respectively a factory and partially completed ships, were held to have expropriated contract rights so closely related to the physical assets seized as to be useless without the physical assets themselves.[5] But, as already

Report, at p. 150; *John H. Lusdyk*, Proposed Decision No. CZ–2,517 (1961), ibid., at p. 153. See also *Alexander Feigler*, Decision No. CZ–2,714 (1961), *Fifteenth Semiannual Report to the Congress for the Period Ending December 31, 1961*, Foreign Claims Settlement Commission of the U.S., at p. 16.

[1] See below, pp. 332–3.

[2] Panel Opinion No. 6, Part I, *Eleventh Semiannual Report*, at pp. 28–29; *Fourteenth Semiannual Report*, at pp. 134–5.

[3] As already noted, attention will be specifically directed to the question of when a temporary taking ripens into expropriation in a later section of this paper. See below, pp. 322–4.

[4] See above, pp. 310–11.

[5] In the *German Interests in Polish Upper Silesia* case, discussed above, pp. 310–11, the expropriation of the factory was deemed to be an expropriation of patents and contract rights being exploited through the use of the factory and its specialized machinery. In the *Norwegian*

noted, it is not only ancillary rights which may be so interfered with as to amount to an expropriation regardless of a disclaimer of an intention to expropriate such rights or even to subject them to any interference. There are cases, for example, where personal property, both tangible and intangible, has been seized by a State and the seizure itself has been admitted, but the State has insisted that it was not trying to acquire any kind of title to the property in question. In those cases, when, upon reasonable demand, the authorities have refused to return the property, the property has been considered expropriated and an indemnity demanded for its total value. In the case of *Jabez C. Casto*, for example, it appeared that the Colombian authorities, expecting a strike, had seized fire-arms belonging to one Casto. Despite the fact that the Colombian Government had promised to return all fire-arms seized during the emergency, the local authorities refused to do so. Upon protest by the United States State Department the Colombian Government paid an indemnity to the claimant.[1]

The *Casto* case and cases like it are, of course, the simpler ones. There are countless more subtle ways in which a country which refrains from outright seizure and which vigorously disavows any intention to expropriate may, none the less, very seriously and perhaps irremediably interfere with the use of property. For example when property that had been sequestered during the First World War by Germany was mismanaged by the sequestrator it was held that such mismanagement constituted 'liquidation of the business' for which claimant was entitled to the replacement value of the property sold in the course of the mismanagement. In two of the cases it appears that the sequestrator sold stocks of wine held by wine establishments at a time when it was impossible to renew the stock and at a time when in view of the continual rise in the value of wine such a sale was not a prudent business decision.[2]

The opinions of the United States Foreign Claims Settlement Commission present other types of situations in which property that has been

Claims case, discussed above, p. 311, the taking of partially completed ships was deemed to be a taking also of the underlying shipbuilding contracts which were worth far more than the value of the materials in the partially completed ships owing to the great shortage of shipping at the time of the seizure.

[1] Whiteman, *Damages* (1937), vol. 2, p. 860. Cf. *Société Anonyme des Manufactures des Glaces et Produits Chimiques de Saint-Gobain*, decided by the Franco-German Mixed Arbitral Tribunal (ibid., p. 897). Claimant was a French company which was a partner in the Glass Works Insurance Company, which company, in turn, owned the entire stock of a German glass company. In 1917 the property of the glass company was sequestered by the German authorities and its stock certificates were seized and sold. The tribunal granted the French company indemnity for the deprivation of the use of the income of the German glass company and, more important from the point of view of the present inquiry, it also granted the French company indemnity for the value of the plant. It should be noted, however, that under the treaty of Versailles, claimant had the option of either requesting restitution or of claiming indemnity for the value of the factory.

[2] See *Stanaslas—Alfred de Montebello* (*France* v. *Germany*) decided by the Franco-German Mixed Arbitral Tribunal (ibid., pp. 1526–8), and *Lallier van Cassel et Cie* (*France* v. *Germany*) decided by the Franco-German Mixed Arbitral Tribunal (ibid., at p. 1528).

interfered with has been held to have been 'taken' for purposes of 'international law', and also, on the other hand, situations in which the interference, although very substantial, has been held not to constitute a 'taking'. In Panel Opinion Number 6, issued in connexion with the processing of Czechoslovakian claims, the Commission had been asked whether the placing of property, both real and personal, under 'national administration' constituted a 'taking' of the property.[1] As already noted, the Commission, relying on the fact that the decree in question stated that the placing of property under national administration was only a temporary measure, found that this action did not constitute a 'taking' of property unless the administrator was specifically appointed to liquidate the property in question. The Commission, nevertheless, indicated that a continued failure to return or otherwise dispose of the property could cause the placing of it under national administration to ripen into an expropriation. In its earlier processing of Hungarian claims, the Commission had actually been confronted with a case presenting such a situation. In that case it appeared that the Hungarian Government had seized the claimant's personal property. Although some of the property was later ordered to be returned to the claimant, she never, in fact, received any of the property back. The Commission found that claimant's property had been 'taken'.[2] Such a holding accords with the disposition of the *Casto* claim discussed above.

In several interesting proposed decisions formulated in the processing of Czechoslovakian claims, however, the Commission held that certain fairly substantial interferences with personal property did not constitute a 'taking'. Thus, it has held that the refusal to grant an export licence for jewellery[3] or to permit the transfer of funds abroad[4] did not constitute a 'taking' of property under international law. In other proposed decisions the Commission has held that the suspension of payment of interest upon bonds[5] or the failure to continue to make pension payments[6] did not by themselves constitute the 'taking' of the bonds or of the pension rights.

But if, as already shown, contract and many other so-called intangible

[1] See above, n. 2, at p. 316.

[2] *Sabine G. Helbig*, Decision No. Hung.-941 (1958), *Tenth Semiannual Report*, at p. 51.

[3] *Erna Spielberg*, Decision No. CZ-2,466 (1961), *Fourteenth Semiannual Report*, at p. 146.

[4] *Mitzi Schoo*, Decision No. CZ-279 (1960), ibid., at p. 180. See also *Karolin Furst*, Decision No. CZ-14 (1960), ibid., at p. 116; cf. *Ludvik (Louis) Kanturek*, Decision No. CZ-2,250 (1961), ibid., at p. 147 (same as to devaluation). In Panel Opinion No. 1 (ibid., at p. 124), the Commission had refused to make any general findings of confiscation or to lay any general rules for the treatment of bank accounts such as those involved in these cases. See also *Helbert Wagg & Co., Ltd.*, [1956] 1 Ch. 323. Cf. *Kahler* v. *Midland Bank Ltd.*, [1950] A. C. 24 (foreign securities which could not be transferred abroad without permission of the Czechoslovakian National Bank); *Rex* v. *International Trustee*, [1937] A.C. 500 (effect given to U.S. annulment of gold clauses and devaluation of dollar).

[5] *Charles H. Sisam*, Decision No. CZ-13 (1960), *Fourteenth Semiannual Report*, at p. 115. *Ignatius H. Pietrzak*, Decision No. PO-1 (1961), ibid., at p. 196.

[6] *Ladislav Karel Feierabend*, Decision No. CZ-1,423 (1960), ibid., at p. 166.

rights can, under certain circumstances, be expropriated, even by indirect interference, it has been asked whether there may not be other intangible property rights—and the physical assets with which these rights are sometimes associated—that, perhaps, will not be held to have been expropriated despite very substantial State interference and regardless of whether such interference is called direct or indirect. Whether property rights in the nature of good-will, for example, can be the subject of a taking for which compensation must be paid is a question which has plagued the writers.[1] The few actual cases presenting the issue have normally involved situations where a State has granted, or assumed for itself, a monopoly over a particular industry.[2] Although the damages in these situations are, for the sake of convenience, often referred to as damages to the 'good-will' of a business, substantial loss of value even in physical assets may be involved. For example some of the physical assets may be such as to be of no use at all in any other type of endeavour, or the cost of conversion to other uses may be too great to be practicable; and it may be simply too expensive to make it worthwhile to transport the equipment to another country. Finally, a factory, or other real property, may be situated in a place where there is no other type of business, owing to the nature of the location, to which such

[1] Asserting that compensation must be paid for such a taking: e.g. Audinet, 'Le Monopole des assurances sur la vie en Italie', *Revue générale de droit international public*, 20 (1913), pp. 5, 10; Rolin, 'Les Droits des sociétés étrangères', *Revue de droit international*, 14 (1912), (N.S.), p. 82; cf. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 182; Fischer Williams, 'International Law and the Property of Aliens', this *Year Book*, 9 (1928), pp. 1, 25–26 (intangibles such as good-will should be treated the same as tangibles). Wortley also indicates that under some circumstances he would consider action destroying good-will to amount to an expropriation (op. cit., above, n. 1, p. 307, at pp. 112–13).

Taking the opposite position: e.g. Fachiri, 'International Law and the Property of Aliens', this *Year Book*, 10 (1929), pp. 32, 39–40; White, op. cit., n. 1, p. 307, at p. 49. See also Du-Besse, 'The State Monopoly of Life Insurance in Italy', *Annual Bulletin of the Comparative Law Bureau of the American Bar Association*, 6 (1913), pp. 23, 30, where it is asserted that the Italian insurance monopoly, to be discussed below, did not involve any violation of international law but that it did involve a violation of Italian law. Herz, loc. cit., above, n. 3, p. 309, at pp. 245–6, has a brief discussion of the problem and cites additional authorities. It should be noted, however, that he incorrectly classifies Borchard as supporting the position that no compensation is payable. It is only with respect to domestic law treatment that Borchard concludes compensation may not be obtainable (op. cit., at pp. 125–9).

[2] Where an enterprise is directly seized by a State, whether on a temporary or permanent basis, the normal method of computing compensation would take into account the value of the enterprise seized as a going concern. Thus such compensation would usually include at least some payment for what might be called 'good-will'. The question is briefly discussed, together with the citation of some authority, in n. 2, at p. 336, below. Similarly, suitability for a particular use is normally one of the elements of the value of individual pieces of property which a State might seize, although, admittedly, good-will includes more than this since it includes the unique value of the property to its owner. For example, the property upon which an alien maintains a department store may be condemned and there may be no other site in the vicinity to which the business may be transferred. See Nichols, *Eminent Domain* (3rd ed., 1950), vol. 2, § 5. 76, at pp. 109–12. The position taken by this writer at pp. 336, 338, below, is that loss of good-will, as such, is not compensatable, although as indicated in n. 1, at p. 336 below, Wortley thinks the rule should be otherwise if the State has acted primarily for the purpose of destroying an alien's business.

property may be turned. Moreover, the contracts of such an enterprise and the profits expected to be made on such contracts must also be considered. Thus the issues raised by the monopoly cases are not solely those relating to whether good-will, in the sense of something beyond the capital invested in an enterprise, can be subject to an expropriation for which compensation must be paid. Rather these issues include the broader question whether the proclamation of a monopoly—or even, without the creation of a monopoly, the total prohibition of a certain type of business—also constitutes the taking of physical assets devoted to such economic activities and of contract rights relating to them. Furthermore, there is the question of the effect of measures falling short of the creation of an exclusive monopoly, or of the proclamation of a total prohibition, of a particular type of business.

The controversy between the United Kingdom and the Kingdom of the Two Sicilies has often been cited as authority for the proposition that claims for compensation on the part of foreigners engaged in a trade may arise from the grant of a monopoly by a State.[1] In 1838 the Kingdom of the Two Sicilies entered into a contract with a private firm whereby the firm was granted a monopoly of the extraction and exportation of Sicilian sulphur. The United Kingdom, on behalf of its nationals engaged in the sulphur industry in Sicily, lodged a strong protest against this action and, it is said, even threatened the use of force.[2] As a result of this protest, and through the mediation of the French Government which had tendered its good offices, the Kingdom of the Two Sicilies, in July 1840, cancelled the contract granting the monopoly and agreed to compensate British nationals who had been injured during the existence of the monopoly.[3] Accordingly, a Commission composed of two Englishmen and two Neapolitans, with a French umpire to resolve deadlocks, was set up to hear the claims. Among the claimants who received compensation were those who had sulphur mines in Sicily at the time of the granting of the monopoly. These people received compensation for the losses they had sustained by virtue of being prevented from extracting or exporting sulphur. There were also two other classes of claimants. The first was composed of those who had contracts to supply sulphur which they were prevented from fulfilling. The other was composed of those who having purchased sulphur in Sicily had been prohibited from exporting the sulphur. In both these types of

[1] For the disposal of this dispute see *British and Foreign State Papers*, 30 (1841–2), pp. 111–12.

[2] See Wortley, op. cit., n. 1, p. 307, above, at p. 113. The Foreign Office correspondence at the time the monopoly was proclaimed is contained in *British and Foreign State Papers*, 28 (1839–40), pp. 1163–1242. It should be noted that Great Britain claimed that the Sicilian monopoly contravened the provisions of a treaty that British subjects should be subjected to no discrimination with respect to rights enjoyed by nationals of other States. But, of course, discrimination against, or among, aliens is ordinarily considered to violate international law.

[3] Ibid. 29 (1840–1), pp. 1225–6.

situation compensation was awarded for the profits which the claimants would have made but for the granting of the monopoly.[1] Likewise, in the *Savage Claim*,[2] an arbitration tribunal awarded damages to an American who alleged that the promulgation of a decree in March 1852 by San Salvador, making the gunpowder trade a State monopoly six months from the date of the decree and imposing certain restrictions on that trade in the interim, rendered his gunpowder unsaleable and forced him to abandon it. Here attention was focused more on the physical assets involved.

Subsequent to both these incidents the Italian Government in 1912 made the business of life insurance a State monopoly.[3] In response to the outcry raised when the question had been first discussed by the Italian Cabinet,[4] the law as promulgated contained a provision under which foreign and domestic life insurance companies already operating in Italy might be authorized to continue writing life insurance for another ten years subject to a certain regulation of their operations and also to the requirement that they reinsure 40 per cent. of their risks with the company set up to exercise the State monopoly. In 1923 the hitherto suspended provisions for a State monopoly were repealed and, subject to certain conditions, private companies, both domestic and foreign, were permitted to continue to engage in the business of life insurance in Italy.[5] Several writers at the time the monopoly was promulgated considered the creation of the State monopoly an expropriation of the good-will of the foreign companies for which, under international law, compensation was required.[6]

Thus, until the famous *Chinn*[7] case, there were strong reasons for contending that the grant of a monopoly was a compensatable taking of enterprises and of assets owned by foreigners engaged in the same trade. In the *Chinn* case the Belgian Government, in an effort to subsidize exports from the then Belgian Congo during the great depression, directed a local water carrier in which the State owned slightly over a 50 per cent. interest to charge nominal rates on the carriage of certain types of goods. In return the Belgian Government agreed, subject to certain conditions, to make good the losses of the carrier. Mr. Oscar Chinn, a British national, owned

[1] The three classes of claimants and the general nature of the awards are discussed, ibid. 30 (1841–2), pp. 115–16.

[2] Moore, *International Arbitration* (1898), vol. 2, pp. 1855–7.

[3] Law of 4 April 1912. A French translation of portions of the law is contained in Audinet, loc. cit., above, n. 1, p. 319, at p. 1.

[4] See Fachiri, 'Expropriation and International Law,' this *Year Book*, 6 (1925), pp. 159, 166–7.

[5] Law of 29 April 1923. For the current régime with respect to life insurance in Italy, see *Novissimo digesto italiano, Contratto di assicurazione*, vol. 4, pp. 563–618. Uruguay also tried to establish a State monopoly of life insurance in 1912, but strong protests from Britain and France caused Uruguay to abandon this scheme. The Uruguayan incident is discussed in several of the articles and books cited above in n. 1, at p. 319, including those of Fachiri and Borchard.

[6] See above, n. 1, at p. 319.

[7] *The Oscar Chinn* case, *P.C.I.J.*, 1934, Series A/B, No. 63.

the only other common carrier by water operating in the Congo. Not being able to compete any longer, he was forced out of business. Great Britain argued that Belgium had in effect granted to one company a *de facto* monopoly of the carriage, as a common carrier, of goods and persons by water in the Congo. It argued further that this action constituted a taking of Mr. Chinn's property rights in a going business, in violation not only of certain treaties between it and Belgium but also of international law, for which taking Mr. Chinn was entitled to compensation. The Permanent Court of International Justice, in a 6 to 5 decision, thought otherwise.

The *Chinn* case, nevertheless, does not completely dispose of the issue. In the first place, what was involved there was what the United Kingdom called a *de facto* monopoly. In this respect it differs from the circumstances present in the three previous situations discussed above where a monopoly had been expressly created. Second, the Court never questioned Belgium's assertion that its action was prompted by the serious economic situation resulting from the collapse of the world prices for colonial products. There was no proof at all that it was prompted by a desire to drive Mr. Chinn out of business,[1] whereas there had been a desire to drive competing interests out of business in the earlier controversies discussed above. Third, the business of being a common carrier by water involves the use of what might be called public facilities, namely navigable waters;[2] this was not the case, or at least not nearly to the same extent, in the sulphur trade, or in the life insurance business, or in the gunpowder business. Thus, the issue of whether the assumption or the granting of a monopoly by a State constitutes, in international law, a compensatable taking of the good-will and of the assets of foreign concerns actively engaged in that business, must be regarded to a large extent as still open. This issue, together with the other issues already raised by the cases thus far examined, will be discussed later.[3]

When does a 'temporary' seizure ripen into expropriation?

It has already been noted that a seizure which, owing to its original temporary nature, is not considered a sufficient taking to justify a claim for full compensation, may, nevertheless, in course of time be deemed to ripen into an expropriation. In one case, that of *Sabine G. Helbig*,[4] the question before the United States Foreign Claims Settlement Commission was whether the claimant's property had been taken before she became a United States national; for if this were in fact the case, she was not entitled, under the applicable statute, to the allowance of her claim. It appeared that in 1939 the claimant had stored certain items of personal property with

[1] Indeed, the Court gave some indication that it specifically rejected any such insinuation; ibid., at p. 86.

[2] Cf. ibid.

[3] See below, pp. 330–6.

[4] Decision No. Hung.–941 (1958), *Tenth Semiannual Report*, at p. 51.

a storage concern in Hungary and she claimed that the Hungarian authorities seized the property subsequent to the date of her naturalization as an American citizen in April 1946. The record showed, however, that the Hungarian Government seized the claimant's property in February 1946 and that the claimant had immediately appealed to the Hungarian authorities for the return of her property. On 27 February 1947 the Hungarian authorities ordered that a portion of the property be returned. No action was taken with respect to the other portion of the property, and in fact none of the property was ever returned to the claimant. The Commission found that the property had been taken prior to the claimant's naturalization as an American citizen on 15 April 1946. It held that the claimant was permanently deprived of possession, control and dominion over her property at the time of the seizure by the Office of the Commissioner for Abandoned Property. The fact that the authorities subsequently ordered that a portion of the property be returned to the claimant, which order was never executed, did not constitute a change in the date when the property was actually taken from the claimant. This case suggests that, if property is seized under circumstances in which it is unclear whether expropriation is intended, the eventual ripening of the taking into an expropriation will make the initial seizure the act of expropriation. This will be so even if during the intervening period the offending Government expressly recognizes the alien's title.

This issue was also considered by the Commission in subsequent Panel Opinions issued to provide general guidance to its staff and to future claimants. In one such Opinion the Commission considered a situation where, although the claimant could not establish transfer of title, the proofs showed that land in Czechoslovakia was turned over to a farm co-operative.[1] As has already been indicated, the Commission declared such claims to be compensatable on the ground that under such circumstances the claimant's property must be considered to have been permanently taken from him. With respect to the question of the date of the expropriation, the Commission was of the opinion that the date of physical transfer to the farm co-operative should be used as the date of taking.

A somewhat different tack, however, was pursued by the Commission in its Opinion dealing with claims based on the placing of property under 'national administration'.[2] The Commission was asked by its staff to furnish a ruling as to what was the date of 'taking' in cases where the restitution of property under 'national administration' was denied, or where restitution proceedings were still pending, or where restitution was not even

[1] Panel Opinion No. 4, *Eleventh Semiannual Report*, at pp. 21–23; *Fourteenth Semiannual Report*, at pp. 130–2.

[2] Panel Opinion No. 6, Part III, *Eleventh Semiannual Report*, at pp. 28–30; *Fourteenth Semiannual Report*, at pp. 134–6.

applied for. In a partial response to this request, the Commission replied that where restitution had been denied, or where restitution proceedings had been suspended, the property should be considered 'taken' at the date of the order denying restitution or suspending the proceedings. This Opinion of the Commission would seem somewhat inconsistent with its decision in the *Helbig* case in which it was indicated that where restitution is denied the taking should be retroactively regarded as having occurred on the date of the initial seizure. The Commission's Opinion, however, would not necessarily be inconsistent with the views it had expressed in its *Collective Farm*[1] Opinion where the taking was also deemed to have occurred at the time of the initial transfer of possession to a farm co-operative. For, in this latter situation, it could be argued that it was readily apparent—Czechoslovakian agricultural policy being what it was—that the land transferred was actually being expropriated and would never be returned. But, where it is doubtful what effect is intended, it seems sensible to date the expropriation from the time the offending Government refuses to return the property or to set a date for its return, and not to refer the date of expropriation back to the date of initial seizure. In so far as the *Helbig* case suggests a contrary rule, it seems to have been wrongly decided. In several recent decisions dealing with property which had been placed under 'national administration', the Commission followed the rule enunciated in its Panel Opinion.[2]

Forced sales

A type of taking that is not expressly called an expropriation, and which, indeed, is normally accompanied by an explicit disclaimer of any such intention, is illustrated by a group of situations commonly included under the classification of 'forced sales'. In some cases there may be an elaborate legal procedure for accomplishing the 'forced sale'; it is obvious, however, that an apparently voluntary transfer made under the threat of an impending expropriation is, none the less, forced. Here again the commentators recognize the right to compensation of an alien who has been subjected to such treatment.[3] But it would be helpful to have something more than abstract principles. Accordingly, while this is not the place for an elaborate treatment of this complex problem, it may, nevertheless, repay the effort to examine briefly, for whatever general guidance they may give, some of the attempts to handle the compensation of victims of so-called 'forced sales' during the Nazi régime.[4]

[1] See above, n. 1, at p. 323.

[2] *Eric Walder*, Proposed Decision No. CZ-196 (1960), *Fourteenth Semiannual Report*, at p. 145; *Mary Anne Lipper*, Proposed Decision No. CZ-2,433, ibid., at p. 156.

[3] See, for example, Wortley, op. cit., above, n. 1, p. 307, at pp. 1-2.

[4] For a more detailed discussion of the texts of the Military Government Laws involved see Karasik, 'Problems of Compensation and Restitution in Germany and Austria', *Law and Contemporary Problems*, 16 (1951), p. 448.

During the military occupation of Germany laws were promulgated recognizing the right of victims of the Nazi tyranny to compensation for injuries to their interests in property. United States Military Government Law No. 59 is typical of the laws adopted by the three Western occupying Powers.[1] When the occupation was terminated the German Federal Republic agreed to keep these provisions in effect until all claims were dealt with.[2] Military Government Law No. 59 applied generally to aliens as well as German nationals.[3] Among the categories of injuries for which restitution might be claimed were those arising as a result of 'a transaction *contra bonos mores*, threats or duress . . . or any other tort'.[4] In lieu of restitution, a claimant, upon relinquishing all other claims, could demand from the person first acquiring his property the difference between whatever the claimant had received for the property and the fair purchase price.[5]

The framers of the law showed great practical awareness of the nature of the problems that would be presented in actual cases. A rebuttable presumption was created that any transfer of property during the Nazi régime (30 January 1933 to 8 May 1945) by a person who was directly exposed to persecutory measures, or who belonged to a class of persons who were to be eliminated entirely from the cultural and economic life of Germany, was an act of confiscation.[6] The presumption of confiscation could be avoided by a showing that the transferor was paid a fair purchase price, and furthermore that he was not denied the free disposal of the moneys received, for reasons of race, religion, nationality, ideology or political opposition to National Socialism. Claimants coming from a class of persons who were marked for elimination from the cultural and economic life of Germany were given a right to avoid any transactions involving a transfer or relinquishment of property entered into during the period between the first Nuremburg laws (15 September 1935) and the end of the Nazi régime.[7] This additional right could only be defeated by a showing that the transaction as such would have taken place even in the absence of National Socialism, or that the transferee successfully protected the claimant's property interests. The fairness of the purchase price was not a relevant consideration.[8] Finally, a rebuttable presumption was established that

[1] *Federal Regulations*, 12 (1947), pp. 7983–94, reprinted in the Supplement to *American Journal of International Law*, 42 (1948), pp. 11–45. Similar laws were adopted in the British zone (Karasik, loc. cit., above, n. 1, p. 324, at p. 452), and in the French zone (ibid., p. 461).

[2] Articles 2 and 3 of the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed 26 May 1952, 6 U.S.T. & O.I.A. 4411, 4454-55, T.I.A.S. No. 3425, as amended by the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, signed 23 October 1954, 6 U.S.T. & O.I.A. 4117, 4149, T.I.A.S. No. 3425. The Convention went into effect simultaneously with the Protocol.

[3] Loc. cit., above, n. 1, p. 325, Article 1.

[4] Ibid., Article 2.

[5] Ibid., Article 16.

[6] Ibid., Article 3.

[7] Ibid., Article 4.

[8] This is evident from the omission of such defences in the text and the cases have so held. See *Shulz* v. *Rosenthal*, I U.S. Ct. of Restitution App. 169 (1950); *Raefler* v. *Benario*, VI Supreme

any gratuitous transfer made by a person subject to persecution, as defined in the act, between 30 January 1933 and 8 May 1945, constituted a bailment or the creation of a fiduciary relationship rather than a donation.[1]

With this brief description of Military Government Law No. 59 in mind, it will be helpful now to examine a few of the actual claims presented to the courts set up to adjudicate upon this kind of claim. It should be noted at the outset that the United States Court of Restitution Appeals and its successor after the termination of the occupation, the Supreme Restitution Court, Third Division, have uniformly held that it makes no difference that the transferee did not participate in the persecution of the claimant or in the application of any other form of duress against him.[2] More directly pertinent to the question of what constitutes a taking, these Courts have rendered some interesting opinions as to what will constitute a forced sale resulting from State-sponsored duress in situations where there has been no outright attempt to use force. In one case[3] the claimant, who was married to a Jewish woman, owned an hotel in Kulmbach which he had inherited from his parents. It was apparently the leading hotel in the city, and its restaurant had been very popular in the days before the Nazi régime. Once the Nazis reached power, however, the local Party leaders made it quite clear that they did not consider it proper for members of the Party to frequent the hotel because the proprietor was married to a Jewess. As a result of these pressures the claimant's business started to decline. In particular, travelling government officials rarely stayed in his hotel, nor did the many business men who had been accustomed to stay there in pre-Nazi days. All this occurred at a time when, owing to increased economic and government activity, hotel accommodation in Kulmbach was scarce. The hotel was even picketed for a short while during the pogrom of 9 November 1938. Finally, in the spring of 1939, the local chapter of the German Automobile Club was severely criticized by the local paper for holding its annual meeting at this hotel. By this time the claimant was disturbed over the future prospects of his business, and accordingly sold out to the respondent under an arrangement whereby the hotel was leased back to him for five years. It was held that, under the circumstances, the claimant's property had been confiscated, and restitution was decreed in his favour. Likewise, the legislation prohibiting the maintenance of denominational schools, coupled with a hint of possible expropriation, made the sale by a Catholic order of the buildings formerly housing its *lycée* for girls

Restitution Ct. (3rd Div.) 133 (1956); cf. *Hellmann* v. *HLG.-Geist-Spitalstiftung*, I U.S. Ct. of Restitution App. 143 (1950).

[1] Loc. cit., above, n. 1, p. 325, Article 5.

[2] See *Guggenheim* v. *Boehm*, III U.S. Ct. of Restitution App. 114 (1952); *Raefler* v. *Benario*, VI Supreme Restitution Ct. (3rd Div.) 133 (1956).

[3] *Poehlmann* v. *Kulmbacher Spinnerei A.G.*, III U.S. Ct. of Restitution App. 701 (1952).

a confiscation resulting from threats within the meaning of the restitution law.[1]

In a case somewhat analogous to the State monopoly situations previously discussed above, another claimant, a known former critic of the Nazi régime, had been the owner of a furniture store which he had bought from his former employer, a Jew.[2] Despite the fact that the claimant's wife belonged to the Party, he was denied a permit to operate a furniture store because he was considered, apparently quite correctly, still to be harbouring pro-Jewish sentiments. After repeated unsuccessful efforts to get the licence, the claimant sold out. He now sought, not restitution, but a sum as compensation for the inadequate price he said he had received for his business. The Court upheld his claim.

Finally, before concluding this brief examination of post-war German cases, it should be mentioned that in a case where the claimants belonged to a class whose elimination from German cultural and economic life was being sought, it was held that they could avoid a transaction even though, at the time of the transaction, the claimants were beyond the reach of Nazi power.[3] The discriminatory laws promulgated with respect to Jewish-owned property were held to be persecution and duress enough, even if a particular claimant were outside Germany at the time. It was recognized that duress could be exercised solely against a man's property; the claimant did not have to be in any physical danger.

These factual situations presented to the restitution courts cannot be dismissed as being of merely historical interest: there were instances of forced sales induced by a fear of coercion and political reprisals during the post-war nationalizations in eastern Europe.[4] Moreover, it is easy to imagine very similar situations arising today. Let us assume for example, that an underdeveloped country decides that it wishes to rid itself of foreign interference in some particular sphere of its economy, or even totally to remove foreign participation from its economic life; and further that the intention to institute such measures is widely known: even assuming there is no definite indication that the State contemplating the expropriation of foreign property will refuse to recognize an obligation to pay compensation, many foreigners will still be tempted in this situation to sell out for what they can get. They will be even more tempted to sell if they are subject to constant although individually trivial instances of harassment and if unofficial

[1] *Stadt Würzburg* v. *Institut der Englischen Fräulein, B.M.V.*, III U.S. Ct. of Restitution App. 753 (1952); Cf. *Kapphan* v. *Steine und Erden, G.m.b.H.*, V U.S. Ct. of Restitution App. 487 (1955) (sale while expropriation proceedings pending).

[2] *Osthoff* v. *Hofale*, I U.S. Ct. of Restitution App. 111 (1950).

[3] *Palast—Lichtspiele A.G.* v. *Fa. August Annathan A.G.*, III U.S. Ct. of Restitution App. 8 (1952); cf. *Ullmann* v. *Fa. Friedrich Boesner, G.m.b.H.*, VI Supreme Restitution Ct. (3rd Div.) 213 (1956).

[4] *Zwach* v. *Kraus Bros. & Co.*, 237 F. 2d 255 (2d Cir. 1956).

campaigns are instituted to stir up hate of foreigners. Under such circumstances, the allurement of the bird in hand will be very hard to resist. Could such aliens later claim that they were the victims of forced sales, particularly if they could point out that no compensation was ever paid to those who did not sell out? Would the answer to this question depend on whether those who sold did so to persons connected in some way with the Government then in power? In either event, after that passage of time which seems inevitable in the preparation and the securing of an opportunity of presenting an international claim, could many of the claimants get very far if they were not aided by the very sort of presumptions to which resort was had in the Nazi situation? One may seriously doubt whether they would. Unless a claimant has sold for a ridiculously low price the problems of proof may be insurmountable. The relevant events will have occurred long ago and witnesses may be hard to find. What witnesses there are may all be located in the respondent States. Memories may fail. In the Nazi situation claimants were materially assisted in the presentation of their cases by the fact that the Nazi régime had been overthrown. Yet even there it was held that where it was sought to prove a confiscation solely from the fact that the purchase price was allegedly inadequate and without any independent showing of duress, the price received must have been 'such a mere pittance that it would "shock the minds of reasonable men" '.[1]

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

The whole question could, of course, be complicated even further if the price the alien received for his property were subjected to some sort of monetary restrictions. In the Nazi situation this, when added to other factors, was considered to make a transfer of property a confiscation.[2] An

[1] *Kapphan* v. *Steine und Erden, G.m.b.H.*, V. U.S. Ct. of Restitution App. 487, 507 (1955). See also the cases cited at n. 12, therein.

[2] U.S. Military Government Law No. 59, loc. cit., above, n. 1, p. 325, Article 3.

extreme case of such monetary restrictions taken from a situation of outright expropriation is Dr. Castro's offer to compensate Americans, whose property had been nationalized, with thirty-year bonds, the interest and principal to be paid out of a fund into which would be paid 25 per cent. of the amounts received from the sale to the United States, at a support price of 5·75 cents per pound, of all sugar in excess of 3,000,000 tons annually.[1] It is evident that some such similar scheme could also be applied to the proceeds foreigners received from so-called 'forced sales'. In this respect, moreover, it has been suggested that currency regulations such as those imposed by Great Britain in 1947 and 1949 might have been subject to attack.[2] Something more will be said about currency regulations later.[3] The point is, however, that the mere recognition in general terms of a right to compensation on the part of an alien who has been involved in what might be called a 'forced sale' or other form of duress does not get one very far; this is, in fact, only another type of situation, albeit a rather different type, in which the question arises as to what is a sufficient taking so as to amount to an expropriation. The factual situations in this kind of problem can be very intricate and, unfortunately, there does not seem to be much authority. Future cases will have to decide how far a panicky alien property holder can question the good faith of the State in which he is operating, and how far he will be compelled to rely either on promises of future compensation or even on a presumption that adequate compensation will be paid by the State. The difficulty and inconvenience of claims based on forced sales would seem to require that the alien must in most cases take his chance of ultimately obtaining compensation from the State involved. If he prefers the bird in hand and sells out for what he can get, then he should normally be prepared to sacrifice any future claims based on the inadequacy of his receipts from the sale. If, however, the threats to an alien's property are accompanied by threats to his physical security, the rule should be otherwise; similarly, if the State in question flatly declares that it will not pay any compensation for the alien-owned property whose seizure is threatened. But even in such situations, unless the alien can show that he received an obviously inadequate price for his property, he should be denied the right to assert a claim based on the insufficiency of the price he has received.

[1] These provisions are contained in Cuban Law 851, 6 July 1960. An English translation of this law may be found in *American Journal of International Law*, 55 (1961), p. 822. In *Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d 845, 862 (2d Cir. 1962), *cert. granted*, 372 U.S. 905 (1963), it was said that in the period 1934 to 1959 there were only three years when the United States bought over 3,000,000 tons of Cuban sugar and that for the ten years preceding nationalization the average price was 5·50 cents per pound.

[2] Wortley, op. cit., above, n. 1, p. 307, at pp. 108–9, especially n. 1, p. 108. But cf. *Helbert Wagg & Co., Ltd.*, [1956] 1 Ch. 323, and the other cases cited n. 4, at p. 318, above.

[3] See below, pp. 331–2.

III

Both the importance and the extreme difficulty of deciding what constitutes a sufficient taking so as to warrant a demand for full compensation for the property taken have been recognized. In hearings before the Committee on Foreign Relations of the United States Senate, the Committee on Foreign Law of the Association of the Bar of the City of New York proposed that definitions of the word 'taken' might be included in future bilateral treaties of trade and navigation in the provisions dealing with the expropriation or other taking of property.[1] This was an admirable suggestion. Unfortunately, the Committee did not go further than to suggest that this definition should be such as to make it clear that 'taking' would include '. . . measures which, though falling just short of the seizure of the full title to the property, effectively deprive its owner of the use and enjoyment thereof, for example, the appointment of a custodian'.[2]

The recent Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens also shows an awareness of the difficult nature of the problem,[3] as does the American Law Institute's Draft Restatement of the Foreign Relations Law of the United States, which, in its provisions dealing with State responsibility for economic injury to aliens, greatly relied on the Harvard Draft.[4] In Article 10, paragraphs 1 and 2, of the Harvard Draft, the taking under the authority of the State of an alien's property is, with certain exceptions, made wrongful. A 'taking of property' is defined in paragraph 3 (*a*) as follows:

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

In the comments accompanying this article, Professors Sohn and Baxter state that they recognize that there are a variety of methods by which a State may interfere with an alien's right to use and enjoy his property and that this interference may even go to the extent of the 'State's forcing the alien to dispose of his property at a price representing only a fraction of what its value would have been had not the alien's use of it been subjected to interference by the State'.[5] Among the measures which a State might

[1] *Hearings before the Senate Committee on Foreign Relations on Executives, E, G, and H*, 84th Congress, 2nd session, 15 (1956).

[2] Ibid.

[3] The portions of the draft relating to injuries to the economic interests of aliens are reprinted, together with some comments, in *American Journal of International Law*, 55 (1961), pp. 545–84.

[4] American Law Institute, *Restatement, The Foreign Relations Law of the United States*, §§ 190, 197 (Proposed Official Draft, 1962). The acknowledgement of indebtedness to the Harvard Draft is contained in the 'Introductory Note' to Part IV of the A.L.I. Draft, 'Responsibility of States for Injuries to Aliens' (at p. 603 of the 1962 Proposed Official Draft).

[5] *American Journal of International Law*, 55 (1961), pp. 558–9.

employ are the blocking of factory entrances on the pretext of maintaining public order, the setting of wages for local labour at prohibitively high rates, the denial of visas for foreign technical personnel, the deliberate refusal of foreign exchange for the purchase of necessary machinery, interference with the alien's occupation of his real property and, finally, the appointment of conservators, managers or inspectors who might interfere with the free use by the alien of his premises and facilities. The draftsmen also mention what they call the simpler method of forbidding an alien to sell his property. In the opinion of the draftsmen the crucial consideration in determining what constitutes a taking will be the duration of the interference. They conclude that 'considerable latitude has been left to the adjudicator of the claim to determine what period of interference is unreasonable and when the taking therefore ceases to be temporary'.[1] The unreasonableness of an interference must be determined 'in conformity with the general principles of law recognized by the principal legal systems of the world'. No attempt was made to particularize on the expression because the matter seemed one 'best worked out by international tribunals'.

The comments of the editors of the *Netherlands International Law Review* during the controversy over the Indonesian seizure of the property of Dutch nationals have already been alluded to.[2] The first factor which the editors stress as determining what constitutes a sufficient taking so as to give rise to a claim for full compensation is the assumption of managerial control. This in itself is said to constitute confiscation.[3] The second important factor they stress is the refusal to grant permission in advance for the transfer of operating profits to the owners.[4]

It is obvious, of course, that in any doubtful case the passage of time will strengthen the conclusion that the property in question has been expropriated. One cannot quarrel with the importance the Harvard draftsmen gave to this factor. Presumably also, as the cases indicate, the express declaration by a State that the taking in question is 'temporary' will cause the conclusion of an expropriation to be postponed somewhat longer than it might otherwise have been. The conclusion that a particular interference is an expropriation might also be avoided if the State whose actions are the subject of complaint had a purpose in mind which is recognized in international law as justifying even severe, although by no means complete, restrictions on the use of property.[5] Thus, the operation of a State's tax laws, changes in the value of a State's currency, actions in the interest of the

[1] Ibid., at p. 559.

[2] See above, n. 3, p. 308.

[3] *Netherlands International Law Review*, 5 (1958), pp. 227, 242. See also ibid., at p. 235.

[4] Ibid., at p. 242.

[5] 'As has already been seen above, the mere fact that an alien still has a 'record' title will not avoid a conclusion of expropriation where the restrictions on use are complete or almost complete. See above, pp. 313–15.

public health and morality, will all serve to justify actions which because of their severity would not otherwise be justifiable; subject to the proviso, of course, that the action in question is not what would be 'commonly' called discriminatory either with respect to aliens or with respect to a certain class of persons, among whom are aliens, residing in the State in question. The word 'commonly' is used because there have been, and no doubt still are, some who would hold that a progressive income tax is discriminatory or otherwise unreasonable,[1] just as there are others who urge that all excise taxes are discriminatory. It is enough to say that the purposes justifying such taxes are generally recognized in international law. They are referred to in paragraph 5 of Article 10 of the Harvard Draft.[2]

'Purpose', however, is a much abused word in international law. It is impossible to read many of the authors who have written widely on the subject of expropriation and nationalization without coming to suspect that, at least some of the time, they are not talking about the purpose which a State actually gives for its actions but rather about some 'real' purpose, some subjective purpose, which motivates the State or, rather, the persons who have the supreme power in a State.[3] But it certainly would seem that if the facts are such that the reasons actually given are plausible, search for the unexpressed 'real' reasons is chimerical. No such search is permitted in municipal law, and the extreme deference paid to the honour of States by international tribunals excludes the possibility of supposing that the rule is different in international law.[4]

All this having been said, there is still a long way to go before one can come to any reasonably concrete conclusions on the subject. General rent control, for example, is normally not considered to amount to expropriation. But what if that control is long continued and the general inflationary trend to which all modern States seem to be subject makes the return on property woefully inadequate? Such situations have, of course, arisen in the industrially advanced States of the West, i.e. the States whose usual role is as plaintiff in expropriation cases. How does this situation differ, other than in the period of time it took to develop, from the conditions in Czechoslovakia which, as noted above, were considered by the Foreign Claims

[1] In *The Times* of 4 April 1962, at p. 5, is printed an excerpt from editorial comment in *The Times* for 4 April 1862 on the budget for 1862–3 presented the day before by Mr. Gladstone, then Chancellor of the Exchequer. The retention of the income tax was criticized. It was said that income taxes were not as conducive to thrift as were indirect taxes which latter worked to discourage consumption. Income tax and other direct taxation, it was said, would encourage gambling-type activities and extravagant expenditures.

[2] *American Journal of International Law*, 55 (1961), at p. 554. See also Wortley, op. cit., above, n. 1, p. 307, at pp. 45–57.

[3] Cf. Kelsen, *General Theory of Law and the State*, Part II (1946); Hagerstrom, *Inquiries into the Nature of Law and Morals* (transl. by Broad, 1953), pp. 17–41 and *passim*.

[4] Cf. Friedman, *Expropriation in International Law* (1953), p. 141; Fischer Williams, loc. cit., above, n. 1, p. 319, at p. 26.

Settlement Commission and seemingly rightly found, according to the general principles enunciated by most of the commentators, to amount to a complete taking of the property in question for which full compensation was appropriate?[1] It will be recalled that the facts underlying the Commission's Opinion were that in addition to requiring owners of real property to lease to whomsoever the State directed, the total gross income of property bringing in over a certain annual amount had to be deposited into a special account from which about 80 per cent. was deducted for real estate taxes and contributions to a building repair fund. This would seem a very difficult case.

The editors of the *Netherlands International Law Review*, as has been already pointed out, suggested that the refusal on the part of Indonesia to grant permission in advance for the transfer of funds abroad to the owners of the Dutch enterprises taken over by Indonesia in effect deprived the Dutch owners of all enjoyment of their property.[2] The British currency regulations in late 1940 severely restricted the transferability of sterling outside of the sterling area. Did they amount to an expropriation? Wortley seems to suggest that they may well have done so.[3] But successful repudiations of gold clauses suggest that in this field, as in so many others, when the necessity is great enough, almost any interference will be permitted.[4] So does the holding of the Foreign Claims Settlement Commission that the refusal to permit the transfer of funds abroad does not constitute confiscation.[5] As previously noted, the Commission has also held that the suspension of interest payments upon bonds[6] and the failure to continue to make pension payments[7] did not constitute a taking of the underlying rights involved. Even the refusal to grant an export licence for jewellery did not, according to the Commission, constitute a 'taking' of alien property.[8]

The right which seems, from an examination of the cases and of the underlying realities, to be least subject to successful interference, is the right of the owner to manage his enterprise. And yet, even here one cannot be dogmatic. The fact that an alien employer is suddenly forced to take nationals of the local State on to his board of directors would not seem, by itself, to amount to expropriation. Nor would it seem to be expropriation if the alien owner were forced to take representatives of his labour force on to his board. There might even be circumstances where operating control over the enterprise might be completely taken from the alien owner

[1] See the Panel Opinion of the Foreign Claims Settlement Commission discussed above, p. 315.

[2] *Netherlands International Law Review*, 5 (1958), pp. 227, 242.

[3] Wortley, op. cit. above, n. 1, p. 307, at pp. 108–9, especially n. 1, p. 108. But cf. *Helbert Wagg & Co., Ltd.*, [1956] 1 Ch. 323.

[4] See *Rex* v. *International Trustee, &c.*, [1937] A.C. 500, where the House of Lords gave effect to the United States abrogation of gold clauses in bond agreements, &c.

[5] See above, n. 4 at p. 318.

[6] See above, n. 5, at p. 318.

[7] See above, n. 6, at p. 318.

[8] See above, n. 3, at p. 318.

without rendering the State liable even for 'damages' for use. Suppose a State took over certain foreign enterprises and operated them prudently, paying a fair return, perhaps the actual profits of the enterprise, to the owners. Presumably after a sufficient passage of time such action would amount to an expropriation, but how long this period might be one would not wish to hazard a guess. If the State announced in advance that the taking would be for the duration of the 'present economic emergency' but 'in no event' longer than, say, 'five years', it would seem doubtful whether an alien could complain that his property had been expropriated. Under somewhat analogous circumstances there are strong indications that, in the United States at least, such property would not be considered to have been expropriated.[1] In such circumstances one might be tempted to ask whether the foreigner could alienate his property during the stated period and try to resolve the controversy on this ground. The editors of the Harvard Draft suggest this as a possible test.[2] But if the enterprise were sufficiently large this criterion would add nothing because of the lack of possible buyers other than the State itself.

The difficulties surrounding the question of what constitutes a 'taking' become even more acute when consideration is turned to the question of whether a grant of a monopoly or the total prohibition of a certain line of endeavour constitutes the 'taking' of property devoted to such activities. It is one thing to say, as was said in the *Chinn* case,[3] that no one has a right to be free from competition or from changes in the public's tastes even though the new competition or the changed public tastes might in fact result in driving the complaining party out of business. It is another thing actually to forestall the struggle for economic survival by denying a business the chance to compete, whether through the creation of a State monopoly or by giving a business no scope to influence public tastes through the total prohibition of a particular line of endeavour. Certainly, in these latter instances, if an alien can show that his property is such that it has no other uses and that its withdrawal to another State is impractical, he has incurred every bit as great a financial loss as if the State physically destroyed the property in question. The difficulties in this area are, of

[1] In an appendix to his Concurring Opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), (at pp. 615 et seq.), Mr. Justice Frankfurter compiled a 'Synoptic Analysis of Legislation Authorizing Seizure of Industrial Property'. The validity of a small number of seizures under this legislation was unsuccessfully challenged in the lower federal courts. All this legislation was possessed of two characteristics. First, seizure was authorized for a limited duration and in most instances the limits were prescribed with reasonable precision, e.g. 'the duration of the war', 'in time of war', 'not . . . longer than is necessary for the suppression of this rebellion', &c. Second, this American legislation without exception contained provisions for the determination and payment of just compensation for the use of the property seized by the Government. The seizure in *Youngstown*, of course, was not based on statutory authority.

[2] Article 10, para. 3 (*a*) of the draft.

[3] *P.C.I.J.*, 1934, Series A/B, No. 63, at p. 88.

course, compounded by the fact the grant of State monopoly over, say transportation, or the prohibition of the liquor or tobacco trade, is so intimately connected with a State's police power, for the exercise of which many domestic systems generally favourable to private enterprise normally do not provide compensation.[1] Thus, if, as in the *Chinn* case, the monopoly granted concerns the use of public facilities, such as the navigable waterways or the public highways or the airways,[2] the grant of a monopoly will normally not constitute an indirect taking or expropriation unless the revocation of a franchise is involved, in which case other factors will have to be considered.[3] Nevertheless, where the police power is not involved—and a State's mere assertion that the police power is involved is obviously not conclusive on this issue—there seems no reason why a claim for compensation should not be allowed. Unless a State can show, for example, that the rates charged by private companies are exorbitant, or at least somehow unreasonable, the creation of a State monopoly on life insurance would not seem to be a justifiable exercise of the State's police power through which the obligation to pay compensation for any fixed assets affected may be avoided. The same conclusion would seem to be applicable to most types of manufacturing for civilian, as opposed to military, consumption.

What measures short of the grant of a total monopoly or the complete prohibition of a particular trade, should be held to give rise to a claim for compensation will, of course, be a difficult question. Suppose that, instead of granting a monopoly to a State-chartered enterprise, a State embarked on a comprehensive subsidized insurance scheme that substantially destroyed the markets of private insurance companies. Not only could there be a claim that the police power is involved here but the private companies are still technically free to write as much business as they want. It would seem, on balance, that in cases of 'partial monopoly' or 'partial prohibition' the difficulties are so great that the only practicable solution is to resolve all doubts against the alien claimant.

Difficult as these questions are where the claims are based upon the loss of value of physical assets, it is even more difficult to say whether aliens,

[1] As to England, see Wortley op. cit. above, n. 1, p. 307, at pp. 50–57, 110–11. As to the United States, see Nichols, *Eminent Domain* (3rd ed., 1950), § 1. 42. See particularly ibid., § 1. 42 [3]. As both writers recognize, the police power may be abused. In international law, of course, a State's reasons for its actions are not binding on international tribunals although they will be admittedly loath to set such reasons aside. Cf. above, n. 4, at p. 332.

[2] In the United States § 401 (i) of the Federal Aviation Act of 1958 specifically declares, in a provision taken almost verbatim from the Civil Aeronautics Act of 1938, that 'no certificate of public convenience and necessity shall confer any proprietary, property, or exclusive right in the use of any air space, Federal airway, landing area, or air-navigation facility' (72 Stat. 756, 49 U.S.C. § 1371 (i).

[3] See Wortley, op. cit., above, n. 1, p. 307, at pp. 55–57. Even if franchises to operate public utilities are considered revocable, Wortley thinks that the revocation of a franchise for a fixed term gives rise to a claim for compensation, ibid., at pp. 57, 113. Since these are direct takings they are beyond the scope of this paper.

whose businesses have been destroyed by the promulgation of a monopoly or the total prohibition of certain types of activities, may claim damages for loss of good-will. Many writers assert that no such claim for damages may be made.[1] It might be pointed out that, in the United States, for example, there is no constitutional right to compensation for such alleged losses and generally no awards for loss of good-will are made.[2] It would seem difficult to argue, particularly in the light of the nebulous and hard-to-ascertain value of such 'good-will', that a different rule should obtain in international law.

One thing, however, emerges very clearly from this examination: even slight variations in the facts can produce substantial differences in results. There are some guiding principles in deciding what kind of interference will constitute a taking, but they apply only to a certain degree. To push them further may lead to unsound conclusions. Thus, outside of the fairly clear cases—such as the *Norwegian Claims* case[3] where the requisition of partially completed ships rendered completely valueless claimant ship-owners' contracts for the construction of new ships, or the transfer of control of claimant's land to a collective farm where it is obvious the land is being expropriated although no attempt is made to affect record title—one must proceed with caution.

IV

Conclusions

Granting, then, that what is considered a reasonable restriction on the use of property will depend to a very large extent on the social and economic

[1] See White, op. cit., above, n. 1, p. 307, at p. 49; Fachiri, loc. cit., above, n. 1, p. 319, at pp. 39–40. Cf. Herz, loc. cit., above, n. 3, p. 309, at p. 246. But see Wortley, op. cit., above, n. 1, p. 307, at pp. 112–13, if a monopoly is set up 'with a view to ruining the business of a foreigner'.

[2] See Nichols, *Eminent Domain* (3rd ed., 1950), vol. 2, § 5. 76. Where a business is directly taken over by the State, compensation is normally computed on the basis of the value of the business as a going concern. This value may often include amounts which cannot readily be assigned to any other account than good-will. See ibid., § 5. 76, at p. 113; cf. Wortley, op. cit., above, n. 1, p. 307, at p. 112. This is, however, a question that is beyond the scope of this paper which is concerned with what constitutes a taking and not the measure of damage for 'direct' takings, where the taking is, so to speak, admitted. It should at least be noted, in this connexion, that under the Treaty of Versailles whereby Germany was required to make good damage to 'property, rights and interest' it was held that Germany was liable for maintenance of the good-will of French enterprises which had been sequestered by the German authorities. *La Soie*, decided by the Franco-German Mixed Arbitral Tribunal, *Recueil des tribunaux arbitraux mixtes*, 2 (1923), p. 734. Certainly part of the compensation for taking over and using an established business would probably be attributable to good-will since payments for such use would, it would seem, be computed on the basis of the value of the sequestered firm as a going enterprise. The Mixed Arbitral Tribunal, however, may have gone further than this and, in so far as it may have done so, may have established some authority contrary to the position taken in the text, i.e. authority for the proposition that the temporary take-over of an alien-owned firm may constitute a partial taking of the good-will of that firm for which taking damages over and above those payable for the use of the enterprise must be paid.

[3] See above, n. 2, at p. 311.

views prevailing at any given time, one may hazard the following general conclusions.

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

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

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

(4) The refusal to give permission in advance for the transfer abroad of operating profits, or other funds, does not by itself amount to expropriation. When coupled with other interferences with the use of property, however, the refusal to permit transfer of funds abroad is a relevant factor in

[1] Throughout this article, of course, these words have been used practically interchangeably.

determining whether expropriation has occurred from the combined effect of all the interference imposed on an alien's use of his property.

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

(6) Despite the *Oscar Chinn* case,[1] and the reliance placed by some commentators thereon, it is not at all clear that the prohibition of the sale of certain items (as noted in the fifth conclusion above) or the grant of a monopoly may not amount to the expropriation of the property of alien competitors. In monopoly situations the existence of generally recognized considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no 'taking'. Whether compensation may be obtained solely for the loss of good-will involved in the grant of a monopoly or in the prohibition of a certain line of trade is a more difficult question, and one to which a negative answer would appear to be indicated.

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

(8) Where a State compels an alien to sell his property for less than its true value either to the State or to a third party, a compensatable claim arises. Where an alien sells his property for less than its true value because of a fear of possible expropriation, the serious practical considerations already discussed[2] would seem to require that no claim for additional compensation should be permitted unless the State has clearly indicated that it will not pay any compensation to those whose property it may expropriate or unless the alien property holder is actually placed in physical jeopardy.

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

[1] See above, n. 7, at p. 321.

[2] See above, pp. 327–9.

ANNEX 210

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"INDIRECT EXPROPRIATION" AND THE "RIGHT TO REGULATE" IN INTERNATIONAL INVESTMENT LAW

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This document, derestricted under the OECD Secretary General's responsibility, has been developed as an input to the Investment Committee's work aimed at enhancing understanding of "indirect expropriation" and the "right to regulate" in international investment law.

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

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Organisation for Economic Co-operation and Development 2004

"INDIRECT EXPROPRIATION" AND THE "RIGHT TO REGULATE" IN INTERNATIONAL INVESTMENT LAW

Introduction

It is a well recognised rule in international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation. Two decades ago, the disputes before the courts and the discussions in academic literature focused mainly on the standard of compensation and measuring of expropriated value. The divergent views[1] of the developed and developing countries raised issues regarding the formation and evolution of customary law. Today, the more positive attitude of countries around the world toward foreign investment and the proliferation of bilateral treaties and other investment agreements requiring prompt, adequate and effective compensation for expropriation of foreign investments have largely deprived that debate of practical significance for foreign investors.

Disputes on direct expropriation – mainly related to nationalisation that marked the 70s and 80s -- have been replaced by disputes related to foreign investment regulation and "indirect expropriation". Largely prompted by the first cases brought under NAFTA, there is increasing concern that concepts such as indirect expropriation may be applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society. The question that arises is to what extent a government may affect the value of property by regulation, either general in nature or by specific actions in the context of general regulations, for a legitimate public purpose without effecting a "taking" and having to compensate for this act. One leading commentator suggests that the issue of definition of expropriation in this context may become the dominant issue in international investment law.[2]

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1. A number of developed countries endorsed the "Hull formula", first articulated by the United States Secretary of State Cordell Hull in response to Mexico's nationalisation of American petroleum companies in 1936. Hull claimed that international law requires "prompt, adequate and effective" compensation for the expropriation of foreign investments. Developing countries supported the Calvo doctrine during the 1960s and 1970s as reflected in major United Nations General Assembly resolutions. In 1962, the General Assembly adopted its Resolution on Permanent Sovereignty over Natural resources which affirmed the right to nationalise foreign owned property and required only "appropriate compensation". This compensation standard was considered an attempt to bridge differences between developed and developing states. In 1974, the UN General Assembly decisively rejected the Hull formula in favour of the Calvo doctrine in adopting the Charter of Economic Rights and Duties of States. While Article 2(c) repeats the "appropriate compensation" standard, it goes on to provide that "in any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals…". Nowadays, the Hull formula and its variations are often used and accepted and considered as part of customary international law.

2. Dolzer, "Indirect Expropriations: New Developments?" Article of the Colloquium on Regulatory Expropriation organised by the New York University on 25-27 April 2002; *11 Environmental Law Journal 64.*

Despite a number of decisions of international tribunals, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated and depends on the specific facts and circumstances of the case. However, while case-by-case consideration remains necessary, there are some criteria emerging from the examination of some international agreements and arbitral decisions for determining whether an indirect expropriation requiring compensation has occurred.

The present survey provides factual elements of information on jurisprudence, state practice and literature on this matter. It presents the issues at stake and describes the basic concepts of the obligation to compensate for indirect expropriation (**Part I),** reviews whether and how legal instruments and other texts articulate the difference between indirect expropriation and the right of the governments to regulate without compensation **(Part II)** and attempts to identify a number of criteria which emerge from jurisprudence and state practice for determining whether an indirect expropriation has occurred (**Part III)**.

I. Basic concepts of the obligation to compensate for indirect expropriation

Customary international law does not preclude host states from expropriating foreign investments provided certain conditions are met. These conditions are: the taking of the investment for a public purpose, as provided by law, in a non-discriminatory manner and with compensation.

Expropriation or "wealth deprivation"[3] could take different forms: it could be *direct* where an investment is nationalised or otherwise directly expropriated[4] through formal transfer of title or outright physical seizure. In addition to the term expropriation, terms such as "dispossession", "taking", "deprivation" or "privation" are also used.[5] International law is clear that a seizure of legal title of property constitutes a compensable expropriation.

Expropriation or deprivation of property[6] could also occur through interference by a state in the use of that property or with the enjoyment of the benefits even where the property is not seized and the

3. "Wealth deprivation" is a term which according to *Weston* avoids most, if not all, of the major ambiguities and imprecision of the traditional terminology. See B. Weston "'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'", *Virginia Journal of International Law, 1975, Volume 16, pp. 103-175 at 112*.

4. In general, expropriation applies to individual measures taken for a public purpose while nationalisation involves large-scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain.

5. Dolzer and Stevens, "Bilateral Investment Treaties", *ICSID 1995 at 98.*

6 In the context of international law, "property" refers to both tangible and intangible property. Under Article 1139 of the NAFTA, the definition of "investment" covers, among other things, "real estate or other property, *tangible or intangible* [emphasis supplied], acquired in the expectation or used for the purpose of economic benefit or other business purposes." Likewise, most BITs contain a relatively standard definition of investment that also covers intangible forms of property: "intellectual property and contractual rights". Source UNCTAD "Bilateral Investment Treaties in the Mid-1990s" 1998. See also the recently concluded US FTAs with Australia, Chile, Central America, Morocco and Singapore: "An action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment".The Iran-United States Claims Tribunal stated that "[the claimants] rely on precedents in international law in which case measures of expropriation or takings, primarily aimed at physical property, have been deemed to comprise also rights of a contractual nature closely related to the physical property…" It has consistently rejected attempts made by Iranian respondents for a narrow interpretation of

legal title to the property is not affected. The measures taken by the State have a similar effect to expropriation or nationalisation and are generally termed "indirect", "creeping",[7] or "de facto" expropriation, or measures "tantamount" to expropriation.

However, under international law, not all state measures interfering with property are expropriation. As ***Brownlie*** has stated, "state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation"[8]. Similarly, according to ***Sornarajah***[9], non-

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"property" and has confirmed that shareholder rights and contractual rights can be the object of expropriation *Starret Housing Corp. v. Islamic Republic of Iran*, 4, Iran-US Cl. Trib. Rep. 122, 156-57 (1983), *Amoco International Finance Corporation v. Iran*, Award No 310-56-3 (14 July 1987), 15 Iran-US C.T.R. 189-289. Under the Protocol 1 of the European Convention on Human Rights, the concept of property is very broadly defined by reference to all the proprietary interests of an individual. It covers a range of economic interests: "movable or immovable property, tangible and intangible interests, such as shares, patents, an arbitration award, the entitlement to a pension, a landlord's entitlement to rent, the economic interests connected with the running of a business and the right to exercise a profession…".

One of the first instances in which the violation of an intangible property right was held to be an expropriation, was the *Norwegian Ship-owners'* case. Although the United States contended that it had requisitioned only ships and not the underlying contracts, the Tribunal found that a taking of property rights ancillary to those formally taken had occurred and required compensation. Nor. v. U.S., 1 R.I.A.A. 307, 332 (Perm. Ct. Arb. 1922). In the 1926 case of *German Interests in Polish Upper Silesia – the Chorzow Factory* case– the Permanent Court of International Justice found that the seizure by the Polish government of a factory plant and machinery was also an expropriation of the closely interrelated patents and contracts of the management company, although the Polish government at no time claimed to expropriate these. F.R.G. v. Pol., 1926 P.C.I.J. (ser. A) No 7 (May 1925).

However, certain intangible property rights or interests, by themselves, may not be capable of being expropriated, but may be viewed instead, as elements of value of business. In the 1934 *Oscar Chinn* case, the Permanent Court did not accept the contention that good will is a property right capable, by itself, of being expropriated. The P.C.I.J. found that a granting of a de facto monopoly did not constitute a violation of international law, stating that "it was unable to see in [claimant's] original position – which was characterised by the possession of customers – anything in the nature of a genuine vested right" and that "favourable business conditions and good will are transient circumstances, subject to inevitable changes". 1934 P.C. I. J. Ser A/B, no 63. In two more recent NAFTA cases, the NAFTA Tribunals addressed claims concerning market access and market share and suggested that these might be property rights for purposes of expropriation. In neither case, however, did the tribunal find that market access or market share could be capable *themselves* of being expropriated, nor did either tribunal find that an expropriation took place. See *Pope & Talbot, Inc v. Canada*, Interim Award (June 26, 2000), paras. 96-98 and *S.D. Myers, Inc. v. Canada*, (November 13, 2000) Partial Award, 232. International Legal Materials 408, para. 232. See also e.g. G. White *"Nationalisation of Foreign Property"* 49 (1961); *The Iran-United States Claims Tribunal: Its contribution to the Law of State Responsibility 196-97 n. 33 (*Richard Lillich and Daniel Magraw editors, 1998).

7. On this point, Dolzer notes that, "'creeping expropriation' suggests a deliberate strategy on the part of the state, which may imply a negative moral judgement". See Dolzer, "Indirect Expropriation of Alien Property", *ICSID Review, Foreign Investment Law Journal, (1986) pp. 41-59 at 44.*

8. Ian Brownlie, "Public International Law", *Oxford University Press, 6th Edition, 2003 at 509.*

discriminatory measures[10] related to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the efficient functioning of the state.

As mentioned above, there is no generally accepted and clear definition of the concept of indirect expropriation and what distinguishes it from non-compensable regulation, although this question is of great significance to both investors and governments. As ***Dolzer and Stevens*** wrote:

> "To the investor, the line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations (that require compensation) may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation (either from the host State or from an insurance contract). For the host State, the definition determines the scope of the State's power to enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due. It may be argued that the State is prevented from taking any such measures where these cannot be covered by public financial resources".[11]

As ***Higgins*** wrote in her study on the taking of property by the state, the issue can be further refined as the determination of who is to pay the economic cost of attending to the public interest involved in the measure in question. Is it to be the society as a whole, represented by the state, or the owner of the affected property?[12]

Nouvel has pointed out that in the case of nationalisation or direct expropriation, the dispossession to the detriment of a private person coincides with the appropriation to the profit of a public person; the measures tantamount to expropriation do not have this linkage. In the latter case, the reduction of the value of private property is not necessarily accompanied by an increase in public wealth.[13]

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9. M. Sornarajah, "The International Law on Foreign Investment" *(1994) at 283, Cambridge University Press.*

10. It is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police powers of the State, compensation is not required. A state measure will be discriminatory if it results "in an actual injury to the alien …with the intention to harm the aggrieved alien" to favour national companies. See Dolzer and Stevens, *op. cit. n. 5*. The Restatement Third recognises the non-discrimination rule: "One test suggested for determining whether regulation and taxation program are intended to achieve expropriation is whether they are applied only to alien enterprises" "Restatement of the Law Third, the Foreign Relations of the United States," *American Law Institute ,Volume 1, 1987, Section 712.* The Iran-US Claims Tribunal recognised in the *Amoco* case that Iran owed compensation for expropriatory measures, and also acknowledged the rule of non-discrimination. The Award specifically states that: "discrimination is widely prohibited by customary international law in the field of expropriation," although the Tribunal found no discrimination in this case. *Amoco* see *op. cit. n. 6.*

11. Dolzer and Stevens *op. cit. n.5 at 99.*

12. R. Higgins "The Taking of Property by the State: Recent Developments in International Law" *Recueil des Cours – Académie de Droit International, 1982, Vol. 176 at 276-77.*

13. Yves Nouvel, « Les mesures équivalant à une expropriation dans la pratique récente des tribunaux arbitraux », *Revue Générale du Droit International Public, 2002-1 pp. 80-102 at 89.*

II. Legal instruments and other texts

Protection against indirect expropriation has been included in various forms of international instruments. Literally all relevant treaties and draft treaties provide for indirect expropriation or measures tantamount to expropriation. However, most of them stay mute on the treatment of the non-compensable regulatory measures, with the exception of: the European Convention on Human Rights and Fundamental Freedoms (hereafter the European Convention on Human Rights), the recently concluded US-Free Trade Agreements and the new model US and Canada BITs. The OECD Draft Convention on the Protection of Foreign Property and the draft OECD Multilateral Agreement on Investment, while themselves silent on the non-compensable regulatory measures, were accompanied by commentaries which did address the issue. Other texts which addressed it are the Harvard Draft Convention on International Responsibility, and the Third Restatement of Foreign Relations of the United States which, while the work of scholars, not state practice, constitute an influential element of doctrine.

A. Legal texts which include indirect expropriation without addressing non-compensable regulation

Bilateral Investment Treaties contain brief and general indirect expropriation provisions which focus on the effect of the government action and do not address the distinction between compensable and non-compensable regulatory actions. For example, treaties entered by France refer to "measures of expropriation or nationalisation or any other measures *the effect of which would be direct or indirect dispossession*". The UK treaties provide that expropriation also covers measures "having *effect equivalent to* nationalisation or expropriation". Other treaties, such as some of those concluded by Sweden, refer to "any direct or indirect measure" or "any other measure having the same nature or the same effect against investments". The former United States Model BIT mentions "*measures tantamount to* expropriation or nationalisation". Several United States treaties are more specific on these measures: "any other measure or series of measures, direct or indirect, tantamount to expropriation (including the levying of taxation, the compulsory sale of all or part of an investment, or the impairment or deprivation of its management, control of economic value…".[14]

The 1992 ***World Bank Guidelines*** section IV (1) on "Expropriation and Unilateral Alterations or Termination of Contracts", state that : "A state may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take *measures which have similar effects*, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation".

The 1994 ***Energy Charter Treaty*** in its Article 13 provides that: "investments of investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or *measures having effect equivalent to nationalization or expropriation*" except where such measure complies with the rules of customary international law in this matter (public purpose, due process, non-discrimination and compensation).

Article 1110 of ***NAFTA*** protects against the expropriation of foreign investments with the following language:

14. See Dolzer and Stevens *op. cit. no. 5.*

1. No Party may directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or *take a measure tantamount to* nationalisation or expropriation of such an investment, except:

   (a) for a public purpose;

   (b) on a non-discriminatory basis;

   (c) in accordance with due process of law and Article 1105 (1)15 and

   (d) on payment of compensation in accordance with [subsequent paragraphs specifying valuation of expropriations and form and procedure of payment].

B. Legal texts which address non-compensable regulation

The relevant principles for the purposes of the ***European Convention of Human Rights*** are included in Article 1 of Protocol 1, concluded in 1952 and entered into force in 1954. Though this article, does not say so explicitly, it strongly implies that the duty to compensate is not applicable to normal regulation:[16]

> "Every natural or legal person is entitled to the peaceful enjoyment of its possessions. No one should be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law.
>
> *The proceeding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"* [italics added].

In 1961, the ***Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens,*** drafted by *Sohn* and *Baxter*, assumed a taking to occur in the case of any "unreasonable interference with the use, enjoyment or disposal of property as to justify an interference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference". In its Article 10(5) it recognised the existence of a category of non-compensable takings:

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

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15. Article 1105(1) provides: "each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".

16. The jurisprudence attached to the Convention by the European Court of Human Rights has consistently taken this line.

Article 3 of the ***1967 OECD***[17] ***Draft Convention on the Protection of Foreign Property***,[18] states that "no Party shall take any measures depriving, directly or indirectly, of his property a national of another Party.." unless four conditions are met according to recognised rules of international law.[19] An accompanying note on the nature of obligation and its scope states the duty to compensate in a broad way:

> "Article 3 acknowledges, by implication, the sovereign right of a State, under international law, to deprive owners, including aliens, of property which is within its territory in the pursuit of its political, social or economic ends. To deny such a right would be attempt to interfere with its powers to regulate – by virtue of its independence and autonomy, equally recognised by international law – its political and social existence. The right is reconciled with the obligation of the State to respect and protect the property of aliens by the existing requirements for its exercise – before all, the requirement to pay the alien compensation if his property is taken."

However, subsequent notes make clear that the concept of "taking" is not intended to apply to normal and lawful regulatory measures short of direct taking of property rights, but rather, to misuse of otherwise lawful regulation to deprive an owner of the substance of his rights:

> 4(a) "….By using the phrase 'to deprive…directly or indirectly …' in the text of the Article it is, however, intended to bring within its compass any measures taken with the intent of wrongfully depriving the national concerned of the substance of his rights and resulting in such loss (e.g. prohibiting the national to sell his property of forcing him to do so at a fraction of the fair market price)" *(emphasis in original).*
>
> 4(b) "….Thus in particular, Article 3 is meant to cover "creeping nationalisation" recently practiced by certain states. Under it, measures otherwise lawful are applied in such a way:
>
> "…as to deprive ultimately the alien of the enjoyment of value of his property, without any specific act being identifiable as outright deprivation. As instances may be quoted excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusal of access to raw materials or of essential export or import licences."

The commentary to the American Law Institute's ***Restatement Third of Foreign Relations Law of the United States***,[20] was designed to assist in determining, *inter alia*, how to distinguish between an indirect expropriation and valid government regulation:

> "A state is responsible as for an expropriation of property when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably

17. The OECD Code of Liberalisation of Capital Movements, through its provisions on the free disposal of blocked accounts and other non-resident owned assets, includes a dimension of preventing confiscation measures, in addition to the liberalisation disciplines *per se* of the Code. However, the Code is silent on the issue of the "right to regulate" in the context of this note.

18. OECD Draft Convention on Foreign Property, *12 October 1967 pp. 23-25*.

19. The measures in question must be taken: (i) in the public interest, (ii) under due process of law; (iii) not be discriminatory; and furthermore, iv) just and effective compensation must be paid.

20. "Restatement of the Law Third, the Foreign Relations of the United States," *American Law Institute, Volume 1, 1987, Section 712, Comment g*.

interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory… *A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory…"* [italics added].

The ***MAI Negotiating Text*** was almost identical to the NAFTA provision. However, the MAI Commentary noted that by extending protection to "measures having equivalent effect" to expropriation, the text was intended to cover "creeping expropriation". MAI negotiators addressed the distinction between indirect expropriation and general regulations in the Report by the Chairman of the Negotiating Group (Chairman's Report)[21] which was put forward at the later stage of the negotiations. In its Annex 3, Article 3 (Right to Regulate) and an interpretative note to Article 5 (Expropriation and Compensation)[22] it is stated:

Article 3 "Right to Regulate"

"[a] a Contracting Party may adopt, maintain, or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to healthy, safety or environmental concerns provided that such measures are consistent with this agreement".

Interpretative note to Article 5 "Expropriation and Compensation"

"This Article [] [is] intended to incorporate into the MAI existing international norms. The reference … to expropriation or nationalisation and 'measures tantamount to expropriation or nationalisation' reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments".

A Declaration adopted by the OECD Council of Ministers on April 28, 1998[23] states that "the MAI would establish mutually beneficial international rules which would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation".[24]

III. Criteria determining whether an indirect expropriation has occurred

As discussed above, few legal texts attempted to address directly how to distinguish legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation, requiring compensation. Scholars recognised the existence of the distinction but did not shed much light on the criteria for making the distinction. This may reflect reluctance to

21. The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group) DAFFE/MAI(98)17, 4 May 1998, available at http://www1.oecd.org/daf/mai/pdf/ng/ng9817e.pdf.

22. *Id.* pp. 13-15.

23. See OECD document C/MIN(98)16/FINAL.

24. For a discussion on regulatory expropriations in the MAI, see the article by R. Geiger "Regulatory Expropriations in International Law: Lessons from the Multilateral Agreement on Investment", *N.Y.U. Environmental Law Journal, 2002, Volume 11, Number 1, pp. 94-109 at 104.*

attempt to lay down simple, clear rules in a matter that is subject to so many varying and complex factual patterns and a preference to leave the resolution of the problem to the development of arbitral decisions on a case-by-case basis.[25] . The two most prominent sources of such decisions were the Iran-United States Claims Tribunal[26] and decisions arising under Article 1, Protocol 1 of the European Convention for the Protection of Human Rights. The recent period has seen a further body of jurisprudence, from cases based on NAFTA and bilateral investment agreements. At the same time, a new generation of investment agreements, including investment chapters of Free Trade Agreements has developed, which include criteria to articulate the difference between indirect expropriation and non-compensable regulation.

A. Jurisprudence

Although there are some "inconsistencies"[27] in the way some arbitral tribunals have distinguished legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation, a careful examination reveals that, in broad terms, they have identified the following criteria which look very similar to the ones laid out by the recent agreements: i) the degree of interference with the property right, ii) the character of governmental measures, i.e. the purpose and the context of the governmental measure, and iii) the interference of the measure with reasonable and investment-backed expectations.

1) Degree of interference with the property right

-- Severe economic impact

Most international decisions treat the severity of the economic impact caused by a government action as an important element in determining whether it rises to the level of an expropriation requiring compensation. International tribunals have often refused to require compensation when the governmental action did not remove essentially all or most of the property's economic value. There is broad support for the proposition that the interference has to be substantial in order to constitute

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25. Christie wrote in 1962 that "it is evident that the question of what kind of interference short of outright expropriation constitutes a 'taking' under international law presents a situation where the common law method of case by case development is pre-eminently the best method, in fact probably the only method, of legal development". G. Christie "What Constitutes a Taking of Property under International Law?" *British Yearbook of International Law, 1962 pp. 307-338.* Sornarajah noted that the difficulty is "in the formulation of a theory that could be used as a predictive device so that there could be guidance as to whether the taking is a compensable or not. Here, though several efforts have been made at devising a theory capable of making the distinction, none has been successful". See *op. cit. n. 9.* Dolzer acknowledged after an extensive review of judicial precedent and state practice that "one cannot but admit at this stage that the law of indirect expropriation can be established, at this moment, on the basis of primary sources of international law, only in a very sketchy and rough manner". See *op. cit. n. 7.*

26. The Iran-United States Claims Tribunal was established in 1981 in order to adjudicate claims by nationals of each country following the Iranian revolution. Its creation was pursuant to the Algiers Declarations which resolved the hostage crisis between Iran and the United States.

27. There is a view that the "inconsistent" case law which has been developed may simply reflect the different approaches of different treaties. According to this view, for example, the practice of the European Court of Human Rights on what "indirect expropriation" means could well be expected to differ from that of NAFTA tribunals, given the different wording, overall purpose and history of the treaties they have to refer to (European Convention of Human Rights on the one hand, and NAFTA on the other hand).

expropriation, i.e. when it deprives the foreign investor of fundamental rights of ownership, or when it interferes with the investment for a significant period of time. Several international tribunals have found that a regulation may constitute expropriation when it substantially impairs the investor's economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings. The European Court of Human Rights (ECHR)[28] has found an expropriation where the investor has been definitely and fully deprived of the ownership of his/her property. If the investor's rights have not disappeared, but have only been substantially reduced, and the situation is not "irreversible", there will be no "deprivation" under Article 1, Protocol 1 of the European Convention of Human Rights.[29]

The first case under **the Iran-United States Claims Tribunal**[30,31] was *Starrett Housing*,[32] which dealt with the appointment of Iranian managers to an American housing project. The Tribunal concluded that an expropriation had taken place:

> "[I]t is recognised by international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even thought the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner".

In the *Sea-Land*[33] case one of the issues was alleged expropriation of a bank account. The Tribunal did not find any substantial deprivation of or interference with the claimant's rights to his account and rejected the claim by noting that the "account remains in existence and available in *rials*, at Sea-Land's disposal".

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28. The European Court of Human Rights is the Court established by the Council of Europe under the Protection of Human Rights and Fundamental Freedoms Convention, to determine questions brought before it by individual petitioners or signatory states concerning violations of human rights by signatory states. It does not distinguish between foreign and domestic owners, but its distinctions as to compensable and non-compensable takings on a human rights basis is relevant.

29. See cases: *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser.A) at 29 (1976); *Poiss v. Austria*, 117 Eur. Ct.H.R. (ser. A)84, 108 (1987); *Matos e Silva, Lda v. Portugal* App. No. 15777/89, 24 Eur. Ct. H.R. rep. 573, 600-01 (1996). See for discussion H. Ruiz Fabri, "The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for 'Regulatory Expropriations of the Property of Foreign Investors", *N.Y.U. Environmental Law Journal, Volume 11, No 1, 2002 pp.148-173.*

30. Sornarajah suggests that "although the awards of the Iran-United States Claims Tribunal have been a fruitful recent source for the identification of indirect takings, they dealt with takings that took place in the context of a revolutionary upheaval and the propositions the tribunal formulated may not have relevance outside the context of the events that attended the Iranian upheaval following the overthrow of the Shah of Iran". See *op. cit. n. 9* at 282. For instance, these actions and the context in which they occurred are, in many ways, different from the sorts of environmental and land-use regulations that have been the subjects of NAFTA claims.

31. For details on these cases see Seddigh and G. H. Aldrich, "What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claim Tribunal", *The American Journal of International Law, Vol. 88 pp. 585-609.*

32. Starret Housing Corp. v. Iran, 4 Iran-United States Cl. Trib. Rep. 122, 154 (1983).

33. Sea-Land Service Inc. v. Iran, 6 Cl. Trib. Rep.149 (1984). See Seddigh and Aldrich p. 656, *op. cit. 31.*

In the *Tippetts*[34] case, the Tribunal found an indirect expropriation because of the actions of a government-appointed manager, rather than because of his appointment *per se*,[35] and equated that deprivation of property rights with a taking of property.[36] The Tribunal said:

> "While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that the deprivation is not merely ephemeral…".

In the **NAFTA** context, in the *Pope & Talbot* case,[37] the Tribunal found that although the introduction of export quotas resulted in a reduction of profits for the Pope & Talbot company, sales abroad were not entirely prevented and the investor was still able to make profits. It stated: "…mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required".[38]

In *S.D. Myers*,[39] a United States company, which operated a PCB remediation facility in the United States, alleged that Canada violated NAFTA Chapter 11 by banning the export of PCB waste to the United States. The Tribunal also distinguished regulation from expropriation primarily on the basis of the degree of interference with property rights: "expropriations tend to involve the deprivation of ownership rights; regulations [are] a lesser interference".[40]

In *Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States*,[41] CEMSA, a registered foreign trading company and exporter of cigarettes from Mexico, was allegedly denied the benefits of the law that allowed certain tax refunds to exporters and claimed expropriation under NAFTA Article 1110. The Tribunal found that there was no expropriation since "the regulatory action has not deprived the Claimant of control of his company, interfered directly in the internal operations of the company or displaced the Claimant as the controlling shareholder. The Claimant is free to pursue other continuing

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34. Tippetts v. TAMS-AFFA Consulting Engineers of Iran, 6 Cl. Trib. 219 (1984).

35. While Tippetts was able to work with the Iranian appointed manager for some months and re-established its rights as a partner, its personnel left Iran following the seizure of the American Embassy and the new manager broke off communications with Tippetts by refusing to respond to its letters and telexes.

36. In this case, the Tribunal said that it "prefers the term 'deprivation' to the term 'taking', although they are largely synonymous, because the latter may be understood to imply that the government has acquired something of value, which is not required".

37. Pope & Talbot Inc. v. Canada, *see op. cit. n. 6.*

38. In addition, the Tribunal stated that: "Regulations can indeed be characterised in a way that would constitute creeping expropriation….Indeed, much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protection against expropriation", see Award paragraph 99.

39. *S.D. Myers Inc. v. Government of Canada, see op. cit. n. 6.*

40. The Tribunal added that: "the distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs".

41. In this case, Marvin Feldman, a United States citizen, submitted claims on behalf of CEMSA. ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, pp. 39-67 at 59.

lines of business activity….Of course, he was effectively precluded from exporting cigarettes…..However, this does not amount to Claimant's deprivation of control of his company".

The **European Court of Human Rights,** in the most widely cited case under Article 1, Protocol 1 of the European Convention of Human Rights (see above), Sporrong and Lönnroth v. Sweden[42] (1982), did not find indirect expropriation to have occurred as a result of land use regulations that affected the claimant's property because:

> "…although the right [of peaceful enjoyment of possessions] lost some of its substance, it did not disappear…The Court observes in this connection that the [claimants] could continue to utilise their possessions and that, although it became more difficult to sell properties [as a result of the regulations], the possibility of selling subsisted".

A different approach was taken by the arbitral Tribunal in the case *CME (the Netherlands) v. the Czech Republic.*[43] CME, the Claimant, had purchased a joint venture media company in the Czech Republic and alleged, *inter alia*, breach of the obligation of the [host country] not to deprive the investor of its investment[44] because of the actions of the national Media Council. The Tribunal, citing *inter alia*, the Tippets and Metalclad cases, found that an expropriation had occurred because "the Media Council's actions and omissions…caused the destruction of the [joint-venture's] operations, leaving the [joint venture] as a company with assets, but without business".[45] It stated also that although "regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the host state"[46] the administrative measures taken by the host country did not fall under this category. It therefore concluded that,

> "Expropriation of [the company's] investment is found a consequence of the [host country's] actions and inactions as there is no immediate prospect at hand that the [joint venture] will be reinstated in a position to enjoy an exclusive use of the license…"[47]

Another relevant decision is the *Revere Copper*[48] case (1980). The case arose from a concession agreement – which was to last for twenty five years – made by a subsidiary of the Revere Copper company with the government of Jamaica. The government, despite a stabilisation clause in the agreement ensuring that taxes and other financial liabilities would remain as agreed for the duration of the concession, increased the royalties. The company found it difficult to continue operations and

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42. In this case, long-term expropriation permits (23 and 8 years) had been granted by the city of Stockholm in respect of the applicant's properties. These did not of themselves expropriate the property, but gave local authorities the power to do so, should they so decide in the future. Sporrong and Lönnorth complained that it was impossible for them to sell these properties and that it amounted to an interference with their right to peaceful enjoyment of possessions. The Swedish government, by contrast, emphasised the public purpose of the permits system and the intentions of the city of Stockholm to make improvements for the general good. See *R. Higgins, op. cit. n. 12* at 276-77.

43. *CME (Netherlands) v. Czech Republic* (Partial Award) (13 September, 2001) available at www.mfcr.cz/scripts/hpe/default.asp

44. Article 5 of the 1991 Bilateral Investment Treaty between the Netherlands and the Czech Republic.

45. See CME para 591, p. 166.

46. *Idem* para. 603, p. 170.

47. *Id.* Para. 607, p. 171.

48. Revere Copper & Brass Inc. v. Overseas Private Investment Corporation, 56 *International Legal Materials 258*.

closed operations and claimed compensation under its insurance contract. The Arbitral Tribunal,[49] assuming that the contract was governed by international law, found that there had been a taking by the government and observed:[50]

> "In our view, the effects of the Jamaican Government's actions in repudiating its long term commitments to RJA (the subsidiary of RC), have substantially the same impact on effective control over use and operation as if the properties were themselves conceded by a concession contract that was repudiated…."

Although the insurance agency (OPIC) argued that RJA still had all the rights and property and that it could operate as it did before, the Tribunal responded that "this is may be true but…we do not regard RJA's control of the use and operation of its properties as any longer effective in view of the destruction by government action of its contract rights".

-- Duration of the regulation

The duration of the regulation could be another criterion of whether the regulation has had a severe enough impact on property to constitute a taking.[51,52]

The Iran-United States Claims Tribunal has acknowledged this was an issue but it has had little difficulty in finding that the appointment of "temporary" managers may constitute a taking of property, when the consequent deprivation of property rights is not "merely ephemeral" (in *Tippetts, Phelps Dodge and Saghi* cases).

A widely cited example where the temporal factor has played an important role is the 1979 case of *Hauer v. Land Rheinland-Pfalz*,[53] The facts relate to a German winegrower who had to apply for a state permit for planting new vines. While the application was pending, the European Commission issued an order prohibiting the planting of that type of vine for three years. The plaintiff brought her claim before the European Court of Justice which found that there was no violation of Hauer's property rights emphasising in particular that the EEC order was to be valid only for a transitory period of three years.

In *S.D. Myers v. Canada*,[54] the NAFTA Tribunal accepted that "in some contexts and circumstances it would be appropriate to view a deprivation as amounting to an expropriation even if it were partial and temporary". However, it concluded that Canada's initiative "was only valid for a time". Under these circumstances, "an opportunity was delayed" but no indirect expropriation could be found.

-- Economic impact as the exclusive criterion

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49. The Tribunal was set up under the American Arbitration Association.

50. For discussion see R. Higgins, pp. 331-37, *op. cit. n.12,* Sornarajah, p. 301, *op. cit. no. 9* at 301 and *R. Dolzer op. cit. n. 7 at* 51-52.

51. *J.M. Wagner, "International Investment, Expropriation and Environmental Protection"*, Golden Gate University Law Review (1999), Vol.29, No 3; pp. 465-538.

52. Prof Christie, in its 1962 article, discusses when a "temporary seizure" ripens into an expropriation *op. cit. no. 25.*

53. See R. Higgins, *op. cit. n 12,* Dolzer, *op. cit. n. 7,* Ruiz Fabri, *op. cit. n.29.*

54. See *op. cit. n. 6.*

There is no serious doubt that the severity of the impact upon the legal status and the practical impact on the owner's ability to use and enjoy his/her property is one of the main factors in determining whether a regulatory measure effects an indirect expropriation. What is more controversial "is the question of whether the focus on the effect will be the only and exclusive relevant criterion – 'sole effect doctrine' – or whether the purpose and the context of the governmental measure may also enter into the takings analysis"[55]. The outcome in any case may be affected by the specific wording of the particular treaty provision. From the doctrine and the case examination, it seems however that the balanced approach is pre-dominant.

A few cases have focused on the effect of the owner as the main factor in discerning a regulation from a taking. In the *Tippetts* case, the Iran-United States Tribunal held that:

> "the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact".

In the *Phelps Dodge* case,[56] a transfer of management was made pursuant to a pre-revolutionary law designed to prevent the closure of factories, ensure payments due to the workers, and protect any debts owed to the Government, which in this case included loans made by a bank that had been nationalised in 1979. Citing Tippetts the Iran-United States Tribunal stated that:

> "The Tribunal fully understands the reasons why the respondent felt compelled to protect its interests through this transfer of management, and the Tribunal understands the financial, economic and social concerns that inspired the law pursuant to which it acted, but those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss".

In the *Metalclad* case,[57] in the context of the NAFTA, Metalclad alleged that its subsidiary COTERIN's attempt to operate a hazardous waste landfill that it constructed in the municipality of Guadalcázar, had been thwarted by measures attributable to Mexico. Metalclad commenced an action under the NAFTA, claiming that an ecological decree promulgated after the claim was made, violated Article 1110 requiring compensation for expropriation. The Tribunal found a violation of NAFTA Article 1110 and stated that in order to decide on an indirect expropriation, it "need not decide or consider the motivation, nor intent of the adoption of the Ecological Decree". The Tribunal stated:

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

The case *Compañía del Desarrollo de Santa Elena v. Costa Rica*,[58] although referred to a direct expropriation, not an indirect taking, has attracted particular attention because the panel expressly

55. *Dolzer*, see *op. cit. n. 2.* at 79.

56. Phelps Dodge, 10 Iran-United States Cl. Trib. Rep. at 130.

57. *Metalclad Corporation v. United Mexican States* (Tribunal Decision August 30, 2000).

58. *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1. (February 17, 2000).

stated that the environmental purpose had no bearing on the issue of compensation. In this case, the claimant (Company Santa Elena) was formed primarily for the purpose of purchasing Santa Elena – a 30 kilometre terrain in Costa Rica – with the intention of developing it as a tourist resort. In 1978, Costa Rica issued an expropriation decree for Santa Elena aiming at declaring it a preservation site. Twenty years of legal proceedings between the Parties finally ended with a decision by an ICSID panel. While this case concerns a direct expropriation where the issue was the day of the taking for purposes of determining compensation, the panel, citing the Tippett case, indicated that a compensable expropriation could occur through measures of a state which deprives the owner of "access to the benefit and economic use of his property" or "has made those [property] rights practically useless".. The panel held that:

> "While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid.[59] The international source of the obligation to protect the environment makes no difference". It also added that:
>
> "Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains".

2) Character of governmental measures, i.e. the purpose and the context of the governmental measure

A very significant factor in characterising a government measure as falling within the expropriation sphere or not, is whether the measure refers to the State's right to promote a recognised "social purpose"[60] or the "general welfare"[61] by regulation. "The existence of generally recognised considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no 'taking'".[62] "Non-discriminatory measures related to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the functioning of the state".[63]

In the context of the jurisprudence of the **European Court of Human Rights** the State may affect control on activities by individual by imposing restrictions which may take the form of planning

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59. For this reason, the Tribunal did not analyse the detailed evidence submitted regarding what Costa Rica referred to as its international obligations to preserve the unique Santa Elena ecological site.

60. The Iran-US Claims Tribunal: Its contribution to the Law of State Responsibility, *see op. cit. n. 6 at 200.*

61. See B.H. Weston, *op. cit. n. 3 at 116.*

62. Christie see *op. cit. n. 25 at 338*.

63. M. Sornarajah, *op. cit. n.9.*

controls, environmental orders, rent controls, import and export laws, economic regulation of professions, [and] the seizure of properties for legal proceedings or inheritance laws".[64]

In the context of the Article 1 of Protocol 1 of the European Convention of Human Rights, the European Court has given States a very wide margin of appreciation concerning the establishment of measures for the public interest and has recognised that it is for national authorities to make the initial assessment[65] of the existence of a public concern warranting measures that result in a "deprivation" of property. The Court held that the state's judgement should be accepted unless exercised in a manifestly unreasonable way.

In addition, the Court has adopted a common approach to "deprivations" and "controls" of use of property. In either case, there has to be a reasonable and foreseeable national legal basis for the taking, because of the underlying principle in stability and transparency and the rule of law.[66] In relation to either deprivation or control of use, the measures adopted must be proportionate. The Court examines whether the interference at issue strikes a reasonable balance between the demands of the general interest of the community and the private interests of the alleged victims of the deprivation and whether an unjust burden has been placed on the claimant. In order to make this assessment, the Court proceeds into a factual analysis insisting that precise factors which are needed to be taken into account vary from case to case. In the *James* case[67] for example, the Court said that:

> "The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being 'in the public interest'. In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being in the 'public interest', even if they involve the compulsory transfer of property from one individual to another".

In the *Sporrong and Lönnroth v. Sweden* case, the Court stated that Article 1 contains "three distinct rules":

> "The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence in the same paragraph. The Third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph".

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64. See *D.J. Harris et al*., referring to the jurisprudence of the European Court of Human Rights in the *"Law of the European convention on Human Rights"*, (1995) at 535.

65. The state margin of appreciation is justified by the idea that national authorities have better knowledge of their society and its needs, and are therefore 'better placed than [an] international [court] to appreciate what is in the public interest'". See *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) 9, 32 (1986).

66. See *H. Mountfield, "Regulatory Expropriations in Europe: the Approach of the European Court of Human Rights"*, N.Y.U. Environmental Law Journal, Volume 11, No 1, 2002 pp. 136-147.

67. This case concerns a reform undertaken by the United Kingdom regarding the right of individuals with long leases to acquire the freehold of their leasehold property. This reform, according to James, the Claimant, "deprived" the freeholders of their property since they could neither refuse to sell nor set the price for it. See *op. cit. n. 65*.

The European Court of Human Rights found no expropriation as a result of the first test, yet found compensation to be required as a result of the second test. Under the "fair balance test", it found that over the years the state had failed to take proper account of individual interests involved. Since the state had neither shortened the temporal effect of the rules nor paid compensation, the court rules that the State had placed "an individual and excessive burden" on plaintiffs and therefore acted in violation of Article 1.

In the **NAFTA** context, in the *S.D. Myers* case[68], the Tribunal found that the expression "tantamount to expropriation" in NAFTA's Article 1110(1), was understood as "equivalent to expropriation" and added:

> "Both words require a tribunal to look at the substance of what has occurred and not only at form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure".

In the case of *Tecnicas Medioambientales Tecmed S.A, v. The United Mexican States*,[69] the investor, Técnicas Medioambientales Techmed, S.A., filed a claim with ICSID alleging that the Mexican government's failure to re-license its hazardous waste site contravened various rights and protections set out in the bilateral investment treaty (BIT) between Spain and Mexico and was an expropriatory act. The Tribunal in order to determine whether the acts undertaken by Mexico were to be characterised as expropriatory, citing the ECHR's practice, considered "whether such actions or measures are proportional to the public interest presumably protected thereby and the protection legally granted to investments, taking into account the significance of such impact plays a key role in deciding the proportionality".[70] It added that: "there must be a reasonable relationship of proportionality between the charge of weight imposed to the foreign investor and the aim sought to be realised by an expropriatory measure".[71]

-- "Police Powers" of the State

The notion that the exercise of the State's "police powers" will not give rise to a right to compensation has been widely accepted in international law. However, the "police powers" doctrine is viewed by some not as a criterion which is weighed in the balance with other factors, but as a controlling element which exempts automatically the measure from any duty for compensation.

One commentary on the law on expropriation and the State's "police powers" is the commentary to the American Law Institute's Restatement (Third) of Foreign Relations Law of the United States[72] which was designed to assist, *inter alia*, in determining how to distinguish between an indirect expropriation and valid governmental regulation: "…a state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for

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68 See *op. cit. n.6.*

69. *Tecnicas Medioambientales Tecmed S.A, v. The United Mexican States, ICSID* Award Case No. ARB (AF)/00/2.

70. *Idem.* Para. 122.

71. *Idem.*

72. Restatement of the Law Third *op. cit. n. 20 Section 712, Comment g.*

crime, or other action of the kind that is commonly accepted as within the police power of the states, if it is not discriminatory…".

In the context of the **Iran-United States Claims Tribunal**, the only award in which an allegation of taking was rejected on the grounds of police power regulations was *Too v. Greater Modesto Insurance Associates*,[73] where the claimant sought compensation for the seizure of his liquor licence by the United States Internal Revenue Service. The Tribunal said:

> "…A State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price…"]

The Tribunal in the *Lauder*[74,] case said about the interference with property rights that, "….Parties to [the Bilateral] Treaty are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State".

In the case of *Tecnicas Medioambientales Tecmed S.A, v. The United Mexican States*,[75] although the Tribunal found an expropriation, it has stated that: "the principle that the State's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable".

3) Interference of the measure with reasonable investment-backed expectations

Another criterion identified is whether the governmental measure affects the investor's reasonable expectations. In these cases the investor has to prove that his/her investment was based on a state of affairs that did not include the challenged regulatory regime. The claim must be objectively reasonable and not based entirely upon the investor's subjective expectations.

In the 1934 *Oscar Chinn*[76] case, the Permanent Court of International Justice (P.C.I.J.) did not accept the contention of indirect taking[77] noting that, in those circumstances, a granting of a de facto monopoly did not constitute a violation of international law and that "favourable business conditions and good will are transient circumstances, subject to inevitable changes":[78]

> "No enterprise…can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs

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73. Award December 29, 1989, 23 Iran-United States Cl. Trib. Rep.378. Also see Seddigh and G. H. Aldrich *op. cit. no. 31*.

74. *Lauder (U.S.) v. Czech Republic* (Final Award) (September 3, 2002) available at www.mfcr.cz/scripts/hpe/default.asp

75. *See op. cit. n. 69*.

76. See *op. cit. n. 6*.

77. The P.C.I.J. employed "effective deprivation", as the standard for determining if the interference was sufficiently serious to constitute a compensable taking.

78. H. Seddigh, "What level of Host State Interference Amounts to a Taking under Contemporary International Law? *Journal of World Investment, 2001, Vol. 2, No. 4, pp. 631-84 at 646.*

duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State".

The Iran-U.S. Claims Tribunal in *Starett Housing Corp. v. Iran*[79] took into account the reasonable expectations of the investor:

> "Investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of economic and political system and even revolution. That any of these risks materialised does not necessarily mean that property rights affected by such events can be deemed to have been taken".

In Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States[80] the NAFTA Tribunal noted:

> "Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue…".

In *Tecnicas Medioambientales Tecmed S.A, v. The United Mexican States*,[81] the Tribunal attempted to determine whether the Mexican government's measures were "reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation". "…Even before the Claimant made its investment, it was widely known that the investor expected its investments in the Landfill to last for a long term and that it took this into account to estimate the time and business required to recover such investment and obtain the expected return upon making its tender offer for the acquisition of the assets related to the Landfill. To evaluate if the actions attributable to the Respondent – as well as the Resolution[82] – violate the Agreement, such expectations should be considered legitimate and should be evaluated in light of the Agreement and of international law".[83] Based on this and the fact that the "Resolution" was not proportionate to the "infringements"[84] by Techmed, the Tribunal found that the "Resolution" and its effects amounted to an expropriation.

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79. See *op. cit. n. 32*.

80 See *op. cit. n. 41*.

81. See *op. cit. n. 75.*

82. Resolution was the decision not to re-new the license.

83. Techmed Award, para. 50.

84. "All the infringements committed were either remediable or remediated or subject to minor penalties". Techmed Award para 148.

B. State practice

As a response to the growing jurisprudence in this field, the recently concluded ***US-Free Trade Agreements with Australia[85], Chile[86], Central America[87], Morocco[88] and Singapore[89]*** and the ***new US model BIT[90]*** provide explicit criteria of what constitutes an indirect expropriation. In the Annexes on Expropriation, they state that:

> The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors;
>
> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action interferes with distinct, reasonable, investment-backed expectations; and
>
> (iii) the character of the government action.

In addition, they address indirect expropriation and the right to regulate:

> Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.

The updated Canada's model Foreign Investment Promotion and Protection Agreement (FIPA)[91] stipulates that it:

> "incorporates a clarification of indirect expropriation which provides that, except in rare circumstances, non-discriminatory measures designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation and are not subject, therefore, to any compensation requirements".

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85 US-Australia Free Trade Agreement signed on March 1, 2004, [Annex 11-B, Article 4(b)].

86. The US-Chile Free Trade Agreement was signed on June 6, 2003 (Annex 10-D).

87 US-Central America Free Trade Agreement (CAFTA) signed on January 28, 2004, (Annex 10-C). The Central American countries are: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua.

88 US-Morocco Free Trade Agreement signed on June 15, 2004 (Annex 10-B).

89 US Trade representative Robert Zoellick to Singapore Minister of Trade and Industry, George Yeo on 6 May, 2003.

90 For the text of the model BIT see http://www.state.gov/e/eb/rls/prsrl/2004/28923.htm

91 For the text of the new FIPA model see http://www.dfait-maeci.gc.ca/tna-nac/what_fipa-en.asp

Summing up

- Expropriation (direct and indirect) requires compensation, based on clearly set rules of customary international law. However, while determination of a direct expropriation is relatively straightforward to make, determining whether a measure falls into the category of indirect expropriation has required tribunals to undertake a thorough case-by-case examination and a careful consideration of the specific wording of the treaty.

- The line between the concept of indirect expropriation and non-compensable regulatory governmental measures has not been systematically articulated. However, a close examination of the relevant jurisprudence reveals that, in broad terms, there are some criteria that tribunals have used to distinguish these concepts: i) the degree of interference with the property right, ii) the character of governmental measures, i.e. the purpose and the context of the governmental measure, and iii) the interference of the measure with reasonable and investment-backed expectations.

- Tribunals, instead of focusing exclusively on the "sole effect" on the owner, have also often taken into account the purpose and proportionality of the governmental measures to determine whether compensation was due. Thus a number of cases were determined on the basis of recognition that governments have the right to protect, through non-discriminatory actions, *inter alia*, the environment, human health and safety, market integrity and social policies without providing compensation for any incidental deprivation of foreign owned property.

- Up to now only a handful of international agreements articulated this difference. Recently, new generation of investment agreements, including investment chapters of Free Trade Agreements, have introduced specific language and established criteria to assist in determining whether an indirect expropriation requiring compensation has occurred. These criteria are consistent with those emerging from arbitral decisions.

- At the same time, prudence requires to recognise that the list of criteria which can be identified today from state practice and existing jurisprudence is not necessarily exhaustive and may evolve. Indeed, new investment agreements are being concluded at a very fast pace and the number of cases going to arbitration is growing rapidly. Case-by-case consideration which may shed additional light will continue to be called for.

ANNEX 211

Ad Hoc NAFTA Arbitration under UNCITRAL Rules

CHEMTURA CORPORATION
(formerly Crompton Corporation)

CLAIMANT

v.

GOVERNMENT OF CANADA

RESPONDENT

AWARD

Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, Chairperson
The Honorable Charles N. Brower, Arbitrator
Prof. James R. Crawford, Arbitrator

Secretary to the Tribunal:
Dr. Jorge E. Viñuales

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250. The Tribunal turns then to the analysis of the measures allegedly amounting to an expropriation in breach of Article 1110 of NAFTA.

b. Cancellation of Chemtura's lindane registrations

1. Claimant's position

251. The Claimant argues that the PMRA's suspension of Crompton Canada's lindane product registrations were measures tantamount to expropriation (Mem., par. 519-520). These measures were not taken for a public purpose, as the PMRA had no new, pertinent or reasonable scientific rationale. The measures were in fact triggered by trade considerations and the related pressure from the United States (Mem., para. 521 ff). Moreover, the expropriation of the Claimant's lindane products business in Canada violated due process and was in breach of international law (Article 1105(1) of NAFTA), for reasons explained under the minimum standard heading (Mem., para. 527 ff). Finally, Canada paid no compensation (Mem., para. 531-532).

2. Respondent's position

252. The Respondent argues that only Chemtura Canada, the Claimant's enterprise as a whole, qualifies as an investment capable of being expropriated. Elements of the value of the enterprise such as goodwill, market share, and customers are not investments under Article 1139 and, hence, cannot be expropriated investments for the purposes of NAFTA (C-Mem., para. 500, 516).

253. Further, according to the Respondent, there has been no substantial deprivation of the Claimant's investment (C-Mem., par. 531 ff) because (i) the Withdrawal Agreement and PMRA's subsequent decision to phase out lindane use in general (not only for canola) had only a limited impact on Chemtura Canada; (ii) Canada never controlled the Claimant's investment, directed its operations, took proceeds of sales, intervened in management or shareholder activities, or otherwise interfered with it in any manner that can be characterized as expropriation or conduct tantamount to expropriation. In reality, the Claimant controlled all aspects of Chemtura Canada's operations; was granted an extended phase-out period during which it could deplete its lindane stock; was permitted to sell two replacement pesticide products in Canada even before the beginning of the phase-out period; and was consistently profitable before, during, and after the ban on lindane was instituted (C-Mem., para. 500). According to the

Respondent, the hearing further confirmed that the Claimant was not substantially deprived of its investment (PHB Resp., para. 217 ff).

254. Even if the Tribunal concluded that there was a substantial deprivation of the Claimant's investment, there was still no expropriation because the PMRA's decision to phase out all agricultural applications of lindane was a valid exercise of Canada's police powers to protect public health and the environment (C-Mem., para. 500 and para. 565 ff). The decision of the PMRA to de-register lindane meets the test of this doctrine because (i) it was not made in an arbitrary manner since it respected due process and was based on valid science (C-Mem., para. 596 ff); (ii) it was non-discriminatory (C-Mem., para. 613 ff); (iii) it was not excessive (C-Mem., par. 622 ff); and (iv) it was made in good faith to combat the serious occupational exposure risks posed by lindane (C-Mem., para. 630 ff; PHB Resp., para. 219-220).

255. The Respondent further notes that the hearing confirmed that the Claimant entered into the Withdrawal Agreement voluntarily. As result, it cannot now claim that its investment with respect to lindane use on canola was expropriated (PHB Resp., para. 221 ff).

256. Finally, as there is no expropriation for the Respondent, there is no need to consider the conditions set by Article 1110(1)(a) to (d) for a lawful expropriation (C-Mem., para. 660).

3. Tribunal's determination

257. As noted above, in assessing a claim of expropriation, NAFTA tribunals have followed a three-step approach inquiring (i) whether there is an investment capable of being expropriated, (ii) whether that investment has in fact been expropriated, and (iii) whether the conditions set in Article 1110(1)(a)-(d) had been satisfied. The application of the test is not disputed in the present case, and the Tribunal sees no reason to depart from such approach. There is, however, some divergence of views between the Parties on two issues.

258. The first issue is whether the Claimant had an investment in Canada capable of being expropriated. Despite some initial disagreement as to the identification of the Claimant's investment, the Parties agree that the investment allegedly expropriated is Chemtura Canada (or its predecessors in title) (Reply, para. 537; C.-Mem., para. 504ff). Such investment falls squarely under the definition of "investment" given in

Article 1139 of NAFTA, according to which "investment means: (a) an enterprise [...]". The Tribunal also considers, as noted in the foregoing section, that elements such as goodwill, customers or market share, or those covered under the more generic heading of the Claimant's "lindane business" in Canada, are part of the overall investment which Chemtura Canada represented. Therefore, the Tribunal concludes that the first part of the test is satisfied.

259. The second part of the test focuses on whether the Claimant's investment, Chemtura Canada, was in fact "expropriated" or "taken". As discussed above, in assessing whether the Claimant has suffered an indirect expropriation or a measure tantamount to expropriation, the Tribunal must determine whether the measures challenged under this heading, i.e. the cancellation of Chemtura Canada's lindane registrations, amounted to a "substantial deprivation" of the Claimant's investment. As noted by the Tribunal in paragraph 249 above, the determination of whether there has been a substantial deprivation must be based on a fact-sensitive assessment. The Tribunal will thus consider the facts on record which may give the measure or degree of the deprivation allegedly suffered by the Claimant.

260. A first indication of the impact of the measures challenged on the Claimant's overall investment is provided in the Damages Assessment Report presented by the Claimant. In explaining why the book value approach is not suitable in this case, the Claimant's expert states that "prior to the measures Crompton's lindane products represented a small share of its overall business" (LECG Report, para. 57). This assertion is further elaborated in a footnote, stating that "[p]rior to the measures in 1999, lindane based products represented around 6.3% of Crompton's overall Canadian business measured by output (pounds) and approximately 17.6% measured by net sales" (LECG Report, para. 57, footnote 27).

261. Second, at the hearing, Mr. Thomson, at the time Formulations Manager of Chemtura Canada, testified (i) that Claimant's crop protection business was at all relevant times only 10% of the sales of the company (Tr., 3 September 2009, 321:9-14), (ii) that 80% of the crop protection business of Chemtura Canada was seed treatment (the percentage of crop protection business relative to the overall business of Chemtura Canada was not specified by the witness) (Tr., 3 September 2009, 322:22-25, 323:1-2), and (iii) that sales from lindane products were no more than 5% of the overall sales from the crop protection business (itself a subset of the overall sales) of Chemtura Canada (Tr., 3 September 2009, 324:24-25, 325:1-9).

262. These indications are confirmed by the second report of the Respondent's quantum expert, where it is stated that: "after being provided with further financial statements for the crop protection division and the lindane product lines by Claimant, we were able to confirm our previous conclusions [...]. Chemtura Canada's financial statements reveal that net sales of lindane-based products represented approximately 10 percent of Crompton Canada's sales" (Second Navigant Report, para. 128).

263. The Tribunal gathers from this evidence that the sales from lindane products were a relatively small part of the overall sales of Chemtura Canada at all relevant times. Under these circumstances, the interference of the Respondent with the Claimant's investment can not be deemed "substantial".

264. This conclusion is also supported by the fact that Chemtura Canada remained operational and its yearly sales, although reduced in 2002, continued an ascending trend between 2003 and 2007 reaching levels comparable to those of 1997 to 1999 (Exh. NCI-3). Finally, there is no allegation that the Respondent interfered with Chemtura Canada's management, daily operations, or the payment of dividends. in other words, the Claimant remained at all relevant times in control of its investment.

265. In summary, the evidence shows that the measures did not amount to a substantial deprivation of the Claimant's investment.

266. Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.[21]

267. Consequently, the Tribunal comes to the conclusion that the Respondent did not breach Article 1110 of NAFTA.

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21 Cf. in a different context *Saluka Investments B.V. v Czech Republic*, UNCITRAL Rules, Partial Award of 17 March 2006, para. 262.

ANNEX 212

Date of dispatch to the parties: December 16, 2002

International Centre for Settlement of Investment Disputes

MARVIN FELDMAN

v.

MEXICO
CASE No. ARB(AF)/99/1

AWARD

President	:	Prof. Konstantinos D. KERAMEUS
Members of the Tribunal	:	Mr. Jorge COVARRUBIAS BRAVO Prof. David A. GANTZ
Secretary of the Tribunal	:	Mr. Alejandro A. ESCOBAR and Ms. Gabriela ALVAREZ AVILA

In Case No. ARB(AF)/99/1,

between

Mr. Marvin Roy Feldman Karpa,
represented by
Mr. Mark B. Feldman, Ms. Mona M. Murphy, Mr. Douglas R.M. King
of Feldman Law Offices, P.C. (formely Feith & Zell, P.C.), and
Mr. Nathan Lewin and Ms. Stephanie Martz of the Law Firm of Miller,
Cassidy, Larroca & Lewin, L.L.P.

and

The United Mexican States,
represented by Lic. Hugo Perezcano Díaz, Consultor Jurídico
Subsecretaría de Negociaciones Comerciales Internacionales
Ministry of Economy

THE TRIBUNAL,
Composed as above,
Makes the following Award

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95. The Respondent also questions whether the Claimant can demonstrate the ownership of an "investment" that was allegedly expropriated in Mexico by Mexican authorities; in the absence of an investment, the Claimant has no standing to bring an action under Chapter 11. In particular, to the extent the Claimant is seeking payment of rebate amounts for October and November 1997, this is a debt obligation that is specifically excluded from the definition of investment under NAFTA Article 1139. Nowhere is there an "investment" of which the Respondent seized ownership and control (counter-memorial, para. 302 ff.).

H2. Applicable Law: NAFTA Article 1110 and International Law

96. A threshold question is whether there is an "investment" that is covered by NAFTA. The term "investment" is defined in Article 1139, in exceedingly broad terms. It covers almost every type of financial interest, direct or indirect, except certain claims to money. The first listed item under "investment" is "an enterprise." There is no disagreement among the parties that Corporación de Exportaciones Mexicanas, S.A. (CEMSA) is a corporate entity organized under the laws of Mexico, essentially wholly owned by the American citizen investor, Marvin Roy Feldman Karpa (first Feldman statement, para. 1). Among the dictionary definitions of "enterprise" are "a unit of economic organization or activity; *esp.* a business organization" (Webster's New Collegiate Dictionary, 1977 ed.). As such, the Tribunal determines that CEMSA comes within the term "enterprise" and is thus an "investment" under NAFTA. This conclusion is consistent with that reached by other NAFTA Chapter 11 tribunals. For example, the tribunal in *S.D. Myers v. Canada* concluded that a Canadian corporation organized for the purpose of facilitating hazardous waste exports to the United States, an affiliate of S.D. Myers in the United States owned by the same shareholders as S.D. Myers, satisfied the NAFTA requirements for an "investment." (*S.D. Myers v. Government of Canada*, Partial Award, November 13, 2000, paras. 230-231, http://www.state.gov/documents/organization/3992.pdf)

97. Expropriation under Chapter 11 is governed by NAFTA Article 1110, although NAFTA lacks a precise definition of expropriation. That provision reads in pertinent part as follows:

> 1. No Party may *directly or indirectly* nationalize or expropriate an investment of an investor of another Party in its

territory or *take a measure tantamount to nationalization or expropriation* of such an investment ("expropriation"), except:

(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law and article 1105(1); and
(d) on payment of compensation in accordance with paragraphs 2 through 6.[5]

The key issue, in general and in the instant case, is whether the Respondent's actions constitute an expropriation.

98. The Article 1110 language is of such generality as to be difficult to apply in specific cases. In the Tribunal's view, the essential determination is whether the actions of the Mexican government constitute an expropriation or nationalization, or are valid governmental activity. If there is no expropriatory action, factors a-d are of limited relevance, except to the extent that they have helped to differentiate between governmental acts that are expropriation and those that are not, or are parallel to violations of NAFTA Articles 1102 and 1105. If there is a finding of expropriation, compensation is required, *even if* the taking is for a public purpose, non-discriminatory and in accordance with due process of law and Article 1105(1).

99. The view that the conditions (other than the requirement for compensation) are not of major importance in determining expropriation is confirmed by the Restatement of the Law of Foreign Relations of the United States, a source relied on by many American and Canadian lawyers that has been discussed in the memorials of both the Claimant and the Respondent in this proceeding.[6] For example, according to the Restatement, the public purpose requirement "has not figured prominently in international claims practice, perhaps because the

[5] Emphasis added. Paras. 2-6 provide for compensation "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place;" that compensation be paid without delay and be fully realizable; include interest in a hard currency; and be freely transferable. *Id*. Article 1110(1) (2-6).

[6] Memorial, paras. 151 ff.; counter-memorial, paras. 335 ff. (with some qualifications). It is important to note that the language used by the Restatement, section 712, differs significantly from that used in NAFTA, even though the concepts are similar.

concept of public purpose is broad and not subject to effective reexamination by other states." (AMERICAN LAW INSTITUTE, Restatement of the Law Third, the Foreign Relations of the United States, USA, American Law Institute Publishers, Vol. 1, 1987, (hereinafter Restatement), Section 712, Comment g.). Similarly, the Restatement suggests that if proper compensation is paid for an expropriation, the fact that the taking was not for a public purpose and was discriminatory, "might not in fact be successfully challenged." A comment observes, perhaps somewhat inconsistently, that "economic injuries [falling under section 712(3)] are generally unlawful because they are discriminatory or are otherwise arbitrary." (*Id.,* Sec. 712, Comment i.) This last clause suggests that if the government actions (legislative, administrative or judicial) are discriminatory or arbitrary (or perhaps unfair or inequitable), as arguably is the case here, they are more likely to be viewed as expropriatory, imparting a degree of circularity to the "expropriation versus regulation" dichotomy.

100. Most significantly with regard to this case, Article 1110 deals not only with direct takings, but indirect expropriation and measures "tantamount to expropriation," which potentially encompass a variety of government regulatory activity that may significantly interfere with an investor's property rights. The Tribunal deems the scope of both expressions to be functionally equivalent. Recognizing direct expropriation is relatively easy: governmental authorities take over a mine or factory, depriving the investor of all meaningful benefits of ownership and control. However, it is much less clear when governmental action that interferes with broadly-defined property rights -- an "investment" under NAFTA, Article 1139 -- crosses the line from valid regulation to a compensable taking, and it is fair to say that no one has come up with a fully satisfactory means of drawing this line.

101. By their very nature, tax measures, even if they are designed to and have the effect of an expropriation, will be indirect, with an effect that may be tantamount to expropriation. If the measures are implemented over a period of time, they could also be characterized as "creeping," which the Tribunal also believes is not distinct in nature from, and is subsumed by, the terms "indirect" expropriation or "tantamount to expropriation" in Article 1110(1). The Claimant has alleged "creeping expropriation." The Respondent has objected that the Claimant has in effect added a new element to the case which, among other things, should

have been submitted to the Competent Authorities under Article 2103(6) for a determination as to whether it should be excluded from consideration as an expropriation. The Restatement defines "creeping expropriation" in part as a state seeking "to achieve the same result [as an outright taking] by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned" (Restatement, Section 712, Reporter's Note 7). Since the Tribunal believes that creeping expropriation, as defined in the Restatement, noted above, is a form of indirect expropriation, and may accordingly constitute measures "tantamount to expropriation", the Tribunal includes consideration of creeping expropriation along with its consideration of these closely related terms. [7]

102. Ultimately, decisions as to when regulatory action becomes compensable under article 1110 and similar provisions in other agreements appear to be made based on the facts of specific cases. This Tribunal must necessarily take the same approach.

103. The Tribunal notes that the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this (see *infra* para. 105).

104. Drawing the line between expropriation and regulation has proved difficult both

[7] The Tribunal notes that the *S.D. Myers* tribunal (citing *Pope & Talbot*) effectively concluded that the words "tantamount to expropriation" were designed to embrace the concept of "creeping" expropriation rather than to "expand the internationally accepted scope of the term expropriation." *See S.D. Myers v. Government of Canada,* Partial Award, November 13, 2000, para. 286, http://www.state.gov/documents/organization/3992.pdf.

in the pre-NAFTA context and for the handful of NAFTA Chapter 11 tribunals that have considered the issue. Here again, despite the less specific language and the lack of references to "tantamount to expropriation," the Restatement is somewhat helpful, particularly the comments, in understanding customary international law in this area. Section 712 reads in pertinent part as follows:

> "A state is responsible under international law for injury resulting from:
>
> (1) a taking by the state of the property of a national of another state that
>
> (a) is not for a public purpose, or
> (b) is discriminatory, or
> (c) is not accompanied by provision for just compensation."

While the language itself differs considerably from Article 1110, many of the essential substantive elements are the same, particularly the concept of a taking and the conditions.

105. The "comments" to the Restatement are designed to assist in determining, *inter alia*, how to distinguish between an indirect expropriation and valid government regulation:

> A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory... *A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory....* (Restatement, Section 712, comment g, emphasis supplied.)

106. It is notable that the Restatement comment specifically includes "taxation" as a possible expropriatory action and establishes state responsibility, *inter alia*, for unreasonable interference with an alien's property. At the same time, non-discriminatory, bona fide *general* taxation does not establish liability. The Reporter's Notes to the Restatement further suggest that "whether an action by the state constitutes a taking and requires compensation under international law, or is a police power regulation or tax that does not give rise to an obligation to

compensate even though a foreign national suffers loss as a consequence" must be determined in light of all the circumstances (Restatement, Section 712, Reporter's Note 5).

107. Along with the Restatement, this Tribunal has also sought guidance in the decisions of several earlier NAFTA Chapter 11 Tribunals that have interpreted Article 1110. The Tribunal realizes that under NAFTA Article 1136(1), "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case," and that each determination under Article 1110 is necessarily fact-specific. However, in view of the fact that both of the parties in this proceeding have extensively cited and relied upon some of the earlier decisions, the Tribunal believes it appropriate to discuss briefly relevant aspects of earlier decisions, particularly *Azinian v. United Mexican States* and *Metalclad v. United Mexican States*. Nevertheless, there has been only one prior finding of a taking under Article 1110, in *Metalclad,* and the principal rationale for that decision was substantially overruled by the reviewing court, the Supreme Court of British Columbia. In the other decisions to date which have considered allegations of a violation of Article 1110 and attempted to articulate criteria for the determination (*S.D. Myers v. Canada* and *Pope & Talbot v. Canada*) the tribunals for various reasons have failed to find violations of Article 1110.

H3. Respondent's Actions as an Expropriation Under Article 1110.

108. The Tribunal has struggled at considerable length, in light of the facts and legal arguments presented, the language of Article 1110 and other relevant NAFTA provisions, principles of customary international law and prior NAFTA tribunal decisions, to determine whether the actions of the Respondent relating to the Claimant constituted indirect or "creeping" expropriation, or actions tantamount to expropriation. (There is in this case no allegation of a direct expropriation or taking under Article 1110.) The conclusion that they do not is explained below.

109. The facts presented here might, depending on their interpretation, appear to support a finding of an indirect or creeping expropriation. The Claimant, through the Respondent's actions, is no longer able to engage in his business of purchasing Mexican cigarettes and exporting them, and has thus been deprived completely and permanently of any

ANNEX 213

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

IN THE PROCEEDING BETWEEN

SWISSLION DOO SKOPJE
(CLAIMANT)

AND

THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA
(RESPONDENT)

(ICSID CASE NO. ARB/09/16)

AWARD

Members of the Tribunal:

H.E. Judge Gilbert Guillaume, *President*
Mr. Daniel M. Price, *Arbitrator*
Mr. J. Christopher Thomas, Q.C., *Arbitrator*

Secretary of the Tribunal:

Ms. Milanka Kostadinova

Date of Dispatch to the Parties: July 6, 2012

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307. The Respondent noted in its Rejoinder (and at the hearing it appeared that the situation had not changed) that no formal criminal charges have yet been filed against Swisslion or its managers.[371]

308. The State is not responsible for the swearing of criminal complaints by private parties. Its duties arise in its response thereto. In the present circumstance, without having a fuller evidentiary record before it, and in the absence of concrete measures, the Tribunal refrains from making a finding in respect of these matters.

b) Expropriation

309. The Tribunal now turns to the allegation that as a result of the court proceedings, the Respondent unlawfully expropriated the Claimant's Second Tranche of shares without payment of compensation.

310. In its Memorial, the Claimant made the uncontroversial point that a State is responsible for an expropriation effected by any of its organs, including its judiciary. It went on to assert that an expropriation had been effected by the courts' terminating the contract "on the ostensible grounds that Swisslion had not fulfilled its obligations to make the requisite investment contributions during the second half of 2006…"[372] It added that even if it had been lawful to terminate the contract, Macedonian law and the Treaty would have required compensation for the repossession of the shares.[373] The Reply emphasised the latter point in particular, noting that the expropriation claim "does not depend upon a finding that the contract was wrongfully terminated. Rather, it rests primarily upon the fact that Swisslion received no compensation for the Second Tranche, for

[371] Rejoinder, para. 262.

[372] Memorial, paras. 117, 121.

[373] Memorial, para. 123.

which it had paid valuable consideration, when those shares were subjected to a 'compulsory transfer of property rights'."[374]

311. The Tribunal will address both elements of the expropriation claim.

312. With respect to the first element, the contract was terminated and the effect of this order was to transfer the shares back to the selling party. It has already been held that the Ministry was entitled to form the view that the contract had not been complied with and to put that view before the courts. The fact that the courts accepted that view and the judicial decisions have not been successfully challenged before this Tribunal means that the argument that the court effected an expropriation must fail.

313. One of the cases on which the Claimant placed reliance, *Saipem v. Bangladesh,* noted that the claimant itself in that case recognized that a predicate for alleging a judicial expropriation is unlawful activity by the court itself.[375] The award recounts the claimant's acknowledgement that it is "*an illegal action of the judiciary* which has the effect of depriving the investor of its contractual or vested rights constitutes an expropriation which engages the State's responsibility".[376] This point, with which the respondent in that case agreed, was accepted by the tribunal, which noted that it concurred "with the parties that expropriation by the courts *presupposes that the courts' intervention was illegal*…"[377] [Emphasis added.]

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[374] Reply, para. 58.

[375] Cited at para. 118 of the Memorial.

[376] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, para. 127.

[377] *Id*., para. 180. It is true that that tribunal went on to hold that this does not mean that expropriation by a court necessarily presupposes a denial of justice evidently concerned about imposing a requirement to exhaust all local remedies before judicial action could be challenged. Be that as it may, in the event the tribunal found that that the courts decided the case on facts and points of law that had not been in dispute between the parties, the courts' intervention was "abusive", "grossly unfair", and that they "exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and this violated the internationally accepted principle of prohibition of abuse of rights." Award, para. 155-156, 161, and 187. The other case on which reliance was placed, *Rumeli v. Kazakhstan*, found liability on a different basis, namely, collusion between the State and the claimants' competitor, which collusion was then effected through court proceedings. It is not apposite to the facts of the present case.

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

315. Turning to the second element, it is common ground that the courts did not order the Ministry to pay the Claimant for the purchase price when it resolved to terminate the contract. The question is whether, as the Claimant has alleged, this in itself amounts to an expropriation under the Treaty.

316. In his opening argument, counsel for the Claimant argued that a fundamental defect of the Macedonian courts' treatment of the contractual litigation was their failure to consider awarding compensation to Swisslion in the event that the Share Sale Agreement was terminated.[378] It was asserted that the failure to pay compensation for the taking of the shares and even to consider the issue was "either grossly incompetent or in bad faith".[379] The Respondent took issue with this contention and in its opening directed the Tribunal to the minutes of the hearing before the Skopje Basic Court hearing on 30 September 2009 where Swisslion touched on the "legal consequences from the termination" as well as to its arguments on appeal.[380] It asserted that while Swisslion

[378] Transcript, Day 1, pp. 38-42.

[379] Transcript, Day 1, 40: 3-6.

[380] Transcript, Day 1, 228: 2-25, 229: 1-20 with reference to Exhibits C-126 (in which Swisslion's legal representative commented in the course of argument that "[i]f the legal interest of the Claimant [i.e., the Ministry of Economy] lies in the termination of this Agreement, we ask the Court to take into account the legal consequences from the termination of the same") and C-76 (the company's appeal submission, where at para. 40, it posed the question "[w]hat about the money paid for these shares? How and by whom will the money paid as a purchase price under Article 3 of the disputed Agreement be refunded?"

alluded to the payment issue in argument before the courts, no request for the payment of compensation was advanced in the local proceedings.[381] Moreover, when it came to Prof. Nedkov's cross-examination, and he was asked whether, the Share Sale Agreement's having been terminated, it was open to Swisslion to commence a separate lawsuit to claim the return of the purchase price, he agreed that this was appropriate under Macedonian law.

317. In particular, when it was put to him that the Claimant did *not* make a formal claim to the Skopje Basic Court for a specific amount of compensation in accordance with Macedonian law, Prof. Nedkov testified:

> *It should not have done this. According to the provisions of law on obligation, an important fact is the termination of the contract by dissolution, while the relations after the dissolution are clarified. If there are any disputes, contentious issues, then you go to the court again. But these are new lawsuits, separate from the main issue if that had dealt with whether the conditions for dissolution of the contract had been met.*[382] *[Emphasis added.]*

318. Were such a lawsuit to be commenced, the court would examine whether there had been a change in the value of the shares between the time of their purchase and the time of their transfer back to the Ministry.[383] This latter point is of some importance; the evidence suggests that the value of the shares for the purposes of compensation when the contract was terminated was not fixed as the price originally paid for the share. That is, it did not automatically follow from the fact of termination that the purchaser would be entitled to a return of the purchase price.

319. Although counsel for the Claimant briefly adverted to his co-counsel's prior submissions on the compensation issue in his closing argument, he did not elaborate upon them in light of the oral testimony, a point noted by counsel for the Respondent in his closing argument.[384] The Tribunal has already found that the termination resulted from a contract dispute in which one Party, which happened to be a governmental entity, formed the view that its counterparty was in breach and put

[381] Transcript, Day 1, 229: 16-20.

[382] Transcript, Day 3, 64: 9-17.

[383] Transcript, Day 3, 43: 8-15; 63: 2-23.

[384] Transcript, Day 5, 74: 13-15, 133: 3-25, 134: 1-25, 135: 1-2.

the matter before the courts. On the evidence before the Tribunal, it was open to the counterparty to petition the court for compensation in the event of termination. In the circumstances of this case, the Tribunal considers that no expropriation of the moneys paid for the shares was effected by the fact that the courts terminated the Share Sale Agreement and did not order a return of the purchase price in the absence of a request for such relief. The Tribunal accepts the Respondent's submission that no claim for compensation was made in accordance with Macedonian civil procedure.[385]

320. The fact that the Tribunal notes that Claimant apparently never sought in the court proceeding, nor according to its legal expert would the court have been competent to award, a return of the purchase price should not to be seen as imposing an exhaustion requirement on the Claimant. Rather, the Tribunal is of the view that, in these circumstances the Claimant has not proven the juridical fact on which the second limb of its expropriation case is based, i.e., that it had a clear right to recover the purchase price in that proceeding such that the court's failure to so order constituted an expropriation.

321. In the end, the Tribunal finds that no claim for expropriation has been made out under Article 6 of the Treaty and the claim is dismissed.

c) Observance of Commitments

322. The Claimant argued further that the Respondent was in breach of Article 12 of the Treaty, Observance of commitments, which states that:

> Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.

[385] Transcript, Day 5, pp. 133-135.

ANNEX 214

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

In accordance with the
United Nations Commission on International Trade Law (UNCITRAL)
Arbitration Rules

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., ET AL.
(CLAIMANTS)

V.

UNITED STATES OF AMERICA
(RESPONDENT)

AWARD

Before the Arbitral Tribunal constituted under Chapter 11
of the North American Free Trade Agreement, and comprised of:

Mr. Fali S. Nariman, President
Prof. James Anaya, Arbitrator
Mr. John R. Crook, Arbitrator

Secretary of the Tribunal
Ms. Janet Whittaker

Date of dispatch to the parties: January 12, 2011

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River's cigarettes should they be sold off-reservation in Michigan. The Claimants described this provision as particularly disadvantageous to Grand River, as its manufacturing facility is not far from the Detroit-Windsor frontier, and the Detroit market offers great potential for off-reservation sales of its low-priced cigarettes. As noted above,[22] the United States contended in its initial jurisdictional objections that this claim implicated tax measures; that the Claimants had not complied with the procedural requirements of NAFTA's Article 2103 relating to claims involving tax measures; and that Article 2103(4)(g) precluded such claims with respect to new taxation measures that have adequate tax policy justifications.

124. The Tribunal held above that it does not have jurisdiction with respect to claims by Jerry Montour, Kenneth Hill and Grand River involving off-reservation sales. The gravamen of the claim regarding Michigan's equity assessment is that it improperly discriminates with respect to off-reservation sale of Grand River's cigarettes in Michigan. As the Tribunal does not have jurisdiction with respect to claims involving such sales, it need not decide the Respondent's objection involving asserted non-compliance with NAFTA Article 2103.

VI. NAFTA ARTICLE 1110 – EXPROPRIATION AND LEGITIMATE EXPECTATIONS

125. The Claimants' case implicated two separate sets of measures by states of the United States. First, they addressed the alleged adverse impact of the Allocable Share Amendments on off-reservation sales of cigarettes manufactured by Grand River. The Tribunal has determined that it only has jurisdiction over claims linked to Arthur Montour's investment activities, which relate exclusively to on-reservation or other Indian country sales. Hence, the claims as they relate to the Allocable Share Amendments and off-reservation sales fail for lack of jurisdiction and will not be considered further.

126. Second, the claims addressed the impact of the Respondent's enforcement measures under the complementary legislation against Arthur Montour and his distribution companies. These claims are within the Tribunal's jurisdiction and are assessed below. In this section, the Tribunal addresses the claim of expropriation of Arthur Montour's investment under NAFTA Article 1110, and the contention that the disputed measures are inconsistent with his reasonable and legitimate expectations, a contention also made to support his claim under NAFTA Article 1105.

A. The Question of the Claimant's Reasonable Expectations

127. In his claims under both NAFTA Articles 1105 and 1110, Arthur Montour contended that the disputed measures, including the complementary legislation, were inconsistent with his reasonable investment-backed expectations. The Respondent agreed that the issue of an investor's reasonable expectations can be relevant to a claim of regulatory expropriation under NAFTA Article 1110, but maintained that

[22] *Supra*, ¶ 73.

such expectations were not legally relevant to claims of denial of fair and equitable treatment under the customary law minimum standard of treatment under NAFTA Article 1105. Given this disagreement, the Tribunal addresses issues related to Arthur Montour's reasonable expectations here, in the context of the Article 1110 claim, where both Parties recognize their potential relevance. The following discussion applies with equal weight to all of Arthur Montour's arguments that his legitimate expectations were frustrated contrary to NAFTA's Chapter 11.

1. Reasonable Expectations: First Nations Status

128. Arthur Montour stressed his status as a member of one of the First Nations in North America and the nature of his business activities, which he described as involving trade among sovereign indigenous peoples. On this basis, he maintained that he had a legitimate expectation not to be subjected to MSA-related regulatory actions by the states of the United States in respect of his tobacco-related activities. Citing the opinions of the Claimants' experts, Professors Clinton and Fletcher, Mr. Montour urged that he was "entitled to expect that none of [his] business activities would even be subjected to the Escrow Statutes, the Allocable Share Amendments, the Contraband laws or any Equity Assessment legislation."

129. Mr. Montour emphasized that he is a member of the Haudenosaunee, the Iroquois Confederation, which was never defeated militarily and was assured the right to pursue parallel and independent political and economic life by the Seventeenth-Century Two Row Wampum Treaty and subsequent treaties, including the 1794 Treaty of Canandaigua with the United States. He placed particular emphasis on his understanding of Article 3 of the 1794 Jay Treaty and the Treaty of Ghent, which ended the War of 1812 between the United States and the United Kingdom and reaffirmed the relevant Jay Treaty provisions.[23] Article 3 of the Jay Treaty provides:

> It is agreed that it shall at all Times be free to His Majesty's Subjects, and to the Citizens of the United States, and also to the Indians dwelling on either side of the said Boundary Line freely to pass and repass by Land, or Inland Navigation, into the respective Territories and Countries of the Two Parties on the Continent of America (the Country within the Limits of the Hudson's Bay Company only excepted) and to navigate all the Lakes, Rivers, and waters thereof, and freely to carry on trade and commerce with each other. ...
>
> No Duty of Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales, or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

[23] The Treaty of Ghent reaffirmed Jay Treaty obligations under discussion here, but did not confer new or additional rights potentially relevant here.

130. Mr. Montour also urged that under U.S. domestic law, individual states of the United States do not have jurisdiction to regulate commerce among Native Americans, especially when it involves transactions outside of the states' geographic boundaries or within "Indian country," including reservation lands. In this regard, his tobacco distribution businesses (Native Wholesale Supply and its predecessor, Native Tobacco Direct) purchased large quantities of cigarettes F.O.B. from Grand River at its plant in Canada and imported them into the United States. Many were sold at wholesale to Native American purchasers on the reservation lands within the Seneca Nations Territory in northern New York, who then offered them for sale, either at retail outlets on the Seneca reservation or to customers across the United States, often via the Internet. Such wholesale sales to customers on the Seneca reservation accounted for much of NWS' business, constituting about 68% of NWS' total sales in 2007.

131. The state of New York has not applied its MSA-related legislation to Mr. Montour's companies on the Seneca reservation. It has not collected escrow in connection with their sales, nor has it taken relevant enforcement action under New York's Complementary legislation. Accordingly, Native Wholesale Supply's sales to customers on the Seneca Reservation are not at issue here. However, NWS also sold substantial quantities of Grand River's cigarettes to Native American wholesalers and retailers operating on reservation lands in other states of the United States, as well as to such dealers in the state of Oklahoma operating within areas that qualify as "Indian country" with similar immunities from state law. Authorities in several of these other states have sought to apply their complementary legislation with respect to the Claimants' on-reservation and other Indian country sales.

132. As viewed by the Claimants' experts, Professors Clinton and Fletcher, under the provision of the Commerce Clause of the U.S. Constitution related to "Indians" and the related body of domestic law generally referred to as "federal Indian law," the power to regulate commerce among Native Americans is reserved solely to the U.S. federal government, such that, with limited exceptions, states cannot regulate their activities, especially within their recognized lands, absent a delegation from the U.S. Congress. In the view of these experts, the states could not under the U.S. Constitution and federal Indian law lawfully apply the Escrow Acts, the Allocable Share Amendments, or take enforcement measures under the complementary legislation, with respect to the Claimants' activities. The Claimants' experts provide elaborate and highly technical arguments to this effect, citing an array of judicial precedents and stressing the factual nexus between the Claimants' business activities, their status as First Nations investors, and the location of the transactions.

133. The Respondent disputed the Claimants' characterizations of the Jay Treaty and applicable U.S. domestic law, and denied that Arthur Montour could reasonably expect that his activities would be wholly immune from state regulation.

134. With respect to the Jay Treaty, the United States asserted that the Claimants had no reasonable expectation that the Treaty would shield their business from governmental regulation. In the Respondent's view, the treaty assures rights for individual Native

Americans to cross the U.S.-Canadian border, as well as limited rights for their peltries and personal goods. It does not insulate an international and interstate tobacco business involving billions of cigarettes from regulation. The Respondent cited in this regard multiple decisions by both U.S and Canadian courts holding that the Jay Treaty does not authorize indigenous persons' duty-free passage of commercial goods.

135. As to U.S. domestic law, the Respondent relied on expert reports by Professor Carol Goldberg and contended that the Claimants—and, as relevant here, Mr. Arthur Montour—had no reasonable expectation of immunity from state regulation arising from U.S. federal Indian law. It urged that "Indian country" is a term of art in U.S. law, encompassing reservations and certain other areas, and that U.S. states can regulate activities involving Native Americans outside of Indian country as well as activities occurring partially inside and partially outside.

136. In the Respondent's view, Arthur Montour's actions took place partially off reservation, and had significant off-reservation effects. Native Wholesale Supply shipped large quantities of cigarettes across large areas of the United States outside of Indian country. Further, the large volumes of cigarettes shipped to on-reservation customers were intended for re-sale to non-Indian customers for consumption off-reservation, and so had substantial off-reservation impacts. By way of example, the Respondent cited evidence showing sales of millions of cigarettes to customers on reservations in California with small Native American populations, such as the sale of 70 million cigarettes to a shop on a small reservation, equaling 116 packs per day per Native American resident.

137. The Tribunal believes that both Parties advanced positions regarding the state of U.S. federal Indian law that were unjustifiably categorical. Both posited legal "bright lines" in situations where they do not exist. In the Tribunal's understanding, U.S. federal Indian law is a complex and not altogether consistent mixture of constitutional provisions, federal statutes, and judicial decisions by the U.S. Supreme Court and other courts. Determining the contents of that law, and its likely impact on particular types of state regulation, often calls for necessarily uncertain predictions of how future courts will apply past decisions involving different settings and different types of state regulation.

138. What is clear from the Parties' submissions and their experts' reports is that U.S. domestic law is currently far from conclusive about the question raised here of the extent of permissible state regulation. The Tribunal notes that the Claimants' experts, Professors Clinton and Fletcher, and the Respondent's expert, Professor Goldberg, are all eminent scholars renowned for their expertise in federal Indian law, yet Professor Goldberg arrives at a conclusion opposite to that of the other two.

139. Both parties apparently would have the Tribunal resolve this highly contested question of U.S. domestic law, which the Tribunal declines to do. In determining, within the framework of this NAFTA proceeding, whether Arthur Montour could have reasonably harbored an expectation that his tobacco distribution activities would

not face state regulation, it is not for this Tribunal to decide whether or not he is correct on the underlying domestic legal proposition of immunity from the state regulation. Even if the Tribunal ultimately were to agree with him on the question of U.S. domestic law, that would not settle the matter of what regulatory response he could reasonably expect when he and his company embarked on their business ventures involving sales in the United States.

140. The Tribunal understands the concept of reasonable or legitimate expectations in the NAFTA context to correspond with those expectations upon which an investor is entitled to rely as a result of representations or conduct by a state party. As the tribunal in *Thunderbird Gaming* explained, the "concept of 'legitimate expectations' relates ... to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."[24] The question of reasonable expectations, therefore, is not equivalent to whether or not an investor is ultimately right on a contested legal proposition that would favor the investor.

141. The "conduct" of the United States pointed to by the Claimants as giving rise to reasonable expectations of immunity from MSA measures is U.S. federal Indian law and the Jay Treaty. Ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party. Even accepting that cited U.S. federal Indian law and the Jay Treaty might serve as sources of reasonable or legitimate expectations for the purposes of a NAFTA claim, the Tribunal finds that they do not in this case.

142. As to U.S. domestic law, given its unsettled nature in relevant respects, it is implausible to find that Mr. Montour could have reasonably expected, and reasonably relied on such an expectation as a prudent investor, that states would refrain from applying the MSA measures to him as they have done. As demonstrated by Professor Goldberg's expert report, U.S. states had at least a colorable argument under domestic law for valid application of the MSA measures to his activities. By this observation the Tribunal is not expressing agreement with the argument in favor of state regulation. The point is that the relative strength of this argument and the range of relevant domestic judicial precedents were such that Mr. Montour was not in a position to reasonably harbor an expectation, upon which he would be entitled to rely under NAFTA, that he would be free from application of the MSA measures. The Tribunal believes, however, that Mr. Montour did have a reasonable expectation that he could pursue his challenge to the application of the MSA measures to his activities on the basis of U.S. domestic law in U.S. domestic courts, and the Tribunal understands that he in fact has done so.

143. Similarly, the Tribunal declines to resolve the opposing interpretations of the Jay treaty in relation to Arthur Montour's commercial activities. The Tribunal affirms the

[24] *Thunderbird Gaming*, ¶ 147.

importance of the principle of *pacta sunt servanda* and acknowledges the significant and constructive roles treaties may have in securing the rights of indigenous peoples. The Tribunal also acknowledges the importance of the Jay Treaty for protecting cross-border movement and trade among indigenous peoples in North America. However, Mr. Montour asserts an absolute immunity from state regulation for commercial activities involving cross-border trade at a significant scale, and in doing so relies on an interpretation of the Jay Treaty that is not plainly supported by the text or easily and readily derived from application of accepted rules of treaty interpretation. What is readily apparent, instead, are the ambiguities in the meaning of the text in respect of the far-reaching claimed immunity, especially in light of the understandings and practice of the contemporary treaty parties, Canada and the United States, which are contrary to the Claimants' interpretation and which must be taken into account. Professor Clinton offers a novel, detailed argument and historical narrative in support of the Claimants' interpretation. However persuasive his argument may be, it does not establish that interpretation as having the degree of certainty that might reasonably ground in the Claimant—for the purposes of his NAFTA claim—a reasonable expectation that he could avoid state application of the MSA measures.

144. The Tribunal also notes that trade in tobacco products has historically been the subject of close and extensive regulation by U.S. states, a circumstance that should have been known to the Claimant from his extensive past experience in the tobacco business. An investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation.

145. Given the circumstances—including the unresolved questions involving the Jay Treaty and U.S. domestic law, and the practice of heavy state regulation of sales of tobacco products—the Tribunal holds that Arthur Montour could not reasonably have developed and relied on an expectation, the non-fulfillment of which would infringe NAFTA, that he could carry on a large-scale tobacco distribution business, involving the transportation of large quantities of cigarettes across state lines and into many states of the United States, without encountering state regulation. (As noted above, Native Wholesale Supply's sales on the Seneca Reservation in New York State are not at issue.)

B. Arthur Montour's Expropriation Claim

146. The Tribunal has jurisdiction over Arthur Montour's claim, including his claim that improper enforcement actions by various states other than New York affecting Native Wholesale Supply's sales have resulted in the expropriation of a substantial portion of the value of his investment. The Tribunal accordingly considers here whether the circumstances claimed involved an expropriation in violation of NAFTA Article 1110.

147. The starting point must be the language of Article 1110(1), providing that "[n]o Party may directly or indirectly nationalize or expropriate *an investment* of an investor of another Party in its territory," unless certain conditions are met (emphasis added).

The text speaks of "an investment," not "an investment or some portion thereof." The most natural reading of the language is that any act of expropriation will affect the totality of an investment. This is in harmony with the conception of expropriation applied in numerous cases—that expropriation involves the deprivation or impairment of all, or a very significant proportion of, an investor's interests.

148. Other NAFTA Tribunals have regularly construed Article 1110 to require a complete or very substantial deprivation of owners' rights in the totality of the investment, and have rejected expropriation claims where (as here) a claimant remained in possession of an ongoing business. The *Pope & Talbot Interim Award* rejected a claim that the disputed measures interfered with the claimants' business sufficiently to constitute an expropriation, where the claimant continued to make profitable exports of logs.[25] As the *S.D. Myers* tribunal explained, "[a]n expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights."[26]

149. The tribunal in *Feldman v. Mexico* rejected a claim of expropriation where the claimant remained in possession and able to conduct other lines of business.

> [H]ere, as in *Pope & Talbot*, the regulatory action (enforcement of longstanding provisions of Mexican law) has not deprived the Claimant of control of the investment, CEMSA, interfered directly in the internal operations of CEMSA or displaced the Claimant as the controlling shareholder. The Claimant is free to pursue other continuing lines of export trading, such as exporting alcoholic beverages, photographic supplies, or other products ... although he is effectively precluded from exporting cigarettes. Thus, this Tribunal believes there has been no "taking" under this standard articulated in *Pope & Talbot*, in the present case.[27]

150. *Glamis Gold* is to similar effect.

> [A] panel's analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: "[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto ... had ceased to exist." The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures "substantially impair[ed] the investor's economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.[28]

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[25] *Pope & Talbot Interim Award*, ¶¶ 100-102,

[26] *S.D. Myers*, ¶ 283. The tribunal continued in *dicta* that "it may be that in some contexts and circumstances" that lesser deprivations would amount to an expropriation, but did not explain this view or indicate authority for it.

[27] *Feldman*, ¶ 152.

[28] *Glamis Gold*, ¶ 357 (citations omitted).

151. Non-NAFTA tribunals also have held that an expropriation requires very great loss or impairment of all of a claimant's investment. The Iran-U.S. Claims Tribunal looked to actions "depriving the owner of virtually all of its property or property rights."[29] ICISD tribunals have rejected expropriation claims involving significant diminution of the value of a claimant's property where the claimant nevertheless retained ownership and control. Thus, the Tribunal in *CMS v. Argentina* rejected a claim of expropriation where the claimant retained full ownership and control of the investment, even though its value was reduced by more than 90%.[30] *LG&E v. Argentina* is similar: "Interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished."[31]

152. However, Arthur Montour's Article 1110 claim involves the alleged expropriation of only part of a growing and seemingly profitable ongoing investment over which he retains ownership and control. U.S. Customs tabulations show that in 2007, Native Wholesale Supply imported almost [redacted] cigarettes from Grand River. In 2008, it imported almost [redacted] In the first three months of 2009 alone, it imported almost [redacted] According to a press report, Native American retailers' sales of Seneca® cigarettes in upstate New York grew by 200% between 2007 and 2008, substantially exceeding sales of Marlboros in the region. The report of the Respondent's valuation experts, Navigant Consulting, shows that Grand River's sales to Native Wholesale Supply also increased during the earlier period 2005-2007. According to the March 2009 Rebuttal Report of the Claimants' valuation expert, "over the past 4 years in California NWS sales have increased by an average of [redacted] per year."

153. The Tribunal received limited evidence as to Native Wholesale Supply's financial condition, but its financial statements from 2001 through September 30, 2006 show substantial growth in the firm's value. The statement for the first nine months of 2006 (the final statement on record) shows continued growth, with the sole stockholder's equity more than doubling during that period. (Arthur Montour is NWS' sole stockholder.) The large growth in the volume of Grand River's cigarettes imported by NMS after 2006 suggests that the venture remained profitable.

154. The language of Article 1110 and the reasoning of numerous tribunals show that an expropriation must involve the deprivation of all, or a very great measure, of a claimant's property interests. The Claimant pointed to no cases supporting the notion that state action allegedly impairing only a limited portion of the value of an otherwise ongoing and profitable investment like Native Wholesale Supply can give rise to a "partial" expropriation under either NAFTA Article 1110 or general

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[29] Charles N. Brower & Jason N. Brueschke, THE IRAN-U.S. CLAIMS TRIBUNAL (1998), p. 409.

[30] *CMS Gas Transmission Co., Inc. v. Argentina*, ICSID Case No. ARB/01/8, Final Award (May 12, 2005), ¶¶ 262-264.

[31] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), ¶ 191.

international law. In response to a question from the Tribunal, Mr. Wilson, the Claimants' valuation expert, testified that he had not previously encountered an expropriation claim of this kind.

> I have never seen anything where it was just one or a subset of assets, and it's really difficult to build that as a business and do what we would traditionally do which is basically the value before and the value after.[32]

155. The Tribunal has been offered no reason to interpret the language of NAFTA's Article 1110(1) to mean other than it says. An act of expropriation must involve "the investment of an investor," not part of an investment. This is particularly so in these circumstances, involving an investment that remains under the investor's ownership and control and apparently prospered and grew throughout the period for which the Tribunal received evidence. Arthur Montour's expropriation claim fails for failure to establish an expropriation within the scope of Article 1110.

VII. CLAIMS OF VIOLATIONS OF ARTICLES 1102 AND 1103 – NATIONAL AND MOST-FAVORED NATIONAL TREATMENT

A. The Governing Texts

156. The Claimants alleged that the Respondent has violated its obligations to assure national and most-favored-nation treatment under Articles 1102 and 1103 of NAFTA. These provide in relevant part:

> Article 1102: National Treatment
>
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.
>
> Article 1103: Most-Favored-Nation Treatment
>
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other

[32] Transcript, Mr. Wilson: 639-640.

ANNEX 215

International Centre for Settlement of Investment Disputes
Washington, D.C.

Total S.A.

v.

Argentine Republic

(ICSID Case No. ARB/04/1)

Decision on Liability

Members of the Tribunal

Professor Giorgio Sacerdoti, President

Mr. Henri C. Alvarez, Arbitrator

Dr. Luis Herrera Marcano, Arbitrator

Secretary of the Tribunal

Ms. Natalí Sequeira

Representing Total S.A.:

Mr. Jan Paulsson, Mr. Nigel Blackaby,
Mr. Georgios Petrochilos, Mr. Noah Rubins,
Ms. Sylvia Noury, Mr. Craig Chiasson,
Mr. Moto Maeda, Ms. Caroline Richard
Freshfields Bruckhaus Deringer LLP
Paris, France

Mr. Alexander Yanos and Mr. Giorgio Mandelli
Freshfields Bruckhaus Deringer LLP
New York, NY, Unites States of America

Mr. Luis A. Erize and Mr. Sergio M. Porteiro
Abeledo Gottheil Abogados SC
Buenos Aires, Argentina

Representing the Argentine Republic:

Dr. Joaquín Pedro da Rocha
Procurador del Tesoro de la Nación Argentina
Procuración del Tesoro de la Nación Argentina
Buenos Aires, Argentina

Date of Dispatch to the Parties: December 27, 2010

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(i) concludes that Argentina breached its obligation under Article 3 of the BIT to grant fair and equitable treatment to Total by not periodically readjusting TGN's domestic tariffs in force in pesos in January 2002 from 1 July, 2002 onwards;

(ii) concludes that the damages thereby suffered by Total must be compensated by Argentina;

(iii) rejects all other claims by Total related to its investment in TGN; and

(iv) defers the determination of the above damages to the quantum phase.

9. Total's Claim that Argentina has Breached Article 5(2) BIT With Respect to its Investment in TGN (Total's Claim of Indirect Expropriation)

9.1 Parties' Arguments

185. In its claim under Article 5(2) of the BIT, Total complains that it has suffered an indirect expropriation without compensation in breach of the said provision.[198] More specifically, Total claims that the same measures amounting to a breach of the fair and equitable treatment obligation of Article 3 of the BIT, alternatively "constitute an indirect expropriation as they substantially deprive Total of the value and economic benefit of its investment in TGN, contrary to Article 5(2) of the Treaty. TGN has lost approximately 86% of its value as a direct result of Argentina's Measures – this goes beyond a 'substantial deprivation' as it amounts to a virtual obliteration of the value of Total's investment in TGN."[199] Total submits that this loss of value of its investment in TGN (for which Total paid US$ 230 million in 2000) was due to the Measures in their totality (*i.e.*, the pesification and freezing the gas tariffs as well as the creation of the trust fund system to expand TGN's network).[200]

186. Besides the substantial deprivation of the value of its investment, Total complains that the establishment of the trust fund, financed by the surcharge on the tariffs paid by industrial users not to TGN but to the fund, is a form of partial expropriation. This is because the fund will finance the upgrading of TGN's network thus becoming a

[198] Article 5(2) of the BIT states that: "The Contracting Parties shall not take, directly or indirectly, any expropriation or nationalization measures or any other equivalent measures having a similar effect of dispossession, expect for reasons of public necessity and on condition that the measures are not discriminatory or contrary to a specific undertaking."
[199] See Total's Post-Hearing Brief, para. 57.
[200] See LECG Report on Damages, para. 157.

kind of co-owner of assets that were supposed to be owned only by TGN. Total complains that, besides the substantial loss of value, the trust Fund mechanism has impaired its control of TGN.

187. Summing up, Total explains its claim that Argentina has breached Article 5(2) in the following terms:

> "It is a well-established principle that a substantial deprivation of the value and economic benefit of an investment constitutes expropriation. Thus the Measures go beyond a 'substantial deprivation'; they constitute an obliteration of the value of Total's investment in TGN. By focusing on the effect of the Measures, Article 5(2) of the Treaty codifies the position under general international law that an expropriation need not involve the loss of control or use of an asset. However, even on the basis of this criteria, Total would succeed in its claim for expropriation considering the extent to which the Measures have emasculated TGN's role as a manager and investor in the gas transportation network. Between 1993 and 2001, TGN invested more than US$1 billion dollars in expanding and upgrading the gas transportation network. With the pesification and freeze of its tariffs, TGN is unable to fund investments in the network. With the creation of the trust-fund system to conduct expansions of the network, the Government has usurped TGN's role in making investment decisions – decisions overseen and steered by Total as the "Technical Operator" of TGN – relegating it instead to the role of a mere operator."[201]

188. Argentina opposes Total's claim under Article 5(2) of the BIT. Relying on the *Pope & Talbot* case,[202] as well as cases such as *Feldman*,[203] *CMS*,[204] *Methanex*,[205] *Azurix*,[206] *LG&E*,[207] *Enron*[208] and *Sempra*,[209] Argentina suggests that the Tribunal has to apply the (loss of) control of the investment criterion in order to judge whether the interference with Total's property rights brought about by the Measures, is substantial enough to constitute an indirect expropriation. Because Total (together with the other shareholders) is still in full control of TGN and continues to manage its investment, Argentina argues that the alleged interference, not being substantial, cannot be regarded as an indirect expropriation.[210] Furthermore, relying on the *Saluka* award,[211] Argentina points to "the principle according to which bona fide

[201] See Total's Post-Hearing Brief, para. 584-585 [footnotes omitted].
[202] See *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, para. 100.
[203] See *Feldman v. Mexico*, *supra* note 121, paras 142, 152.
[204] *CMS Gas Transmission Company v. Argentina*, *supra* note 29, paras 263-264.
[205] *Methanex av. United States*, UNCITRAL, Final Award, 3 August 2005, part IV.D para. 16.
[206] *Azurix v. Argentina*, *supra* note 113, para. 322.
[207] *LG&E v. Argentina*, *supra* note 111, para. 188.
[208] *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, paras 245-246.
[209] *Sempra Energy International v. Argentina, supra* note 189, para. 284.
[210] See Argentina's Rejoinder, para. 544.
[211] See *Saluka Investments BV v. The Czech Republic*, *supra* note 103, para. 255.

non-discriminatory regulatory measures within the police power of the State do not require any compensation."[212] In accordance with this principle, the negative effects on the value of foreign investments caused by the changes introduced by the Emergency Law (even if they had led to a significant devaluation of foreign assets) are not compensable under either customary law or the BIT. Therefore, Argentina's measures, being regulatory measures of general application enacted to face the 2001-2002 emergency, cannot be regarded as effecting a compensable expropriation.[213]

189. Total opposes Argentina's reasoning with the following arguments. In the first place, Total maintains that a loss of control of the management and enjoyment of an investment is not required or decisive in order to find an indirect expropriation under international law and in light of the specific wording of the Argentina-France BIT. Total's view is that Article 5(2) of the Argentina-France BIT covers a wider range of measures than those "having effect equivalent to nationalisation or expropriation" (Article 5 of the Argentina-U.K. BIT) or "tantamount to expropriation or nationalisation" (Article IV(1) of the Argentina-U.S. BIT).[214] More specifically, Total contends that "[T]he words 'similar effect' encompass a wider range of measures than "tantamount to" and the non-technical term "dispossession" covers the loss of value of an asset, in addition to the loss of the title, control or use."[215] Hence it is Total's position that the above measures implemented by Argentina have an effect similar to dispossession and constitute an indirect expropriation under the specific wording of Article 5(2) of the BIT, irrespective of whether they are equivalent to an expropriation or nationalisation.

190. In the second place, Total submits that, even if Argentina was correct that the severe loss of value was caused by a regulation of general application without any intent or even effect of dispossession, this would not prevent a finding of indirect expropriation (regulatory taking). On the one hand, Total submits that: "[I]n any event, even on a valid invocation of police powers, Argentina would not be exempted from the obligation to provide Total with prompt, adequate and effective

[212] See Argentina's Rejoinder, para. 545.
[213] See Argentina's Rejoinder, para. 547 ff.
[214] See Total's Post-Hearing Brief, paras 193-195 (see also Total's Reply paras 439-441). These provisions have been applied in the *BG* and *National Grid* cases (the Argentina-UK BIT) and in *CMS* and *Enron* cases as well as in other such as *Sempra* and *Azurix* (the Argentina-US BIT). In all of these cases, arbitral tribunals rejected investors' claims of indirect expropriation.
[215] See Total's Post-Hearing Brief, para. 195.

compensation."[216] On the other, Total points out that Argentina's Measures, even if regarded as regulatory or police power measures, constitutes an expropriation because they contradict the specific undertakings Argentina gave to Total and are therefore in breach of Article 5(2) of the BIT, last sentence. These specific undertakings or assurances are identified by the Claimant as:

> "(a) the commitment to preserve TGN's economic equilibrium through recurrent and extraordinary tariff reviews with the aim of ensuring that tariffs remained sufficient to cover costs and earn a reasonable rate of return; and, in support of this commitment (b) the promise to calculate tariffs in dollars and adjust them in accordance with the US PPI; …"[217]

9.2 Tribunal's Conclusions

191. Before discussing the legal issues, the Tribunal considers it appropriate to recall the evidence concerning Total's position as a major shareholder of TGN and its role as "Technical Operator". On the basis of the evidence and the arguments of the parties in their Post-Hearing Briefs it is uncontested that Total is in full control of its investment in TGN. Conversely, TGN operates under the management of its shareholders and carries on its daily activities. It is listed on the Buenos Aires Stock Exchange. The government's decision in 2004 to establish a trust fund system in order to finance expansions of the network by imposing surcharges on the tariffs paid by industrial users does not entail either loss of control by Total over its investments nor TGN's loss of control over its business operations. The trust fund finances the expansion of the network (which TGN is unable to do due to the lack of adequate revenues caused by freezing the tariffs), while TGN operates the network as licensee,[218] besides managing the expansion projects.[219] Total has not shown that the trust fund interferes with the ability of TGN shareholders to manage TGN. Based on the evidence, the Tribunal considers that Total has not been precluded in any way from exercising its rights as a shareholder in TGN, as it was able to go on managing TGN's business together with the other shareholders in TGN. The Tribunal

[216] See Total's Post-Hearing Brief, para. 586.
[217] See Total's Post-Hearing Brief, para. 587.
[218] See Argentina Rejoinder, paras 452-457 and Total's Post-Hearing Brief, para. 519. The parties agree that a small part of the expansion was financed by TGN and that the cooperation between the trust fund and TGN is governed by agreement between them.
[219] See Total's Post-Hearing Brief, para. 519.

concludes that Total "is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment", as the ICSID Tribunal dealing with *CMS* claim – another foreign investor in TGN - found in May 2005.[220]

192. The Tribunal will first examine Article 5(2) of the BIT, interpreting it in accordance with Article 31 of the Vienna Convention on the Law of the Treaties.[221] As mentioned above, Article 5(2) states that:

> "The Contracting Parties shall not take, directly or indirectly, any expropriation or nationalization measures or any other equivalent measures having a similar effect of dispossession, except for reasons of public necessity and on condition that the measures are not discriminatory or contrary to a specific undertaking."[222]

193. The key expression as to indirect expropriation is the protection from "any expropriation or nationalisation measures or any other equivalent measures having a similar effect of dispossession." Therefore, besides expropriations and nationalisations, Article 5(2) covers measures which are "equivalent" to expropriation and nationalisation, as far as they have a "similar effect of dispossession."[223] Contrary to Total's position, the term "dispossession" is not a "non-technical term." The term "dispossession" refers to a precise legal concept under civil law systems to which both France and Argentina belong. Possession is a factual relation between a thing, object or asset and a person who exercises factual control over it. Possession in Roman and civil law is independent in part from legal property.[224] While a lawful owner or acquirer is entitled to obtain and exercise

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[220] See *CMS Gas Transmission Company v. Argentina*, *supra* note 29, para. 263.

[221] Article 31 VCLT states that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[222] In the French original: "Les Parties contractantes ne prennent pas, directement ou indirectement, de mesures d'expropriation ou de nationalisation, ni tout autre mesure équivalente ayant un effet similaire de dépossession, si ce n'est pour cause d'utilité publique et à condition que ces mesures ne soient ni discriminatoires, ni contraires à un engagement particulier." In the Spanish original: "Las Partes Contratantes se abstendrán de adoptar, de manera directa o indirecta, medidas de expropiación o de nacionalización o cualquier otra medida equivalente que tenga un efecto similar de desposesión, salvo por causa de utilidad pública y con la condición que estas medidas no sean discriminatorias ni contrarias a un compromiso particular."

[223] See Argentina's Rejoinder, para. 542 where Argentina points out that: "…,the Argentina-France BIT also makes reference to measures equivalent to expropriation, as the Argentina-US BIT and the NAFTA, which the Claimant fails to mention…."

[224] See G. Cornu, *Vocabulaire Juridique*, Presses Universitaires de France, 2000, p. 651, according to whom 'possession' is a "*pouvoir de fait exercé sur une chose avec l'intention de s'en affirmer le maître (animus domini), même si – le sachant ou non – on ne l'est pas*;" and the term "*possesio rei*" "*signifiant «possession d'une chose*»

possession, possession, as a factual matter, may exist without or irrespective of a title. Indeed, property may derive from protracted undisturbed possession over a thing by a non-owner. The term "dispossession" therefore refers necessarily to the loss of the control which is characteristic of "possession".

194. The use of the terms "*dépossession*" or "*mesures dont l'effet est de déposséder*" to characterise indirect expropriation is typical of French BITs. As stressed by two authoritative French commentators "*dans son acception habituelle, la mesure de dépossession est celle qui prive l'investisseur de ses droit essentiels sur l'investissement au profit de l'autorité publique, quelles que soient les modalités de cette dépossession.*"[225] Contrary to Total's position, in requiring a loss of material control over the investment, the term "dispossession" in Article 5(2) appears somehow to be more restrictive than the parallel provisions in the Argentina-U.S. ("tantamount to expropriation") and the Argentina-UK BIT which refer only to "equivalent to nationalisation or expropriation". Since Total has not been dispossessed of its TGN holding nor of the management of its business, the Tribunal concludes that the requirement of dispossession under Article 5(2) has not been met.

195. In any case, the Tribunal will also address Total's argument that it is well-established that a substantial deprivation of the value of an investment constitutes indirect expropriation. Hence, Total requests the Tribunal to find *in casu* that Argentina's measures, having caused such a loss, are in breach of Article 5(2) of the BIT. Looking beyond the specific wording of Article 5(2), the Tribunal considers that under international law a measure which does not have all the features of a formal expropriation could be equivalent to an expropriation if an effective deprivation of the investment is thereby caused. An effective deprivation requires, however, a total loss of value of the property such as when the property affected is rendered worthless by the measure, as in case of direct expropriation, even if formal title continues to be

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servant aujourd'hui à désigner la possession qui correspond au droit de propriété." See also, *ibid.* p. 278 where the term '*dépossession'* is defined as "[*p]erte de la possession, soit par violence ou voie de fait, soit à un titre juridique (gage, antichrèse, séquestre*); privation effective de la détention matérielle d'une chose. " As to this notion under Argentina's legal system see the entry '*poseer'* in Ana María Cabanellas de las Cuevas, Diccionario Jurídico Universitario, Editorial Heliasta, 1ra Edición, 2000, Tomo II: poseer is defined as "*tener materialmente una cosa en nuestro poder. Encontrarse en situación de disponer y disfrutar directamente de ella…"*

[225] See D. Carreau, P. Juillard, *Droit international économique*, 1ere édition, 2003, para 1376, at p. 508. The two authors, discussing the use of term "*dépossession*" in the French model BIT, go on to state that *"[m]ais d'autres instruments, notamment le modèle américain et…l'ALENA, utilisent l'expression, qui parait mieux appropriée, de mesures équivalant à une mesure d'expropriation ou de nationalisation.*" (see para. 1377 at p. 509)

held.[226] This is supported by the general direction of the case law under BITs,[227] other international jurisprudence[228] and scholarly legal opinions.[229]

196. In light of the above legal principles, the Tribunal turns to examine the merits of Total's claim that it is the victim of an indirect expropriation. The Tribunal considers that Total has not shown that the negative economic negative impact of the Measures has been such as to deprive its investment of all or substantially all its value. Therefore the Tribunal rejects Total's claim of indirect expropriation in breach of Article 5(2) of the BIT. We note that this conclusion is consistent with all of the previous arbitral precedents dealing with indirect expropriation claims brought by foreign investors in the utility sector under various BITs in respect of the same or similar measures of Argentina in 2001-2002. According to this uniform arbitral case law, Argentina's Measures have been considered to not give rise to an indirect expropriation under various BITs,[230] in the absence of an effective deprivation of the value of the foreign investment in the above-mentioned meaning (*i.e.*, total deprivation of the investment's value or total loss of control by the investor of its investment, both of a permanent nature).

197. Before concluding on this claim, the Tribunal recalls that the Claimant challenged a number of distinct measures under Article 5(2) of the BIT: the

[226] Thus, an expropriation could be found even where control remains in the hands of the foreign investor provided that economic profitability of the investment has been totally destroyed in some other way.

[227] See *Sempra Energy International v. Argentina*, *supra* note 189, para. 285 where the Tribunal stated that "a finding of indirect expropriation would require more than adverse effect. It would require that the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated." As to Argentina's Measures see also *LG&E v. Argentina*, *supra* note 111, para. 191 where it is stated that "[i]nterference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for the expropriation"; *BG Group Plc v. Argentina*, *supra* note 113, paras 258-266 and *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, para. 245. See also *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, *supra* note 116, para. 115; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para. 604; *Goetz and others v. Burundi*, ICSID Case No. ARB/95/3, Award (Embodying the Parties' Settlement Agreement), 10 February 1999, para. 124.

[228] See for example *Starrett Housing Corp. v. Iran*, Award, 14 August 1987, 4 Iran-US C.T.R. 122, at pp. 154-157; *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award, 29 June 1984, 6 Iran-US C.T.R. 219, p. 255.

[229] See C. Leben, *La liberté normative de l'État et la question de l'expropriation indirecte*, C. Leben (dir.), *Le contentieux arbitral transnational relative à l'investissement*, Anthemis, 2006, 163 ff. at p. 173-175; R. Dolzer, C. Schreuer, *supra* note 133, at p. 96-101.

[230] See *LG&E v. Argentina*, *supra* note 111, para. 200 where the Tribunal stated that: "the effect of the Argentine State's actions has not been permanent on the value of the Claimants' share, and Claimants' investment has not ceased to exist. Without a permanent, severe deprivation of LG&E's rights with regard to its investment, or almost complete deprivation of the value of LG&E's investment, the Tribunal concludes that these circumstances do not constitute expropriation." See also *BG Group Plc v. Argentina*, *supra* note 113, para. 268-270; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, para. 246.

pesification and the freezing the gas tariffs and the creation of the trust-fund system to expand TGN's network. The Tribunal recalls here that, by analysing the pesification under Total's claim of breach of Article 3, it has already judged the said measure as a *bona fide* regulatory measure of general application, which was reasonable in light of Argentina's economic and monetary emergency and proportionate to the aim of facing such an emergency. Therefore, the Tribunal has concluded that in the absence of specific stabilization promises to the Claimant, the pesification does not amount to a breach of Article 3 of the BIT.[231] For the same reasons, it is the Tribunal's view that the pesification also does not amount to a measure equivalent to expropriation or nationalisation,[232] that is an indirect expropriation entailing Argentina's obligation to compensate Total. Moreover, contrary to Total's submissions, the pesification was not contrary to any specific undertaking given by Argentina to Total. In this regard the Tribunal recalls its finding under Total's claim of breach of Article 3 of the BIT that the provision according to which the gas tariffs were calculated in US dollars and adjusted in accordance with US PPI variations cannot be properly construed as "promises" or "specific undertakings" given by Argentina to Total since they were not addressed directly or indirectly to Total.[233]

[231] See above paras. 159 ff.

[232] The Tribunal is aware of the current international debate on the issue of whether, by judging changes in national legal systems introduced by legislative measures under bilateral investment treaties "… one should only take into account the effects produced by the measure or if one should consider also the context within which a measure was adopted and the host State's purpose" (*LG&E v. Argentina*, *supra* note 111, para. 194). When foreign investors complain of State regulatory actions under a BIT, in order to decide whether the measures also amount to an indirect expropriation (a so-called regulatory taking) a tribunal must take into account their features and object so as to assess their proportionality and reasonableness in respect of the purpose which is legitimately pursued by the host State. These regulatory measures, when judged as legitimate, proportionate, reasonable and non-discriminatory, do not give rise to compensation in favour of foreign investors. The Tribunal shares the dominant approach followed by international tribunals, that is to take into account also the purpose and the causes of the measures taken by a State (together with their adverse effects on the foreign investment). In this regard see R. Dolzer, C. Schreuer, *supra* note 133, at p. 104, referring to the opinion of *Fortier* (Fortier, Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 19 ICSID Review-Foreign Investment Law Journal 293 (2004)), *the Oscar Chinn Case* and *Sea-Land Service Inc. v. Iran*, 6 Iran-US Cl. Trib. Rep. 149, 166 (1984).

[233] See above paras 145 ff. The Tribunal recalls that Article 5(2) of the BIT prohibits measures "contrary to a specific undertaking." The Tribunal notes that the BIT contains a further reference to "specific undertaking" in Article 10: "Investments which have been the subject of a specific undertaking by one Contracting Party vis-à-vis investors of the other Contracting Party shall be governed, without prejudice to the provisions of this Agreement, by the terms of that undertaking, in so far as its provisions are more favourable than those laid down by this Agreement." Based on Article 5(2), Total submits that the Measures enacted by Argentina, even if considered legitimate as an exercise of its police powers, give rise to an obligation to compensate Total, because Argentina has made specific undertakings to Total. However, Total has not invoked a breach of Article 10, although it has argued that the "core commitments" of the Gas Regulatory Framework should be qualified as "specific undertakings" under Article 5(2) of the BIT.

198. Finally, the Tribunal is unable to sustain Total's claim that the failure to readjust the tariffs would constitute also an indirect expropriation in breach of Article 5(2) of the BIT. This is because this *de facto* freezing of the gas tariffs implied neither a deprivation of the investment nor a total loss of its value. The Tribunal further notes that damages under the heading of indirect expropriation would not be different from damages due to breach of the fair and equitable treatment standard. In no case could the Tribunal award double recovery for the same damages to the same assets hypothetically caused by the breach of two different BIT provisions.[234]

199. For the reasons above, the Tribunal concludes that Argentina has not indirectly expropriated Total's investment in TGN in breach of Article 5(2) of the BIT.

10. Total's claim that Argentina has breached Article 4 of the BIT (Non-discrimination)

10.1 Total's Position

200. Total contends that Argentina's Measures (*i.e.*, the pesification and freezing of gas transportation tariffs) discriminated against Total's investment, transferring wealth from TGN and other energy companies predominantly owned by foreign interests to industry, commerce and agriculture predominantly owned by domestic investors. Accordingly, since the Measures entail discriminatory treatment against the energy sector as a whole and TGN in particular, they are not only in breach of Article 3 of the BIT but also in breach of Article 4 "which obliges Argentina to treat Total's investment on a basis no less favourable than that accorded in like situations to investments of its own nationals".[235]

201. It is Total's position that this discriminatory treatment against the energy sector and TGN:

> "not only constitutes further evidence of Argentina's unfair and inequitable treatment of Total in breach of Article 3 of the Treaty, it also amounts to a further

[234] This would be so even if the methods of calculation were different under the two Articles of the BIT.
[235] See Total's Memorial, para. 369. Article 4 of the BIT reads as follows: "Each Contracting Party shall accord in its territory and maritime zone to investors of the other Party, in respect of their investments and activities in connection with such investments, treatment that is no less favourable than that accorded to its own investors or the treatment accorded to investors of the most-favoured nation, if the latter is more advantageous…"

ANNEX 216

304 F.3d 1271
United States Court of Appeals,
Federal Circuit.

Chris PARADISSIOTIS, Plaintiff–Appellant,
v.
UNITED STATES, Defendant–Appellee.

No. 01–5094.
|
DECIDED: Sept. 13, 2002.

Synopsis

Cyprus citizen with business ties to Libyan government sued United States alleging that a regulatory taking occurred when Treasury Department's Office of Foreign Asset Control (OFAC) prohibited him from exercising certain stock options in an American company, pursuant to Libyan Sanction Regulations (LSRs). The Court of Federal Claims, Bohdan A. Futey, J., 49 Fed.Cl. 16, granted government's motion to dismiss. On appeal, the Court of Appeals, Bryson, Circuit Judge, held that: (1) government's prohibition on exercise of options did not effect regulatory taking, and (2) there could be no reasonable expectation of being able to exercise options once Cypriot took directorship of Libyan government-controlled corporation with LSRs already in effect.

Affirmed.

See also 171 F.3d 983.

Attorneys and Law Firms

***1272** Edwin Armistead Easterby, Looper, Reed & McGraw, a Professional Corporation, of Houston, TX, argued for plaintiff-appellant.

Jeffrey A. Belkin, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Stuart E. Schiffer, Acting Assistant Attorney General; David M. Cohen, Director; and Mark A. Melnick, Assistant Director. Of counsel on the brief were Barbara C. Hammerle and Stevenson O. Munro, Office of the General Counsel, Department of the Treasury, of Washington, DC.

Before CLEVENGER, RADER, and BRYSON, Circuit Judges.

Opinion

BRYSON, Circuit Judge.

This case presents a narrow question under the Takings Clause of the Fifth Amendment: whether the Treasury Department's act of freezing the assets of the appellant, a person determined to be an agent of the government of Libya, constituted a compensable taking of the value of certain stock options owned by the appellant when the stock options expired while the appellant's assets were frozen. The appellant does not challenge the act of freezing his assets, but contends that the Treasury Department should have granted him a license to exercise the stock options before they expired and then kept the proceeds of that transaction in an interest-bearing account. The Court of Federal Claims rejected that argument, as do we. The act of freezing the plaintiff's assets in this country, including the stock options, was not a compensable taking in the first instance, and the Treasury Department's refusal to lift the freeze to allow the plaintiff to exercise the stock options did not convert the act of freezing the plaintiff's assets into a taking for which the government is required to pay just compensation.

I

A

In January of 1986, in response to Libyan support for international terrorism, President Reagan issued two executive orders banning commerce with Libya and freezing all U.S. assets of the Libyan government and its agents. *See* Exec. Order No. 12,543, 51 Fed.Reg. 875 (Jan. 7, 1986); Exec. Order No. 12,544, 51 Fed.Reg. 1235 (Jan. 8, 1986). Pursuant to those executive ***1273** orders, the Treasury Department's Office of Foreign Assets Control promulgated the Libyan Sanctions Regulations, which ordered the freezing or blocking of all U.S. assets owned or controlled by the government of Libya and prohibited all U.S. persons and corporations from doing business with the government of Libya. The regulations also prohibit the acquisition, transfer, or disposition of any security "registered or inscribed in the name of the Government of Libya [as defined]," except pursuant to a license issued by the Office of Foreign Assets Control. 31 C.F.R. § 550.209. The regulations cover stocks, bonds, letters of credit, or "contracts of any nature whatsoever, and any other property, real, personal, or mixed,

tangible or intangible, or interest or interests therein, present, future or contingent." 31 C.F.R. § 550.314.

The Libyan Sanctions Regulations define the government of Libya broadly, to include "[a]ny partnership, association, corporation, or other organization owned or controlled directly or indirectly by" the Libyan government or "[a]ny person to the extent that such person is, or has been ... acting or purporting to act directly or indirectly on behalf of any of the foregoing...." 31 C.F.R. § 550.304. Any person falling within the scope of that section is referred to as a Specially Designated National.

B

Appellant Chris Paradissiotis is a citizen of Cyprus. For many years he worked in various capacities for Coastal Corporation ("Coastal"), a Delaware corporation, or its subsidiaries. In 1985, Mr. Paradissiotis received option contracts to buy 2,250 shares of Coastal stock at $20.91 per share. The following year, he became a director of Holborn Oil Trading, Ltd. ("HOTL"), a Bermuda corporation owned by Coastal. HOTL runs an oil refinery in Germany on behalf of the Libyan government. HOTL also owns approximately one-third of the stock of Holborn Investment Company, Ltd. ("HICL"), a Cypriot corporation that operates and maintains the German refinery. As of December 1990, the majority owner of HICL was a corporation controlled by the Libyan government through a holding company. HOTL installed Mr. Paradissiotis as a director on the board of HICL.

In 1991, based on Mr. Paradissiotis's connection to HICL and other Libyan-related entities, the Office of Foreign Assets Control listed him as a Specially Designated National pursuant to 31 C.F.R. § 550.304(c). The legal effect of that designation was to treat Mr. Paradissiotis as an agent of the government of Libya and to require that his assets within the United States be frozen. Those assets included his options to buy Coastal stock.

Between January 1993 and December 1996, Mr. Paradissiotis applied to the Office of Foreign Assets Control for licenses to sell or exercise his stock options, which were set to expire on March 19, 1997. When his applications were denied, he brought suit in the United States District Court for the Southern District of Texas challenging the denials. He argued that the Libyan Sanctions Regulations were invalid, that he was improperly listed as a Specially Designated National, and that the act of freezing his stock options violated his constitutional rights. The district court granted summary judgment for the government and ruled, inter alia, that Mr. Paradissiotis could not assert a viable takings claim. Two days after the district court's ruling, the Coastal stock options expired.

The Fifth Circuit affirmed the district court's judgment except with regard to the Fifth Amendment takings claim. *Paradissiotis* ***1274** *v. Rubin,* 171 F.3d 983 (5th Cir.1999). The court agreed with the district court that Mr. Paradissiotis was validly labeled as a Special Designated National and that the Treasury Department had acted lawfully in applying the Libyan Sanctions Regulations to prohibit him from exercising his stock options. With respect to the takings claim, the court held that the Court of Federal Claims had exclusive jurisdiction over that issue, and the court therefore vacated that aspect of the district court's judgment.

Mr. Paradissiotis then filed suit in the Court of Federal Claims alleging that the freezing of his assets and the consequent destruction of the value of his stock options constituted a taking of his personal property for public use, in violation of the Takings Clause of the Fifth Amendment. Following a thorough analysis of the applicable law, the Court of Federal Claims dismissed Mr. Paradissiotis's action.

II

As framed on appeal, Mr. Paradissiotis's claim is very narrow. The Fifth Circuit litigation established that Mr. Paradissiotis was validly denominated a Specially Designated National and that the refusal to permit him to exercise his stock options was consistent with the Libyan Sanctions Regulations and the Executive Orders on which they were based. It is not now open to him to challenge those rulings. Moreover, Mr. Paradissiotis concedes that the act of blocking his assets did not give rise to a valid takings claim. Instead, he argues that although the freezing of his assets was lawful, the Office of Foreign Assets Control should have permitted him to exercise his stock options and then retained the proceeds of that transaction in a blocked, interest-bearing account. The failure to follow that course, he contends, constituted a compensable taking.

The general principles applicable here are well settled. On several occasions, this court has addressed Fifth Amendment takings claims raised by persons or entities that have been

adversely affected by actions taken for national security reasons to freeze the assets of, or prohibit transactions by, foreign entities, and on each occasion we have held that the actions have not violated the Takings Clause. With specific reference to the Libyan Sanctions Regulations, we have held that those regulations substantially advance the national security of the United States and that the frustration of contract rights resulting from the application of those regulations does not constitute a Fifth Amendment taking. *Chang v. United States,* 859 F.2d 893, 896–97 (Fed.Cir.1988); *see also 767 Third Ave. Assocs. v. United States,* 48 F.3d 1575, 1581 (Fed.Cir.1995).

The principle underlying those decisions was articulated by the Supreme Court in the *Legal Tender Cases (Knox v. Lee),* 79 U.S. (12 Wall.) 457, 551, 20 L.Ed. 287 (1870), where the Court explained:

> A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? ... [W]as it ever imagined this was taking private property without compensation or without due process of law?

While takings law has changed significantly since those words were written, the language used by the Supreme Court has often been quoted, and the principle remains sound. *See Omnia Commercial Co. v. United States,* 261 U.S. 502, 509–10, 43 S.Ct. 437, 67 L.Ed. 773 (1923); *B–West* ***1275** *Imports, Inc. v. United States,* 75 F.3d 633, 638 (Fed.Cir.1996); *Chang,* 859 F.2d at 897; *Galloway Farms, Inc. v. United States,* 834 F.2d 998, 1002 (Fed.Cir.1987). Thus, valid regulatory measures taken to serve substantial national security interests may adversely affect individual contract-based interests and expectations, but those effects have not been recognized as compensable takings for Fifth Amendment purposes. As applied to economic sanctions such as orders blocking transactions and freezing assets, that principle disposes of any suggestion that the United States could freeze Libyan assets in this country only if it were prepared to pay the cost of any losses resulting from the freeze. Economic sanctions would hardly be sanctions if the foreign targets of the sanctions could simply stand in line to be compensated for the losses those sanctions caused them.

Mr. Paradissiotis does not take issue with that general principle, but he contends that it is not applicable to this case because the refusal to permit him to exercise his stock options did not serve the purposes underlying the Libyan Sanctions Regulations and the enabling statute, the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701–06 (1994). He contends that the purpose of IEEPA and the Libyan Sanctions Regulations is to preserve foreign assets subject to United States jurisdiction so that they will be available for use as bargaining chips in negotiating the resolution of a declared national emergency and to facilitate the disposition of claims of United States citizens with respect to those assets. Allowing the value of his stock options to be destroyed by blocking their exercise until the options expired did not serve those purposes, he argues, and therefore cannot be justified by the national security interests that are promoted by IEEPA, the 1986 Executive Orders, and the Libyan Sanctions Regulations.

While the interests cited by Mr. Paradissiotis are among those served by freezing assets and blocking transactions involving hostile foreign powers, the backgrounds of IEEPA and its predecessor, the Trading with the Enemy Act, 50 U.S.C.App. §§ 1–44, make clear that those actions serve other interests as well. Those interests include "depriv[ing] enemies, actual or potential, of the opportunity to secure advantages to themselves or to perpetuate wrongs against the United States or its citizens through the use of assets that happened to be in this country," *Propper v. Clark,* 337 U.S. 472, 481, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949), and denying hostile foreign governments and nationals access to funds "which might be used to promote activities inimical to the interests of the United States," *Miranda v. Secretary of the Treasury,* 766 F.2d 1, 5 (1st Cir.1985). Moreover, one of the purposes of economic sanctions is to put economic pressure on the target government by preventing its representatives from engaging in profitable economic activity in this country and elsewhere. *See Milena Ship Mgmt. Co. v. Newcomb,* 995 F.2d 620, 625 (5th Cir.1993) (observing that "the purpose of economic sanctions ... is to exert economic pressure on the offending government, not to mitigate it"). It would be inconsistent with that purpose to allow a designated Libyan agent to engage in a profitable securities transaction involving

a United States asset, just as it would be inconsistent with the sanctions' purpose to allow a Libyan oil company to do business in this country. Merely freezing the proceeds of either form of economic activity would not serve the purposes of the economic sanctions, as it would permit Libyan entities to engage in profitable transactions with the expectation of ultimately recovering the proceeds of those transactions in full. We therefore ***1276** reject Mr. Paradissiotis's argument that the government's refusal to permit him to exercise his stock options was contrary to the purposes of the applicable statutory and regulatory provisions and thus constituted a Fifth Amendment taking.

We also reject Mr. Paradissiotis's argument that he suffered a compensable taking because at the time he obtained the Coastal stock options he had a reasonable expectation that he would be able to exercise those options and the government's refusal to permit him to do so upset those expectations. In making that argument, Mr. Paradissiotis invokes the line of regulatory takings cases that have looked to whether the claimant had reasonable investment-backed expectations that were upset as a result of the regulatory action in question. *See Connolly v. Pension Benefit Guar. Corp.,* 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1985); *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984); *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Contrary to cases in which, for example, a claimant purchased property but subsequently enacted regulatory measures destroyed the property's value, *see Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), in this case Mr. Paradissiotis's stock options were in no jeopardy until 1990, when he took the step that ultimately resulted in his loss—serving as a director of a Libyan-controlled corporation. At that time, the consequences of his conduct were entirely foreseeable. The Libyan Sanctions Regulations had been in effect for four years, it was clear that his position made him subject to those regulations, and it was clear that exercising his stock options would be a prohibited transaction under the regulations. The pertinent date for considering Mr. Paradissiotis's expectations was 1990, when he took the step that subjected him to regulations that otherwise would have had no effect on him. As of that date, he had clear notice of what the consequences of his actions would be. *See Meriden Trust & Safe Deposit Co. v. Fed. Deposit Ins. Corp.,* 62 F.3d 449, 455 (2d Cir.1995) (because the plaintiff bank chose to maintain its insured status, "voluntarily subjecting itself to a known obligation, ... no unconstitutional taking occurred"). Mr. Paradissiotis took the risk—a big risk, in light of the high visibility of the Libyan sanctions regime—that his involvement with a Libyan-controlled corporation would result in loss of access to his United States assets. The fact that his risk-taking turned out badly for him does not render it a taking in violation of the Fifth Amendment.

AFFIRMED.

All Citations

304 F.3d 1271

ANNEX 217

750 F.Supp.2d 150
United States District Court,
District of Columbia.

ZARMACH OIL SERVICES, INC., Plaintiff,
v.
UNITED STATES DEPARTMENT OF THE TREASURY, Office of Foreign Assets Control, Defendant.

Civil Action No. 09–2164 (ESH).
|
Nov. 16, 2010.

Synopsis
Background: Assignee of rights and benefits to blocked funds, intended to be transferred to lessor of oil drilling rights in Sudan, brought action against Department of the Treasury, Office of Foreign Assets Control (OFAC), seeking review of OFAC's denial of specific license to release funds blocked pursuant to sanctions regime against Government of Sudan. OFAC moved to dismiss and for summary judgment.

Holdings: The District Court, Ellen Segal Huvelle, J., held that:

OFAC maintained statutory authority to continue blocking funds even after assignee made second payment to lessor so as to extinguish whatever property interest lessor had in blocked funds, and

decision of OFAC to deny license was not arbitrary and capricious.

Motion granted.

Attorneys and Law Firms

***151** David H. Dickieson, Schertler & Onorato, LLP, Washington, DC, for Plaintiff.

Scott Risner, U.S. Department of Justice, Washington, DC, for Defendant.

MEMORANDUM OPINION

ELLEN SEGAL HUVELLE, District Judge.

Plaintiff Zarmach Oil Services, Inc. ("Zarmach") has sued the United States Department of the Treasury, Office of Foreign Assets Control ("OFAC"), seeking review under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701–706, of OFAC's denial of a specific license to release funds blocked pursuant to the sanctions regime against the Government of Sudan. Zarmach argues that OFAC's denial violates the APA because it is arbitrary and capricious and contrary to law. Defendant has moved to dismiss and for summary judgment. For the reasons stated herein, the Court will grant defendant's motion.

BACKGROUND

I. STATUTORY FRAMEWORK

In 1977, Congress enacted the International Emergency Economic Powers Act ***152** ("IEEPA"), 50 U.S.C. §§ 1701–1706, amending the Trading With the Enemy Act of 1917 ("TWEA") and granting the President the authority to regulate various international economic transactions during declared wars or national emergencies. Upon presidential declaration of a national emergency "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States," 50 U.S.C. § 1701(a), IEEPA authorizes the President to:

> regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation ... of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest ... with respect to any property, subject to the jurisdiction of the United States....

Id. § 1702(a)(1)(B).

On November 3, 1997, President Clinton issued Executive Order No. 13067, which authorized a series of economic sanctions against the Government of Sudan pursuant to IEEPA. Finding that the Government of Sudan's "continued support for international terrorism; ongoing efforts to destabilize neighboring governments; and the prevalence of human rights violations, including slavery and the denial of religious freedom" constituted "an unusual and extraordinary threat to the national security and foreign policy of the United States," Exec. Order No. 13067, 62 Fed. Reg. 59989 (Nov. 3, 1997), the President blocked "all property and interests in property of the Government of Sudan that are in the United States [or] that hereafter come within the United States." *Id.* § 1. The Executive Order further authorized the Secretary of the Treasury, "in consultation with the Secretary of State and, as appropriate, other agencies ... to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to [the President] by IEEPA, as may be necessary to carry out the purposes of [the] order," including redelegation of any of these functions to other officers and agencies of the United States Government. *Id.* § 5.

On October 13, 2006, President Bush issued Executive Order No. 13412, which maintained the blocking of the Government of Sudan and extended the scope of the blocking to Sudanese petroleum and petro-chemical industries. *See* Exec. Order No. 13412, 71 Fed. Reg. 61369 (Oct. 13, 2006).

Pursuant to IEEPA and a delegation of authority by the Secretary of the Treasury, 31 C.F.R. § 538.802, OFAC has promulgated regulations to implement Executive Order Nos. 13067 and 13412. OFAC's regulations provide that:

> Except as authorized ..., no property or interests in property of the Government of Sudan, that hereafter come within the United States ... may be transferred, paid, exported, withdrawn or otherwise dealt in.

31 C.F.R. § 538.201(a). The regulations further provide that:

> Any transfer ... which is in violation of any provision of this part ... and involves any property or interest in property blocked pursuant to § 538.201 is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property or property interests.

31 C.F.R. § 538.202(a). Since 2000, OFAC has defined "Government of Sudan" to include the Sudanese Petroleum Corporation ("Sudapet"), based on evidence that Sudapet ***153** was owned by the Government of Sudan's Ministry of Energy. (Declaration of Adam J. Szubin ["Szubin Decl."] ¶ 20.)

OFAC defines the terms "property" and "property interest" to include "any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent." 31 C.F.R. § 538.310. The regulations further provide that "the term interest when used with respect to property (e.g., 'an interest in property') means an interest of any nature whatsoever, direct or indirect." 31 C.F.R. § 538.307. The regulations define "transfer" to mean:

> any actual or purported act or transaction ... whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, convey, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and, without limitation upon the foregoing, shall include the making, execution, or delivery of any assignment, power, conveyance ... agreement, contract, ... [or] sale....

31 C.F.R. § 538.313.

Under its sanctions programs, OFAC may, by request, issue a "specific license" to authorize an otherwise prohibited transaction or service. *See* 50 U.S.C. app. § 5; 31 C.F.R. § 501.801. OFAC has interpreted its blocking authority under IEEPA and implementing executive orders as granting it discretionary authority to issue or withhold such licenses

based on national security and foreign policy considerations, and OFAC regulations generally do not compel the issuance of a specific license once certain criteria are met. (Szubin Decl. ¶ 15.) The Sudanese Government's interest in blocked property is extinguished once the property has been transferred pursuant to an OFAC-licensed transfer. 31 C.F.R. § 538.403.

II. FACTUAL HISTORY

In November 2003, Cliveden Petroleum, Inc. ("Cliveden"), a corporation located in Geneva, Switzerland, negotiated a lease with Sudapet for oil drilling rights in the Sudan. (Compl. ¶ 5.) Pursuant to the lease, Cliveden requested that its bank, Banco Atlantico, Gibraltar, transfer $915,102 via electronic wire to Sudapet's bank. (*Id.* ¶ 7.) During the transfer, the funds were unintentionally routed through the intermediary bank of Bank of New York Mellon in the United States. (*Id.* ¶ 9.) Because the assets were destined for Sudapet, an entity defined by OFAC as part of the Government of Sudan, OFAC blocked the transfer and froze the assets.

A month later, on December 2, 2003, Cliveden entered into an agreement to "irrevocably and unconditionally assign to Zarmach all of its rights and benefits attached to the pending blocked funds and to the related claim against the U.S. Office of Foreign Asset Control."[1] (*Id.* ¶ 17; *Id.* Ex. 3.) Despite this purported transfer of rights, on January 13, 2004, Banco Atlantico, on behalf of Cliveden (which presumably no longer had any interest in the funds), applied to OFAC for a license to allow the funds to be released. (*Id.* ¶ 13.) OFAC denied this request, explaining that "the blocked funds transfer in question involves an interest of a Sanctions Target; specifically, pursuant to Sudanese Sanctions Regulations, 31 C.F.R. Part 538" and that the release of the blocked assets ***154** "would be inconsistent with U.S. sanctions policy." (*Id.* Ex. 2.)

Subsequently, Cliveden wired a separate payment of $915,102 to Sudapet in order to satisfy its obligations under the lease transaction. (*Id.* ¶ 16.)

On August 14, 2009, Zarmach submitted an Application for the Release of Blocked Funds, seeking reconsideration of OFAC's previous denial of a specific license regarding this transaction. (*Id.* ¶ 18; Administrative Record ["AR"] at 000007–19.) On September 2, 2009, OFAC denied Zarmach's request. (Compl. Ex. 4.) OFAC explained that it "licenses the release of blocked funds only under limited and compelling circumstances consistent with the national security and foreign policy interests of the United States" and stated that while it had reviewed the information submitted by Zarmach, OFAC had "determined once again that licensing the release of the blocked funds would be inconsistent with OFAC policy," as the transfer in question involved "an interest of a sanctions target, specifically, **Sudanese Petroleum Corporation.**" (*Id.*)

Zarmach initiated the present action on November 17, 2009, claiming that OFAC's denial of a license violates the APA and the Takings Clause of the Fifth Amendment to the Constitution.

ANALYSIS

I. STANDARD OF REVIEW

When a district court reviews agency action under the APA, as is the case here, the court may "reverse the agency action only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *United Techs. Corp. v. U.S. Dep't of Defense,* 601 F.3d 557, 562 (D.C.Cir.2010) (quoting 5 U.S.C. § 706(2)(A)). "This 'standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.' " *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). In applying this standard, the Court does not undertake its own fact-finding, *Holy Land Found. For Relief and Dev. v. Ashcroft* ("*Holy Land I* "), 219 F.Supp.2d 57, 67 (D.D.C.2002), *aff'd,* 333 F.3d 156 (D.C.Cir.2003), but rather must base its review on the "administrative record that was before the [agency] that the time [it] made [its] decision."[2] *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record, even though the Court does not employ the standard of review set forth in Rule 56 of the Federal Rules of Civil Procedure. *Richards v. I.N.S.,* 554 F.2d 1173, 1177 & n. 28 (D.C.Cir.1977); *Fund for Animals v. Babbitt,* 903 F.Supp. 96, 105 (D.D.C.1995).

An agency's decision need not be "a model of analytic precision to survive a challenge," and "[a] reviewing court

will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' " *Dickson v. Sec'y of Def.,* 68 F.3d 1396, 1404 (D.C.Cir.1995) (quoting *Bowman Transp., Inc. v. Arkansas–Best* ***155** *Motor Freight Sys.,* 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)). "The court, therefore, must be able to conclude that the agency 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.' " *Kreis v. Sec'y of the Air Force,* 406 F.3d 684, 686 (D.C.Cir.2005) (quoting *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43, 103 S.Ct. 2856). Accordingly, courts " 'do not defer to the agency's conclusory or unsupported suppositions,' " *United Techs.,* 601 F.3d at 562 (quoting *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force,* 375 F.3d 1182, 1187 (D.C.Cir.2004)), and counsel's "post hoc rationalizations" cannot substitute for an agency's failure to articulate a valid rationale in the first instance. *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health & Human Servs.,* 396 F.3d 1265, 1276 (D.C.Cir.2005); *see Burlington Truck Lines v. United States,* 371 U.S. 156, 169, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962). Such agency litigating positions "are not entitled to deference because they do not necessarily reflect the views of the agency, but rather may have been developed hastily, without adequate consideration of opposing positions pursuant to the agency's normal deliberative process." *Public Citizen, Inc. v. Lew,* 127 F.Supp.2d 1, 10 (D.D.C.2000).

Furthermore, courts owe a substantial measure of "deference to the political branches in matters of foreign policy," including cases involving blocking orders. *Regan v. Wald,* 468 U.S. 222, 242, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984) ("Matters relating 'to the conduct of foreign relations ... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.' " (quoting *Harisiades v. Shaughnessy,* 342 U.S. 580, 589, 72 S.Ct. 512, 96 L.Ed. 586 (1952))); *accord Holy Land I,* 219 F.Supp.2d at 84 ("Blocking orders are an important component of U.S. foreign policy, and the President's choice of this tool to combat terrorism is entitled to particular deference.").

II. LEGAL ANALYSIS

Plaintiff's principal claim is that OFAC's refusal to grant it a specific license amounts to a violation of 5 U.S.C. § 706(2)(A)-(C) of the APA. (Compl. ¶¶ 52–54; Pl.'s Opp. at 5.) Under these provisions, this Court may vacate a decision by an agency if the decision is:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;[3] [or]
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right....

5 U.S.C. § 706(2)(A)-(C). The plaintiff claims that OFAC's actions should be vacated under each of the above provisions. (Pl.'s Opp. at 15–22.) The Court will address each *seriatim.*

A. Statutory Authority[4]

Zarmach claims that OFAC's decisions to maintain the blocking were in excess of ***156** OFAC's statutory authority, arguing in its license application to OFAC that the Government of Sudan has "no ownership interest" in the blocked funds because the funds never actually reached Sudapet's possession, and because Cliveden subsequently satisfied its obligation to Sudapet through a separate transaction. (AR–000007.)

IEEPA provides the President with broad authority to block "property in which any foreign country or a national thereof has *any interest.*" 50 U.S.C. § 1702(a)(1)(B) (emphasis added). A sanctions target need not have a "legally enforceable ownership interest" in assets in order to subject them to blocking.[5] *Holy Land Found. for Relief & Dev. v. Ashcroft* ("*Holy Land II* "), 333 F.3d 156, 162–63 (D.C.Cir.2003) (upholding OFAC's broad definition of "property interest").

Congress has authorized the Executive Branch to define the statutory terms of IEEPA, including the scope of the term "any interest," 50 U.S.C. § 1704, and because OFAC is charged with administering the provisions of Executive Order No. 13067 and has the authority to promulgate regulations to effectuate its provisions, the agency's broad definitions carry the force of law. *See* 31 C.F.R. § 538.802; *Consarc Corp. v. U.S. Treasury Dep't, Office of Foreign Assets Control,* 71 F.3d 909, 914–15 (D.C.Cir.1995) (OFAC is entitled to *Chevron* deference in its interpretations of IEEPA, and its interpretation of its own regulations "receives an even greater degree of deference than the *Chevron* standard, and must prevail unless plainly inconsistent with the regulation") (citation omitted); *Consarc Corp. v. Iraqi Ministry,* 27 F.3d 695, 701 (D.C.Cir.1994) (The Treasury Department "may choose and

apply its own definition of property interests, subject to deferential judicial review.").

Pursuant to this authority, OFAC defines the term "property interest" broadly to include "any ... property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent." 31 C.F.R. § 538.310. *See also id.* § 538.307 (defining "interest," used with respect to property, as "an interest of any nature whatsoever, direct or indirect"). Consequently, OFAC's blocking of Cliveden's transfer was within the scope of its statutory authority, even if Sudapet's interest in the assets took the form of an "indirect future or contingent interest." (Defendant's Motion to Dismiss and Motion for Summary Judgment ["Def.'s Mot."] at 16.).

Zarmach argues, however, that the second payment from Cliveden to Sudapet consummating their lease deal extinguished whatever property interest Sudapet may have once had in the blocked assets, depriving OFAC of the statutory ***157** authority to continue blocking them. OFAC regulations, however, provide only one method by which the Sudanese Government's interest in the funds may be extinguished: a valid license from OFAC, *see* 31 C.F.R. § 538.403(a), and contain no provision by which the efforts of a sanctions target and a company it wishes to do business with can, on their own, "un-block" assets frozen by OFAC.

Furthermore, the exercise of OFAC blocking authority over the assets is not, as Zarmach claims, an exercise in "extraterritorial jurisdiction." (Pl.'s Opp. at 13.) The regulations explicitly prohibit the transfer of any "property or interests in property of the Government of Sudan, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of U.S. persons, including their overseas branches." 31 C.F.R. § 538.201(a) (emphasis added). It is undisputed both that the blocked funds came within U.S. jurisdiction during the course of the original transfer (Compl. ¶ 9), and are currently held by the Bank of New York Mellon, (*id.* ¶ 32). Once blocked, the assets cannot be transferred except pursuant to an OFAC license. *See* 31 C.F.R. §§ 501.801, 538.201, 538.202, 538.403. This result is not altered by the fact that a foreign entity has an interest in the blocked funds, or that one such foreign entity purports to transfer the funds to another foreign entity, as "to have enforceable rights in the United States, [the assignee] must find authority for the assignment somewhere in United States law." *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 122 (2d Cir.2000) (Under the Cuban Assets Control Regulations, blocked assets cannot be transferred without authorization from OFAC.).

The Court also notes the consistent refrain by Zarmach that OFAC's continued refusal to issue it a license fails to advance the policies and goals of the United States' sanctions program against Sudan. (*See, e.g.,* AR–000007 ("The funds no longer serve any U.S. policy purpose, as neither Sudan nor [Sudapet] assert any ownership interest in the funds."); Compl. ¶ 48 ("The present circumstances offer no incentive or impetus for Sudan, or any of its decision makers to change its behavior, because it has absolutely no interest in the frozen funds belonging to Zarmach."); *id.* ¶ 49 ("Punishing and withholding the funds ... fulfills none of the purposes of the Sudanese Sanctions."); Pl.'s Opp. at 5 ("Nothing in [the designation of Sudapet as a blocked entity] was intended to punish foreign business operating outside of the United States from doing business with Sudan.").) This policy argument, however, has no legal merit.

Zarmach may indeed believe that OFAC's policy of refusing to unblock transfers made through U.S. banks between foreign companies and sanctions targets is an ineffective strategy for exerting pressure on foreign governments. But as OFAC has asserted, such a policy discourages companies worldwide from doing business with the sanctions target and places companies at risk for having their assets frozen should they inadvertently be routed through the United States, increasing transaction costs on such businesses and forcing sanctions targets to pay higher prices for goods and services. (*See* Def.'s Mot. Ex. A, Declaration of Adam J. Szubin (Mar. 10, 2010) ¶ 11.) If companies knew they could recover blocked assets simply by re-paying the sanctions target by other means, OFAC's blocking authority would be severely diminished, thereby reducing the President's leverage in dealing with sanctions targets. (*Id.* ¶¶ 11–12.) In any event, this Court declines to adjudicate such matters of strategy and tactics relating to the conduct of foreign policy, which ***158** "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Regan,* 468 U.S. at 242, 104 S.Ct. 3026.

B. Arbitrary and Capricious

Zarmach argues that OFAC's decision to deny a license was arbitrary and capricious because (1) the basis for this decision cannot reasonably be discerned and (2) OFAC has treated it differently than a similarly situated party—namely, the Government of Ethiopia. (*Id.* at 16–19.)

1. Basis for OFAC's Decision

The basis in the administrative record for OFAC's decision to deny a specific license is clear. Both Cliveden's original application for a license and Zarmach's request for reconsideration of OFAC's initial denial stated that Sudapet was the intended beneficiary of the original transfer. (AR–000004, AR–000005, AR–000010.) Sudapet had previously been designated by OFAC as part of the Government of Sudan. The administrative record is clear that because the transfer involved "an interest of a sanctions target," the funds were subject to blocking and a specific license would be inconsistent "with the national security and foreign policy interests of the United States." (AR–000001; AR–000006.) The fact that OFAC reached this decision despite Zarmach's argument that neither Sudan nor Sudapet had any "*ownership* interest in the funds" (AR–000007 (emphasis added)) does not mean that OFAC's path cannot "reasonably be discerned.' " *Dickson,* 68 F.3d at 1404. [6]

2. OFAC Action Involving Government of Ethiopia

Zarmach challenges OFAC's decision as inconsistent with its treatment of blocked funds destined for Sudan from the Government of Ethiopia, arguing that because OFAC "consider[ed] a release" of Ethiopia's blocked assets, "it would be absurd not to draw the same conclusion in a scenario which mirrors the same facts." (Pl.'s Opp. at 17–18.)

While an agency "must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so," *Indep. Petroleum Ass'n of Am. v. Babbitt,* 92 F.3d 1248, 1258 (D.C.Cir.1996), this Court is mindful that "[a] review of a decision made by OFAC is 'extremely deferential' because OFAC operates 'in an area at the intersection of national security, foreign policy, and administrative law,' " *Empresa Cubana Exportadora de Alimentos y Productos Varios v. United States Dep't of Treasury,* 606 F.Supp.2d 59, 68 (D.D.C.2009) (quoting *Islamic Am. Relief Agency v. Gonzales,* 477 F.3d 728, 734 (D.C.Cir.2007)).

Here, OFAC has proffered sufficient legitimate reasons for treating these cases differently. As an initial matter, it bears noting that while OFAC "considered" issuing a license for the release of Ethiopia's blocked assets, it never actually did so. (Pl.'s Opp. at 18; Defendant's Reply ["Def.'s Reply"] at 10.) Furthermore, OFAC was faced with a specific request from a foreign country (as opposed to a private business), and "based on strong ***159** foreign policy guidance from the State Department and its own consideration of the national security and foreign policy interests involved," OFAC considered the possibility of issuing a license. (AR–000153–54) Such foreign policy considerations are owed substantial deference by this Court, *Regan,* 468 U.S. at 242, 104 S.Ct. 3026, and certainly constitute "legitimate reasons" for reaching a different outcome. Zarmach has therefore not met its burden of establishing that OFAC's differing treatment of its assets and those of the Government of Ethiopia was arbitrary and capricious.

C. Constitutional Claims

1. Takings Clause of the Fifth Amendment

Zarmach alleges that OFAC's refusal to grant it a license violates the Takings Clause of the Fifth Amendment. (Compl. ¶ 53, 55–61.) Under the Fifth Amendment, no "private property [shall] be taken for public use, without just compensation." U.S. Const. amend. V. This claim must be dismissed.

As an initial matter, the Court lacks subject matter jurisdiction over this claim, which is properly brought before the United States Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1). *Dames & Moore v. Regan,* 453 U.S. 654, 688–89, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) (noting that Court of Federal Claims is the proper forum for claims alleging an unconstitutional taking). Moreover, it is no answer for plaintiff to argue that it seeks not compensation but a judgment setting aside OFAC's decision. *Ry. Labor Executives' Ass'n v. United States,* 987 F.2d 806, 816 (D.C.Cir.1993) ("The Taking Clause does not prohibit the government from taking private property. The Clause requires only that the government accomplish the taking in a particular way, namely, by paying for the property."); *Islamic American Relief Agency v. Unidentified FBI Agents,* 394 F.Supp.2d 34, 51 (D.D.C.2005) (finding Court of Federal Claims is proper forum for takings claim in suit challenging IEEPA blocking under APA), *aff'd in part sub nom. Islamic Am. Relief Agency v. Gonzales,* 477 F.3d 728 (D.C.Cir.2007).

But even if this Court had jurisdiction over plaintiff's Takings Clause claim, which it does not, the claim fails as a matter of law. It is well-established that the blocking of assets pursuant to an executive order is not a taking within the

meaning of the Fifth Amendment. *Islamic American Relief Agency v. Unidentified FBI Agents,* 394 F.Supp.2d at 51; *Holy Land I,* 219 F.Supp.2d at 78 (citing multiple cases for the proposition that the blocking of assets does not "as a matter of law, constitute takings within the meaning of the Fifth Amendment"). Accordingly, plaintiff's Fifth Amendment claim will be dismissed.

2. Fourth Amendment

Zarmach further claims that OFAC's "continued blocking" of the funds constitutes an unreasonable seizure contrary to the Fourth Amendment. This claim, too, must fail. As an initial matter, such a claim, having been raised for the first time in plaintiff's opposition, is not properly before the Court. *See Sharp v. Rosa Mexicano,* 496 F.Supp.2d 93, 97 n. 3 (D.D.C.2007) ("[P]laintiff may not, through summary judgment briefs, raise the new claims ... because plaintiff did not raise them in his complaint, and did not file an amended complaint."); *DSMC, Inc. v. Convera Corp.,* 479 F.Supp.2d 68, 84 (D.D.C.2007) (rejecting plaintiff's attempts to broaden claims and thereby amend its complaint in opposition to defendant's motion for summary judgment).

***160** Even if the Court were to read Zarmach's vague assertion that "OFAC's refusal to grant a license ... is contrary to constitutional rights afforded to Zarmach" (Compl. ¶ 53), as somehow containing the requisite specificity necessary to assert a Fourth Amendment violation, this claim would fail. As the Court in *Holy Land I* noted, "the Government plainly had the authority to issue the blocking order pursuant to the IEEPA and the executive orders and the Court has determined that its actions were not arbitrary and capricious. Further, the case law is clear that a blocking of this nature does not constitute a seizure." *Holy Land I,* 219 F.Supp.2d at 78–79 (citing *Tran Qui Than v. Regan,* 658 F.2d 1296, 1301 (9th Cir.1981); *D.C. Precision Inc. v. United States,* 73 F.Supp.2d 338, 343 n. 1. (S.D.N.Y.1999); *Can v. United States,* 820 F.Supp. 106, 109 (S.D.N.Y.1993)); *Islamic American Relief Agency v. Unidentified FBI Agents,* 394 F.Supp.2d 34 at 48 ("[T]his Court agrees that the OFAC's blocking of the [plaintiff's] assets does not create a cognizable claim under the Fourth Amendment."). The Court therefore rejects plaintiff's belated attempt to assert a Fourth Amendment claim.

CONCLUSION

For the foregoing reasons, the Court grants defendant's motion for summary judgment. A separate order accompanies this Memorandum Opinion.

All Citations

750 F.Supp.2d 150

Footnotes

1 This transfer appears to have occurred pursuant to a corporate restructuring by Cliveden, which currently no longer exists as a corporate entity and whose former Chairman is now the Chairman of Zarmach. (Plaintiff's Response to Defendant's Motion to Dismiss and Motion for Summary Judgment ["Pl.'s Opp."] Ex. A.)

2 Zarmach therefore cannot create a material issue of fact at this stage of the proceedings by offering new "factual" information (i.e., the affidavit by the Chairman of both Cliveden and Zarmach) that had not been previously submitted to OFAC. *See also infra* note 6.

3 In addition to claiming that the OFAC's actions violate various constitutional provisions, and thus should be vacated pursuant to the APA, the plaintiff's complaint and its opposition independently allege various constitutional violations. (Compl. ¶¶ 55–61; Pl.'s Opp. at 19–22.) However, the claims are identical. Because the Court finds that the OFAC's actions do not violate the Constitution, and thus should not be vacated under the APA, the constitutional claims necessarily must fail as well.

4 The "standing" arguments raised by defendant do not require extended analysis, as they are almost entirely premised on the validity of OFAC's blocking order, thereby implicating the precise merits-based question associated with plaintiff's claims. "[T]hough the trial court may rule on disputed jurisdictional facts at any time, if they are inextricably intertwined with the merits of the case it should usually defer its jurisdictional decision until the merits are heard." *Herbert v. Nat'l Acad. of Sciences,* 974 F.2d 192, 198 (D.C.Cir.1992).

5 Zarmach's repeated reliance on the *Rux* litigation, a judgment action pursuant to the Terrorism Risk Insurance Act of 2002, Pub. L. 107–297 ("TRIA"), is therefore inapposite. *See Rux v. ABNAmro Bank N.V.,* No. 08–cv–6588, 2009 U.S.

Dist. LEXIS 42847 (S.D.N.Y. April 14, 2009). While TRIA authorizes the attachment of certain blocked assets in which a terrorist party has an actual ownership interest ("blocked assets of that terrorist party," TRIA § 201(a)), the Sudanese sanctions regime under IEEPA authorizes blocking assets in which the Government of Sudan has *any* interest, even if it falls short of a legally enforceable ownership interest.

6 Zarmach's assertions in both its Complaint and in a sworn declaration by its own chairman that "Sudan has no interest in the blocked funds" does not alter this analysis. Even if the Court were required to credit such allegations—which it is not, as they represent legal conclusions—the issue before the Court is based on the record before OFAC at the time of its decision, *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 415, 91 S.Ct. 814, and whether the agency can demonstrate a "rational connection between the facts found and the choice made," *Kreis*, 406 F.3d at 686.

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ANNEX 218

394 F.Supp.2d 34
United States District Court,
District of Columbia.

ISLAMIC AMERICAN RELIEF AGENCY, Plaintiff,
v.
UNIDENTIFIED FBI AGENTS, et al., Defendants.

No. CIV.A. 04–2264(RBW).
|
Sept. 15, 2005.

Synopsis
Background: Islamic relief organization which had been designated a Specially Designated Global Terrorist (SDGT) brought action against Treasury Secretary, Attorney General, and government agents, alleging, inter alia, that the blocking of its assets violated its First, Fourth, and Fifth Amendment rights, as well as the International Emergency Economic Powers Act (IEEPA). Defendants moved to dismiss and for summary judgment.

Holdings: The District Court, Walton, J., held that:

substantial evidence supported decision to block organization's assets despite fact that much of the evidence supporting the finding was classified;

Government did not exceed its statutory authority by blocking organization's assets;

no due process violation occurred in government's seizure of organization's assets even though organization was not afforded notice and a hearing before the blocking; and

District Court lacked personal jurisdiction over Internal Revenue Service (IRS) agent.

Motions granted.

Attorneys and Law Firms

***39** Shereef Akeel, Melamed, Dailey & Akeel, P.C., Huntington Woods, MI, for Plaintiff.

Andrea Marie Gacki, Carlton Greene, U.S. Department of Justice, Washington, DC, for Defendant.

MEMORANDUM OPINION [1]

WALTON, District Judge.

On December 30, 2004, the plaintiff commenced this action claiming violations by the defendants of the First, Fourth and Fifth Amendment to the United States Constitution, the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq.* (2000), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* (2003). Complaint ("Compl.") ¶ 1. On that same day, the plaintiff filed a motion for a preliminary injunction, which this Court denied on February 18, 2005. February 18, 2005 Order. Currently before the Court is (1) the Defendants' Motion to Dismiss and for Summary Judgment [2] and (2) Defendant Paul Schlup's Motion to Dismiss. [3] For the reasons set forth below, the Court grants both motions. [4]

I. Background

(A) Factual Background

The Islamic African Relief Agency, now the Islamic American Relief Agency ***40** ("IARA–USA"), based in Columbia, Missouri, was established in 1985 as a nonprofit humanitarian relief organization under section 501(c)(3) of the United States Internal Revenue Code. Complaint ("Compl.") ¶ 8; Pl.'s Opp'n at 6. Specifically, the IARA–USA has "provided charitable and humanitarian aid to refugees, orphans, victims of human and natural disasters, and other poor and needy persons and entities throughout the world, without regard to faith or political affiliation." Compl. ¶ 9. At the time the IARA–USA was incorporated in the United States, an organization based in Sudan also existed under the name Islamic African Relief Agency ("IARA"). [5] Pl.'s Opp'n at 6. The plaintiff posits that the two organizations are completely separate entities and are in no way related. Compl. ¶¶ 12, 28. In 2000, the IARA–USA began expanding and providing humanitarian relief to other countries outside of the African continent. Pl.'s Opp'n at 7. Thus, to reflect its broader mission, the plaintiff changed its name to the Islamic American Relief Agency ("IARA–USA"). *Id.*

On October 13, 2004, pursuant to Global Terrorism Executive Order No. 13,224, and the IEEPA, the United States Department of the Treasury, Office of Foreign Assets Control ("OFAC"), designated the IARA, including the IARA–USA, as a Specially Designated Global Terrorist ("SDGT"), and blocked the assets of the IARA, along with the assets of five of its senior officials.[6] Com pl. ¶¶ 23–26; Compl., Ex. A; Pl.'s Opp'n at 11. The designation was based on evidence, both classified and unclassified, that purportedly demonstrated that the IARA "assist[s] in, sponsor[s], or provide[s] financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism ...." Exec. Order. 13,224, § 1(d)(i), 66 Fed.Reg. 49,079, at 49,080 (Sept. 23, 2001). Based upon the blocking notice against the IARA, the property of the IARA–USA was also blocked and its bank accounts frozen. Compl. ¶ 29. The OFAC blocking notice stated that the IARA–USA could challenge the blocking order by writing a letter to the Director of the OFAC. Compl., Ex. A at 2. In addition to the blocking notice, the plaintiff posits that the defendants illegally obtained a sealed search warrant, and seized and removed property from the IARA–USA office in Columbia, Missouri. Compl. ¶¶ 31–32.

On December 30, 2004, the plaintiff filed this action challenging the OFAC's decision to block its assets. In particular, the plaintiff brings this action against John Snow, Secretary of the Treasury and Alberto Gonzales, Attorney General of the United States,[7] in their official capacities, and various unidentified Federal Bureau of Investigation ("FBI") Agents, Paul Schlup, a Special Agent with the Internal Revenue Service, and other unidentified Department of the Treasury employees both in their individual and official capacities. Compl. ¶¶ 13–21. The plaintiff's complaint asserts nine separate counts against the various defendants. Specifically, the plaintiff ***41** alleges violations of the APA, the First, Fourth and Fifth Amendments to the United States Constitution, Civil Liability for False Affidavit, and violations of 42 U.S.C. § 1985(3). Compl. ¶¶ 45–101. Moreover, the plaintiff seeks monetary damages pursuant to *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) against the individual defendants.

(B) Statutory and Regulatory Background

(1) *International Emergency Economic Powers Act ("IEEPA")*

Through much of the Twentieth century, the United States utilized economic sanctions as a tool of foreign policy pursuant to the Trading With the Enemy Act ("TWEA"). Passed in 1917, and amended in 1933, the TWEA granted the President "broad authority" to "investigate, regulate, ... prevent or prohibit ... transactions" in times of war or declared national emergencies. 50 U.S.C. app. § 5(b). In 1977, through the passage of the IEEPA, Congress further amended the TWEA. The IEEPA delineates "the President's authority to regulate international economic transactions during wars or national emergencies." S.Rep. No. 95–466 at 2. The IEEPA limited the TWEA's application to periods of declared wars and to certain existing TWEA programs, while the IEEPA was applicable during other times of declared national emergencies. *See Regan v. Wald,* 468 U.S. 222, 227–28, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984). Under the IEEPA, the President can declare a national emergency "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a). The IEEPA authorizes the President to

> investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States ....

50 U.S.C. § 1702(a)(1)(B).[8] However, the IEEPA specifically prohibits the President from regulating or prohibiting directly or indirectly "donations, by persons subject to the jurisdiction of the United States, of articles such as food, clothing, and medicine ... except to the extent that the President determines that such donations ... would seriously impair his ability to deal with any national emergency ...." 50 U.S.C. § 1702(b)(2).

Annex 218

(2) *Executive Order No. 13,224*

Following the September 11, 2001 terrorist attacks on the United States, President Bush, on September 23, 2001, issued Executive Order 13,224, declaring a national emergency with respect to the ***42** "grave acts of terrorism ... and the continuing and immediate threat of further attacks on United States nationals or the United States." Exec. Order. 13,224, 66 Fed.Reg. 49,079, at 49,079 (Sept. 23, 2001). Through this Executive Order, President Bush invoked the authority granted to him under the IEEPA, *id.* § 1, and blocked all property and interests in property of twenty-seven foreign terrorist, terrorist organizations, and their supporters, each which were designated as SDGTs, *id.,* annex.

The Executive Order authorizes the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to designate additional SDGTs whose property or interests in property should be blocked because they "act for or on behalf of" or are "owned or controlled by" designated terrorists, or because they "assist in, sponsor, or provide ... support for," or are "otherwise associated" with them. *Id.* § 1(c)-(d). Moreover, the Executive Order also authorizes the Secretary of Treasury to "employ all powers granted to the President by IEEPA and [the United National Participation Act ('UNPA')]" and to promulgate rules and regulations to carry out the purposes of the Order and to re-delegate such functions if he chose to do so. *Id.* § 7, 66 Fed.Reg. at 49,081. Moreover, the Executive Order states:

> because of the ability to transfer funds or assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to this order.

Id. § 10. In addition, section 4 of the Executive Order states that "the making of donations of the type specified in section 203(b)(2) of IEEPA (50 U.S.C. § 1702(b)(2)) ... would seriously impair my ability to deal with the national emergency declared in this order ... and [therefore the President] ... prohibit[s] such donations ...." *Id.* § 4, 66 Fed.Reg. at 49,080.

(3) *Executive Order 13,372*

On February 16, 2005, President Bush issued Executive Order 13,372. This Executive Order amended Executive Order 13,224 to make clear that the IEEPA's humanitarian aid exception does not authorize entities blocked pursuant to Executive Order 13,324 to donate humanitarian aid articles to anyone, even unblocked persons, without prior authorization from the OFAC. Exec. Order No. 13,372, 70 Fed.Reg. 8499 (Feb. 16, 2005). Specifically, Executive Order 13,372 states:

> I hereby determine that the making of donations of the type of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)), by, to, or for the benefit of, any persons determined to be subject to this order would seriously impair my ability to deal with the national emergency declared in this order, and would endanger Armed Forces of the United States that are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances, and I hereby prohibit such donations as provided by section 1 of this order.

Id. § 1

(4) *Regulations*

The OFAC has, pursuant to a delegation of authority by the Secretary of the Treasury, promulgated recordkeeping and procedural regulations applicable to their various sanctions programs. *See, e.g.,* 50 C.F.R. pt. 500. These regulations permit a designated or blocked individual or entity to seek a license from the OFAC to ***43** engage in any transaction involving blocked property. 31 C.F.R. § 501.801–802. In addition, the regulations establish a procedure to allow a person to "seek administrative reconsideration" of a designation or blocking if a party believes an error has been made. *Id.* § 501.806–807. Specifically, an applicant seeking administrative reconsideration is permitted to submit

materials to contest the designation, and the OFAC may request additional materials from the applicant in assessing the request for reconsideration. *Id.*

II. The Defendants' Summary Judgment and Dismissal Motion

(A) Standards of Review

On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), this Court must construe the allegations and facts in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the facts alleged. *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Barr v. Clinton,* 370 F.3d 1196, 1199 (D.C.Cir.2004) (citing *Kowal v. MCI Communications Corp.,* 16 F.3d 1271, 1276 (D.C.Cir.1994)). However, the Court need not accept asserted inferences or conclusory allegations that are unsupported by the facts set forth in the complaint. *Kowal,* 16 F.3d at 1276. In deciding whether to dismiss a claim under Rule 12(b)(6), the Court can only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference into the complaint, and matters about which the Court may take judicial notice. *St. Francis,* 117 F.3d at 624–25. The Court will dismiss a claim pursuant to Rule 12(b)(6) only if the defendant can demonstrate "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley,* 355 U.S. at 45–46, 78 S.Ct. 99.

This Court will grant a motion for summary judgment under Rule 56(c) if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits or declarations, if any, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). When ruling on a motion for summary judgment, this Court must view the evidence in the light most favorable to the non-moving party. *Bayer v. United States Dep't of Treasury,* 956 F.2d 330, 333 (D.C.Cir.1992). However, the non-moving party cannot rely on "mere allegations or denials ..., but ... must set forth specific facts showing that there [are] genuine issue[s] for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citation omitted). Under Rule 56, "if a party fails to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial" summary judgment is warranted. *Hazward v. Runyon,* 14 F.Supp.2d 120, 122 (D.D.C.1998) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The party moving for summary judgment bears the burden of establishing the absence of evidence to support the non-moving party's case. *Id.* In considering a motion for summary judgment, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). [9]

*44 (B) Legal Analysis

The plaintiff's principal claim in this action is that the OFAC's designation of the IARA–USA as an SDGT and the blocking of its assets, amount to violations of the APA, namely, 5 U.S.C. § 706(2). Pl.'s Opp'n at 18. Under this provision of the APA, this Court may vacate a decision by an agency only if the decision is:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity; [10]
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law; [11]
>
> (E) unsupported by substantial evidence ...; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2)(A). The plaintiff claims that the defendants' actions should be vacated under each of the above provisions. Pl.'s Opp'n at 18. The Court will address each in turn.

(1) *Are the Defendants' Actions Arbitrary and Capricious, Supported by Substantial Evidence, and Warranted by the Facts?*

Under the arbitrary and capricious standard, the Court does not undertake its own fact-finding, rather, the Court must review the administrative record as assembled by the agency. *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). This review is highly deferential to the agency. *See Citizens to Pres. Overton Park, Inc. v. Volpe,* 401 U.S.

402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); *Holy Land Found. for Relief and Dev. v. Ashcroft,* 333 F.3d 156, 162 (D.C.Cir.2003). And "there is a presumption in favor of the validity of [the] administrative action." ***45** *Bristol–Myers Squibb Co. v. Shalala,* 923 F.Supp. 212, 216 (D.D.C.1996). If the "agency's reasons and policy choices ... conform to 'certain minimal standards of rationality' ... the [decision] is reasonable and must be upheld." *Small Refiner Lead Phase–Down Task Force v. EPA,* 705 F.2d 506, 521 (D.C.Cir.1983) (citation omitted). Thus, the Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres. Overton Park,* 401 U.S. at 416, 91 S.Ct. 814. Moreover, in reviewing agency decisions regarding foreign relations, the Court is mindful that "[m]atters related 'to the conduct of foreign relations ... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or inference.' " *Regan,* 468 U.S. at 242, 104 S.Ct. 3026 (quoting *Harisiades v. Shaughnessy,* 342 U.S. 580, 589, 72 S.Ct. 512, 96 L.Ed. 586 (1952)). Thus, "[a]s a general principal, ... this Court should avoid impairment of decisions made by the Congress or the President in matters involving foreign affairs or national security." *Global Relief Found. v. O'Neill,* 207 F.Supp.2d 779, 788 (N.D.Ill.2002) (citing *Haig v. Agee,* 453 U.S. 280, 292, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981)).

The plaintiff contends that the administrative record lacks any evidence demonstrating that the plaintiff has funded terrorist activities or that the plaintiff knowingly interacted with a known terrorist or terrorist organization prior to its designation by the IARA as an SDGT. Pl.'s Opp'n at 18–19. Moreover, the plaintiff contends that the District of Columbia Circuit's decision in *Holy Land Found.,* 333 F.3d at 156, requires the conclusion that the OFAC's decision should be vacated because it lacks substantial evidence in the record. Pl.'s Opp'n at 20–21. In particular, the plaintiff relies heavily on their claim that the IARA and the IARA–USA are completely separate entities that are in no way related, or controlled by the other. *Id.* at 22–30.

This Court recognizes that the plaintiff is at an inherent disadvantage as it is not able to review and analyze the administrative record in its entirety, but rather is limited only to those portions of the administrative record that are not classified. This Court, however, has before it both the classified and unclassified administrative record. Although the Court cannot disclose the evidence which the defendants contend support its decision to block the assets of the IARA–USA, upon careful review of the entire record before it, and affording the defendants the substantial deference they are due under the APA, this Court must conclude that the agency's decision to block the IARA–USA's assets was not arbitrary and capricious, but is in fact supported by substantial evidence in the record and warranted by the facts contained therein. [12] In fact, contrary to ***46** the plaintiff's argument, this Court must conclude that there is substantial evidence in the record to support the defendants' conclusion that the IARA–USA is related and connected to the IARA. Accordingly, the defendants are entitled to summary judgment on this portion of the plaintiff's APA claim.

(2) *Did the Defendants' Actions Exceed their Statutory Authority?*

The power vested in the President pursuant to the IEEPA "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701. Based on the authorization of this statutory provision, the plaintiff posits that the defendants' decision to block the IARA–USA's assets violated the APA because the OFAC exceeded its statutory authority. Pl.'s Opp'n at 43–44. Specifically, the plaintiff argues that there is no evidence of an "unusual and extraordinary threat" to the United States to warrant the blocking of the IARA–USA's assets, as there is no evidence that the plaintiff engaged in or supported terrorist activities. *Id.* at 44.

Contrary to the plaintiff's argument, however, 50 U.S.C. § 1701 does not form the basis for challenging an individual designation. Rather, this provision sets forth the requirement that the President declare a national emergency with respect to such "unusual and extraordinary threats" in order to invoke the provisions of the IEEPA. Once this finding has been made, then the provisions of the IEEPA can be invoked and the assets blocked of organizations designated as SDGTs. Thus, any challenge based on 50 U.S.C. § 1701 must be to the President's determination that an "unusual and extraordinary threat" exists, *i.e.,* the legality of the Executive Order. No such challenge is made here, nor could it successfully be made. The President specifically found the existence of "grave acts of terrorism and threats of terrorism committed by foreign terrorists, ... and the continuing and immediate threat of further attacks on United States nationals or the United States [that] constitute an unusual and extraordinary

threat to the national security, foreign policy, and economy of the United States ....” Exec. Order. 13,224, 66 Fed.Reg. 49,079, at 49,079 (Sept. 23, 2001). Thus, by finding that an unusual and extraordinary threat exists, and by declaring a national emergency, the President employed 50 U.S.C. § 1701 to invoke the provisions of the IEEPA. And following the September 11, 2001 attacks, there was clearly a basis for the President's finding of an unusual and extraordinary threat, and this finding comports with the requirements of 50 U.S.C. § 1701. Accordingly, the President properly exercised the powers granted to him under the IEEPA.

Nonetheless, even if this Court could conclude that 50 U.S.C. § 1701 provides a basis to challenge an individual organization's designation, the plaintiff's claim would still have to be rejected. First, Executive Order 13,224 clearly designates the procedures for designating organizations as SDGTs. Exec. Order. 13,224 §§ 5–7, 66 Fed.Reg. 49,079, at 49,081 (Sept. 23, 2001). Moreover, this Court has already concluded that the defendants had a reasonable basis for blocking the IARA–USA's assets. Thus, there was a sufficient basis for the conclusion that the IARA–USA's actions posed an “unusual and extraordinary” threat to the United States. ***47** Accordingly, there is simply no basis for the plaintiff's claim that the OFAC exceeded its statutory authority. [13] Accordingly, this claim must be dismissed under Rule 12(b)(6), as the plaintiff has failed to state a claim upon which relief can be granted.

(3) *Were the Plaintiff's Constitutional Rights Violated?*

(a) *The Plaintiff's Fourth Amendment Claim*

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The plaintiff contends that the defendants searched its offices and seized its assets without a warrant or an exception to the warrant requirement in violation of the Fourth Amendment. Compl. ¶¶ 52–57; Pl.'s Opp'n at 36–37. The plaintiff specifically is challenging “the removal of its property at the time of the raid.” Pl.'s Opp'n at 35. Moreover, the plaintiff alleges that the defendants obtained a search warrant under false pretenses. *Id.* It appears that the plaintiff is raising two distinct Fourth Amendment claims. First, whether the criminal search warrant that was issued and executed was valid, and second, whether the OFAC properly blocked the IARA–USA's assets.

To the extent that the plaintiff's Fourth Amendment claim seeks to challenge the validity of the search warrant, this aspect of the claim must be dismissed. The search warrant was issued by the United States District Court for the Western District of Missouri. Federal Rule of Criminal Procedure 41(g) states that “[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized.” Fed.R.Crim.P. 41(g). Consistent with the language of the rule, the District of Columbia Circuit has held such a challenge to the validity of a search warrant ***48** must be brought in the district in which the seizure took place. *See Smith v. Katzenbach,* 351 F.2d 810, 814 (D.C.Cir.1965); [14] *see also In re Grand Jury Proceedings,* 115 F.3d 1240, 1245 (5th Cir.1997). Accordingly, to the extent that the plaintiff challenges the validity of the search warrant, this claim must be brought in the district in which the property was seized—the Western District of Missouri. [15] Accordingly, this claim must fail.

Moreover, to the extent the plaintiff is alleging that the OFAC's blocking of its assets violates the Fourth Amendment, this claim must fail as well. As another member of this Court noted in *Holy Land Found.,* “[t]he Government plainly had the authority to issue the blocking order pursuant to the IEEPA and the Executive Orders and the Court has determined that its actions were not arbitrary and capricious. Further, the case law is clear that a blocking of this nature does not constitute a seizure.” *Holy Land Found. for Relief and Dev. v. Ashcroft.,* 219 F.Supp.2d 57, 78–79 (D.D.C.2002) (citing *Tran Qui Than v. Regan,* 658 F.2d 1296, 1301 (9th Cir.1981); *D.C. Precision Inc. v. United States,* 73 F.Supp.2d 338, 343 n. 1. (S.D.N.Y.1999); *Can v. United States,* 820 F.Supp. 106, 109 (S.D.N.Y.1993)). Accordingly, this Court agrees that the OFAC's blocking of the IARA–USA's assets does not create a cognizable claim under the Fourth Amendment. Thus, the defendants are entitled to dismissal of the plaintiff's Fourth Amendment claim. [16]

(b) *The Plaintiff's Fifth Amendment Due Process Claim*

The Fifth Amendment provides that no person may "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V. "The fundamental requirement of [procedural] due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) ***49** (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus,* 435 U.S. 247, 259, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey,* 408 U.S. at 481, 92 S.Ct. 2593. In resolving claims of procedural due process violations, three factors are considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 96 S.Ct. 893. Moreover, in applying this test, the Court is mindful that there are circumstances that "present[ ] an 'extraordinary' situation in which postponement of notice and hearing until after seizure d[oes] not deny due process." *Calero–Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 679–80, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). As the Court noted in *Calero–Toledo,* even immediate seizure of a property interest is appropriate if (1) "the seizure has been directly necessary to secure an important governmental or general public interest;" (2) "there has been a special need for very prompt action;" and (3) "the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Id.* at 679, 94 S.Ct. 2080 (citation omitted).

Here, the plaintiff claims its due process rights were violated because it was not afforded notice and a hearing before its assets were blocked. Compl. ¶¶ 45–47; Pl.'s Opp'n at 38–39. In support of this argument, the plaintiff relies heavily on *Nat'l Council of Resistance of Iran (NCRI) v. Dep't of State,* 251 F.3d 192, 205 (D.C.Cir.2001). However, *NCRI* is inapposite. In *NCRI,* the District of Columbia Circuit held that notice and an opportunity to be heard must be afforded prior to designating an entity as a "foreign terrorist organization" under the Anti–Terrorism and Effective Death Penalty Act ("AEDPA"). *NCRI,* 251 F.3d at 205–208. However, as another member of this Court has found, *NCRI* does not control in cases where action was taken pursuant to the IEEPA, as actions under the IEEPA "flow [ ] from a Presidentially declared national emergency." *Holy Land Found.,* 219 F.Supp.2d at 76. Moreover, the Circuit Court in *NCRI* did "not foreclose the possibility that the [government], in an appropriate case, [could] demonstrat[e] the necessity of withholding all notice and all opportunity to present evidence until the designation [was] already made." *NCRI,* 251 F.3d at 208. This is just such a case. Thus, this Court agrees with its colleague in *Holy Land Found.,* that the applicable test was enunciated in *Calero–Toledo.*

It cannot be reasonably argued that protecting the public from terrorist attacks is not an important governmental and public interest. Moreover, here,

> prompt action by the Government was necessary to protect against the transfer of assets subject to the blocking order. Money is fungible, and any delay or pre-blocking notice would afford a designated entity the opportunity to transfer, ***50** spend, or conceal its assets, thereby making the IEEPA sanctions program virtually meaningless.

Holy Land Found., 219 F.Supp.2d at 77. Finally, there is no dispute that the government, not private parties, initiated the blocking at issue here. Based on these circumstances, the Court agrees with the defendants' position that the plaintiff

were not entitled to pre-deprivation notice and a hearing. Accordingly, the plaintiff's due process challenge must be dismissed, as it fails to state a claim as a matter of law.

(c) *The Plaintiff's Fifth Amendment Equal Protection Claim*

The plaintiff also contends that the defendants have violated the equal protection guarantees embodied in the Fifth Amendment.[17] Compl. ¶¶ 71–78; Pl.'s Opp'n at 31–35. Specifically, the plaintiff opines that the defendants have treated the IARA–USA differently than it has treated the United Nations Children's Fund ("UNICEF"), which has assisted, sponsored, and provided support to the IARA even after the organization was designated as a SDGT. Pl.'s Opp'n at 33.

"The Equal Protection Clause of the [Fifth] Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (quoting *Plyler v. Doe,* 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)). When assessing an equal protection challenge, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440, 105 S.Ct. 3249. However, "when a statute classifies by race, alienage, or national origin," courts must apply a "strict scrutiny" standard of review. *Id.* Accordingly, this Court must first determine what level of review it must employ in this case.

In *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), the Supreme Court made clear that an "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Id.* at 312, 96 S.Ct. 2562. The only conceivable suspect class challenge that could be made here would be religious based,[18] but there is no basis for such a claim, and the plaintiff does not argue, that the IEEPA and the Executive Order intentionally discriminates on the basis of religion. Pl.'s Opp'n at 34 (acknowledging that the IEEPA is "fair on its face"). Nor does the IEEPA or the Executive Orders interfere with the exercise of a fundamental right. Accordingly, any classification made by the IEEPA or the Executive Orders need only be rationally related to a legitimate governmental objective in order to survive a constitutional challenge. *See Mathews v. de Castro,* 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). Here, the IEEPA and the Executive Order are ***51** clearly rationally related to the government's objective to protect the American public from terrorist attacks.

Moreover, the plaintiff has simply failed to even invoke the Equal Protection guarantees of the Fifth Amendment. As noted earlier, as a predicate to invoking the protections of the Equal Protection Clause, the plaintiff must demonstrate that it was similarly situated to other nonprofit organizations who support terrorist activities and who were treated differently. *See Plyler v. Doe,* 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Cook v. Babbitt,* 819 F.Supp. 1, 11 (D.D.C.1993) (citing *City of Cleburne,* 473 U.S. at 439, 105 S.Ct. 3249). Here, the plaintiff contends that its treatment has been different than that of UNICEF. However, based on the evidence presented to this Court, there is simply no basis to conclude that UNICEF has even remotely the same type and number of ties to the IARA, or any other organization with terrorist ties, as does the plaintiff. Thus, the underlying premise for the plaintiff's equal protection argument fails as UNICEF and the IARA–USA are simply not similarly situated. As the Circuit Court stated, "there is no constitutional right to fund terrorism." *Holy Land Found.,* 333 F.3d at 165 (citation omitted). And the record evidence supports the conclusion that the IARA–USA has done exactly that. Accordingly, the defendants are entitled to summary judgment on the plaintiff's equal protection claim.

(d) *The Plaintiff's Takings Clause Claim*

The second count of the plaintiff's complaint alleges that the taking of its property and the blocking of its assets violate the Takings Clause of the Fifth Amendment. Compl. ¶¶ 48–51. Under the Fifth Amendment, no "private property [shall] be taken for public use, without just compensation." U.S. Const. amend V. The defendants argue, and this Court agrees, that this claim must be dismissed.[19] First, it appears that this Court lacks subject matter jurisdiction over the plaintiff's Fifth Amendment claim, as this is a claim properly brought before the United States Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491. *See, e.g.,* 28 U.S.C. § 1491(a)(1) ("[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive

department ....”); *Dames & Moore v. Regan,* 453 U.S. 654, 688–89, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) (noting that the Court of Federal Claims is the proper forum for claims alleging an unconstitutional taking). Moreover, to the extent that the plaintiff seeks to challenge the blocking of assets pursuant to an Executive Order, such an order is not, as a matter of law, a takings within the meaning of the Fifth Amendment. *Holy Land Found.,* 219 F.Supp.2d at 78 (citing multiple cases for the proposition that the blocking of assets does not “as a matter of law, constitute takings within the meaning of the Fifth Amendment.”). [20]

(e) *The Plaintiff's First Amendment Freedom of Speech Claim*

The fourth count of the plaintiff's complaint alleges that the defendants, by prohibiting ***52** the plaintiff from making humanitarian contributions, has violated the free speech guarantees of the First Amendment. Compl. ¶¶ 58–63. Under the First Amendment, “Congress shall make no law ... abridging the freedom of speech.” U.S. Const. amend I. In analyzing claims under the First Amendment, the Supreme Court has provided multiple analytical frameworks depending on the type of speech at issue. For example, if the speech is aimed at interfering with the expressive component of conduct, the Court must apply the strict scrutiny standard of review. *See, e.g. Texas v. Johnson,* 491 U.S. 397, 406, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (applying strict scrutiny to law prohibiting only the burning of flags which offended witnesses of the events). However, the Court analyzes a claim under intermediate scrutiny when the “ regulation ... serves purposes unrelated to the content of expression.” *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *see also United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (applying intermediate scrutiny to regulation prohibiting the burning of a draft card). [21] Here, the plaintiff premises its claim on the Supreme Court's decisions in *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) and *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000), and opines that this Court should employ the strict scrutiny analysis. Specifically, the plaintiff posits that these cases stand for the proposition that the contribution of money is clearly the type of speech activity that warrants protection under the First Amendment. Pl.'s Opp'n at 39–40. Thus, because the Executive Order and the IEEPA prohibit the plaintiff from making financial contributions for humanitarian aid, the plaintiff contends that they violated the First Amendment. Pl.'s Opp'n at 39–40.

The defendants do not argue, nor could they, that donation of money is not a form of speech protected by the First Amendment. *See, e.g., Buckley,* 424 U.S. at 16, 96 S.Ct. 612; *Village of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 636–37, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). Rather, they posit that the Court should employ an intermediate scrutiny standard of review, Defs.' Mem. at 53–54, and this Court agrees. Contrary to the plaintiff's contention, *Buckley* and its progeny simply do not set forth the proper framework for the analysis the Court must conduct in this case. In *Buckley,* the Supreme Court was presented with a statute that placed restrictions on political contributions. *Buckley,* 424 U.S. at 1, 96 S.Ct. 612. Noting that “[t]he First Amendment affords the broadest protection to such political expression,” the Court applied the strict scrutiny standard in analyzing whether the restrictions passed constitutional scrutiny. *Id.* at 14, 96 S.Ct. 612. Here, however, there is no allegation that the IARA–USA uses its funds to make political contributions, rather, the IARA–USA uses its funds for charitable and humanitarian aid. As Judge Kessler noted in *Holy Land Found.,* “[s]uch charitable contributions plainly do not involve political expression, and therefore do not warrant strict scrutiny under *Buckley.*” *Holy* ***53** *Land Found.,* 219 F.Supp.2d at 82 n. 37. Rather, First Amendment freedom of speech challenges to blocking decisions are analyzed under the intermediate scrutiny standard discussed in *United States v. O'Brien,* 391 U.S. 367, 376–77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *See Holy Land Found.,* 219 F.Supp.2d at 81; *see also Humanitarian Law Project v. Reno,* 205 F.3d 1130, 1135–36 (9th Cir.2000); *Global Relief Found., Inc. v. O'Neill,* 207 F.Supp.2d 779, 806 (N.D.Ill.2002).

Under *O'Brien,* the government's restriction passes intermediate scrutiny if (1) “it is within the constitutional power of the Government;” (2) “it furthers an important governmental interest;” (3) “the governmental interest is unrelated to the suppression of free expression;” and (4) “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” 391 U.S. at 377, 88 S.Ct. 1673. Here, the IEEPA and the Executive Order clearly survive constitutional scrutiny under this standard and the plaintiff makes absolutely no attempt to argue otherwise. First, the President clearly had the power to issue Executive Order 13,224, and the OFAC had the authority to block the plaintiff's assets. *See Regan,* 468 U.S. at 244, 104 S.Ct. 3026; *Teague v. Regional Comm'r of Customs,* 404 F.2d 441, 445–46 (2d Cir.1968). Second, Executive Order 13,224 and the OFAC's actions clearly further an important

governmental interest—preventing terrorist attacks. Third, the government's interest is completely unrelated to the suppression of free expression, rather, its interest is to prohibit the funding of terrorist activities. As noted in *Holy Land Found.,* "[m]oney is fungible, and the Government has no other, narrower, means of ensuring that even charitable contributions to a terrorist organization are actually used for legitimate purposes." *Holy Land Found.,* 219 F.Supp.2d at 82 (citing *Humanitarian Law Project,* 205 F.3d at 1136). Moreover, nothing in the IEEPA or the Executive Order prohibits the IARA–USA from expressing its views. Finally, the incidental restriction on the First Amendment is no greater than necessary. Accordingly, this Court must conclude that the restrictions created by the Executive Order and the OFAC's actions are "narrowly enough tailored to only further its interest in stopping the flow" of funds to terrorist activities. *Id.*

(f) *The Plaintiff's First Amendment Freedom of Association Claim*

The plaintiff also claims, relying on *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215, (1982), that because Executive Order 13,224 and the actions of the OFAC's completely prohibit the plaintiff from making any contributions, which is a type of associational activity, the Executive Order and the blocking order violate its right of association as protected by the First Amendment. Pl.'s Opp'n at 41–43. Specifically, the plaintiff contends that the government simply cannot meet its "burden of establishing knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims," which is necessary to withstand constitutional scrutiny. Pl.'s Opp'n at 41–42 (quoting *Healy v. James,* 408 U.S. 169, 186, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972)). The argument raised here is virtually identical to the argument raised and rejected by the Court in *Holy Land Found.,* and this Court sees no reason to depart from the very clear and persuasive logic in that case.

In *Claiborne Hardware Co.,* the Supreme Court reversed the judgment against the NAACP and members of that organization who had participated in a seven-year ***54** boycott of white merchants. The Supreme Court found that liability had been unconstitutionally imposed "by reason of association alone." *Claiborne Hardware Co.,* 458 U.S. at 920, 102 S.Ct. 3409. As the District Court in *Holy Land Found.* noted, "this is simply not a case like *Claiborne Hardware,* because OFAC's action was not taken against [the IARA–USA] for 'reason of association alone.' " *Holy Land Found.,* 219 F.Supp.2d at 80 (citation omitted). Rather, here, as in *Holy Land Found.,*

> the IEEPA, the two Executive Orders, and the blocking order do not prohibit membership in [the IARA–USA] or endorsement of its views, and therefore do[es] not implicate [the IARA–USA's] association rights. Instead, they prohibit [IARA–USA] from providing financial support to [the IARA], "and there is no constitutional right to facilitate terrorist."

Holy Land Found., 219 F.Supp.2d at 81 (quoting *Humanitarian Law Project,* 205 F.3d at 1133). Thus, *Claiborne Hardware Co.* does not control this case and the defendants' actions, which do not prohibit association, are not unconstitutional.

Moreover, because the defendants have not acted based on guilt by association, the specific intent requirement discussed in *Claiborne Hardware Co.* is not applicable here. Nonetheless, "imposing a 'specific intent' requirement on the Government's authority to issue blocking orders would substantially undermine the purpose of the economic sanctions programs. Regardless of [its own] intent, [the IARA–USA] cannot effectively control whether support given to [the IARA] is used to promote that organizations's unlawful activities." *Holy Land Found.,* 219 F.Supp.2d at 81 (citing *Humanitarian Law Project,* 205 F.3d at 1133). Accordingly, the defendants are entitled to dismissal of this claim, as the plaintiff has failed to state a claim upon which relief can be granted.

(g) *The Plaintiff's First Amendment Freedom of Religion Claim*

The fifth count of the plaintiff's complaint alleges a violation of its First Amendment right of free exercise of religion. Compl. ¶¶ 64–70. Specifically, the plaintiff claims that the "IARA–USA and its Muslim donors and employees support and participate in the IARA–USA's work because it fulfills their religious obligations as Muslims to engage in Zakat (humanitarian charitable giving)." *Id.* ¶ 65. Thus, argues the plaintiff, by blocking its assets, the government has substantially burdened its and its donors exercise of religion. *Id.* ¶ 66. The defendants posit, however, that this claim must fail under the ruling in *Farrakhan v. Reagan,* 669 F.Supp. 506, 512, aff'd 851 F.2d 1500, 1988 WL 76623 (1988), and also because the IARA–USA cannot invoke the religious rights of its employees or past donors, nor does it have standing itself to state a valid free exercise claim. Defs.' Mem. at 58–

59. The plaintiff makes no attempt to counter the defendants' argument, and this Court therefore must conclude that the plaintiff concedes that this claim has no merit and must be dismissed. *FDIC,* 127 F.3d at 67–68. In any event, the Court notes that the IARA–USA lacks standing to even make such a claim. As the Supreme Court has recognized, "[s]ince 'it is necessary in a free exercise cause for one to show the coercive effect of the enactment as it operates against him in the practice of his religion,' the claim asserted here is one that ordinarily requires individual participation." *Harris v. McRae,* 448 U.S. 297, 321, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (citation omitted). Thus, the *Harris* Court held that an organization did not have standing to raise a free exercise claim, but rather, it must be brought by an individual. ***55** *Id.* Here, since the only named plaintiff is the IARA–USA, an organization, the IARA–USA simply has no standing to assert this challenge. *See Harris,* 448 U.S. at 321, 100 S.Ct. 2671; *Holy Land Found.,* 219 F.Supp.2d at 83–84.

(h) *The Plaintiff's 42 U.S.C. § 1985(3) Claim*

Although not specifically challenged by the defendants in their dismissal motion, the plaintiff's § 1985 claim must fail as well. This claim is predicated on the defendants' alleged constitutional violations. Com pl. ¶¶ 92–101. Since this Court has already concluded that the plaintiff's constitutional challenges can not survive the defendants' motions, the legal predicate underlying this claim is lacking and it too cannot survive.

(C) Conclusion

Based on the foregoing analysis, the Court concludes that the plaintiff is unable to maintain any of the claims it has raised under the APA, the Constitution, and 42 U.S.C. § 1985. Accordingly, the Court must grant either the defendants' motion to dismiss or their motion for summary judgment.

III. Defendant Schlup's Dismissal Motion

In addition to the other defendants' motion for dismissal of the claims against them in their official capacities, which the Court has granted, defendant Schlup also seeks dismissal of the claims brought against him in his individual capacity. The plaintiff alleges that Schlup violated its First, Fourth, and Fifth Amendment rights, by submitting a false affidavit to obtain a search warrant, and violated 42 U.S.C. § 1985(3). Pl.'s Opp'n to Schlup Mot. at 1. The claims are premised upon the invocation of the ruling enunciated in *Bivens,* 403 U.S. at 388, 91 S.Ct. 1999.[22] Compl. ¶¶ 47, 51, 57, 63, 70, 78, 85. Schlup posits that he should be dismissed as a defendant in this case because this Court lacks personal jurisdiction over him.[23] Schlup's Mem. at 3. The plaintiff contends, however, that this Court has personal jurisdiction over Schlup under two distinct theories. First, the plaintiff opines that Schlup has "transacted business" within the meaning of the District of Columbia's long-arm statute, D.C.Code § 13–423. Pl.'s Opp'n to Schlup's Mot. at 4. And second, the plaintiff posits that this ***56** Court has personal jurisdiction over Schlup because he is a member of a civil conspiracy with members subject to personal jurisdiction in this Court. Pl.'s Opp'n to Schlup's Mot. at 6. Neither argument, however, provides a sufficient basis for this Court to exercise personal jurisdiction over Schlup.[24]

(A) The District of Columbia Long–Arm Statute

"Because *Bivens* suits are suits against government officials in their individual, rather than their official, capacities, personal jurisdiction over the individual defendants is necessary to maintain a *Bivens* claim." *Robertson v. Merola,* 895 F.Supp. 1, 3 (D.D.C.1995) (citing *Delgado v. Bureau of Prisons,* 727 F.Supp. 24 (D.D.C.1989); *Lawrence v. Acree,* 79 F.R.D. 669, 670 (D.D.C.1978)). On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing personal jurisdiction over each defendant. *Crane v. New York Zoological Soc.,* 894 F.2d 454, 456 (D.C.Cir.1990) (explaining that the plaintiff bears the burden of establishing a factual basis for a court's exercise of personal jurisdiction over a defendant). In order to satisfy this burden, the plaintiff cannot rely on conclusory allegations; rather, it must allege specific facts on which personal jurisdiction is based. *First Chicago Int'l v. United Exchange Co.,* 836 F.2d 1375, 1378 (D.C.Cir.1988) (noting that conclusory allegations regarding a defendant's business practices are insufficient to establish personal jurisdiction). Moreover, a court need not treat the plaintiff's allegations as true; rather, the court may consider and weigh affidavits and other relevant matter in making the jurisdictional determination. *Id.* Nonetheless, "[i]n determining whether such a basis exists, factual discrepancies appearing in the record must be resolved in favor of the plaintiff." *Crane,* 894 F.2d at 456 (D.C.Cir.1990).

Under District of Columbia law, personal jurisdiction can be satisfied either by demonstrating that the court has general jurisdiction pursuant to D.C.Code § 13–422, or that the court has personal jurisdiction pursuant to the District of Columbia long-arm statute, D.C.Code § 13–423. It is clear, and the

plaintiff does not contend otherwise, that the Court does not have general jurisdiction over defendant Schlup, as he is not domiciled in the District of Columbia nor does he maintain his principal place of business here. *See* D.C.Code § 13–422. Rather, Schlup is a ***57** resident of Missouri and works in Missouri. Schlup's Mot., Declaration of Paul R. Schlup ("Schlup Dec.") ¶ 2. Thus, the question for this Court to resolve is whether it can exercise personal jurisdiction over Schlup pursuant to the District of Columbia's long-arm statute.

The plaintiff contends that it has satisfied the requirements of showing that this Court can exercise personal jurisdiction over Schlup pursuant to D.C.Code § 13–423(a)(1). Pl.'s Opp'n to Schlup's Mot. at 2. This provisions provides: "(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—(1) transacting business in the District of Columbia." D.C.Code § 13–423. D.C. § 13–423(a)(1) is " 'co-extensive with the Constitution's due process limit.' " *Dickson v. United States,* 831 F.Supp. 893, 897 (D.D.C.1993) (quoting *First Chicago Int'l v. United Exch. Co., Ltd.,* 836 F.2d 1375, 1377 (D.C.Cir.1988)); *see also Envtl. Research Int'l, Inc. v. Lockwood Greene Engineers, Inc.,* 355 A.2d 808 (D.C.1976) (stating that Congress intended the District of Columbia's long-arm statute to be co-extensive with due process.). As a result of this congruence, courts in this jurisdiction have consistently held that "[t]he only nexus required by ... [§ 13–423](a)(1) ... between the District of Columbia and the nonresident defendant is 'some affirmative act by which the defendant brings itself within the jurisdiction and establishes minimum contacts.' "[25] *Berwyn Fuel, Inc. v. Hogan,* 399 A.2d 79, 80 (D.C.1979) (quoting *Cohane v. Arpeja–California, Inc.* 385 A.2d 153, 158 (D.C.1978)). Therefore, the plaintiff must demonstrate that exercising jurisdiction over the defendants would not "offend the traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *see also Hasenfus v. Corporate Air Services,* 700 F.Supp. 58, 61 (D.D.C.1988) (quoting *Int'l Shoe,* 326 U.S. at 316, 66 S.Ct. 154) (internal quotation marks omitted). "Under the 'minimum contacts' standard, courts must insure that 'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court [here].' " *GTE New Media Services Inc. v. BellSouth Corp.,* 199 F.3d 1343, 1347 (D.C.Cir.2000) (quoting *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)).[26]

Here, the plaintiff opines that because Schlup is a special agent with the ***58** Internal Revenue Service ("IRS"), and the IRS is a component of the United States Department of the Treasury, which has its headquarters in the District of Columbia, he has transacted business within the District of Columbia pursuant to the D.C.Code § 13–423(a)(1). Pl.'s Opp'n to Schlup's Mot. at 4. The plaintiff's argument is wholly without merit. First, as already indicated, in order for the plaintiff to precede on its constitutional claims pursuant to *Bivens,* it must first establish that this Court has personal jurisdiction over Schlup in his individual capacity. *Robertson,* 895 F.Supp. at 3. Moreover, it is well-settled that this Court cannot assert jurisdiction over an individual defendant based on his actions taken pursuant to his employment. *See, e.g., Ali v. District of Columbia,* 278 F.3d 1, 7 (D.C.Cir.2002) (district court did not have personal jurisdiction over government employee because all contacts with the District of Columbia were taken in his official capacity); *Ibrahim v. District of Columbia,* 357 F.Supp.2d 187, 193 (D.D.C.2004) (dismissing claims against government employees because all actions connecting these defendants to the forum were taken in their official capacities). Rather, personal jurisdiction over employees of an agency must be based on their individual contacts with the forum, and cannot be based on the agency's contacts with the forum. *See Ali,* 278 F.3d at 7; *accord Wiggins v. Equifax, Inc.,* 853 F.Supp. 500, 503 (D.D.C.1994) ("[p]ersonal jurisdiction over the employees or officers of a corporation in their individual capacities must be based on their personal contacts with the form and not their acts and contacts carried out solely in a corporate capacity."); *Keeton v. Hustler Mag., Inc.,* 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) ("jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him"); *Richard v. Bell Atlantic Corp.,* 976 F.Supp. 40, 49 (D.D.C.1997). Thus, the agency's contact with the District of Columbia are insufficient to confer jurisdiction on this Court over defendant Schlup. Here, the plaintiff believes that this Court can exert personal jurisdiction over Schlup because he is employed and paid by the Department of the Treasury, provides services to the Department of the Treasury at its direction, and is supervised directly or indirectly by officials at the Department of the Treasury. Pl.'s Opp'n to Schlup's Mot. at 3. These allegations are simply insufficient, as each action is based solely on actions allegedly taken by Schlup in his official capacity as an employee of the IRS. The plaintiff's claim that employment by a federal agency provides a basis for this Court to exercise personal jurisdiction over a plaintiff who works and resides in

Missouri under D.C.Code § 13–423(a)(1) is clearly contrary to existing precedent.

Moreover, hailing Schlup into Court in this jurisdiction would clearly offend the Due Process Clause. In the seminal case in this area, *International Shoe,* the Supreme Court found that a Delaware corporation that employed salesmen who resided in the State of Washington, regularly sold shoes in permanent display rooms in Washington, resulting in large volumes of business in Washington, had sufficient contact with the State of Washington to be hailed into court there without violating due process. *Int'l Shoe Co.,* 326 U.S. at 320, 66 S.Ct. 154. By contrast, here, Schlup does not live in the District of Columbia, does not own property in the District of Columbia, never owned or operated a business in the District of Columbia, and never supplied services in the District of Columbia. Schlup's Mot., Schlup Dec. ¶¶ 1–11. The simple fact that Schlup is employed by the IRS, which is a component ***59** of the Department of the Treasury and is headquartered in the District of Columbia, is simply no basis for this Court to exercise personal jurisdiction over Schlup. *See, e.g., American Ass'n of Cruise Passengers v. Cunard Line Ltd.,* 691 F.Supp. 379, 380 (D.D.C.1987) (concluding that personal jurisdiction could not be asserted over an out-of-state defendant because of his membership in a District of Columbia trade association); *Investment Co. Institute v. United States,* 550 F.Supp. 1213, 1217 n. 6 (D.D.C.1982) (noting that "it would surely come as a surprise to the members of the many trade associations having offices [in the District of Columbia] that their memberships counted as intrastate business for jurisdictional purposes.").

(B) Conspiracy Theory of Jurisdiction

Alternatively, the plaintiff posits that this Court has personal jurisdiction over Schlup because he is a member of a civil conspiracy with members subject to personal jurisdiction in this Court. Pl.'s Opp'n to Schlup's Mot. at 6. Courts in this Circuit have "held that acts within the forum of one co-conspirator, in furtherance of an alleged conspiracy, subject a nonresident co-conspirator to personal jurisdiction." *Dooley v. United Technologies Corp.,* 786 F.Supp. 65, 78 (D.D.C.1992) (citing *Mandelkorn v. Patrick,* 359 F.Supp. 692 (D.D.C.1973)). However, a plaintiff seeking to meet its burden of demonstrating that a court may exercise jurisdiction over a defendant under a conspiracy theory must present a "particularized pleading of the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy." *DSMC, Inc. v. Convera Corp.,* 273 F.Supp.2d 14, 20 (D.D.C.2002). "[M]ere speculation that the nonresident defendants' are co-conspirators [is] insufficient to meet plaintiff's *prima facie* burden." *Dooley,* 786 F.Supp. at 78. Thus, conclusory allegations are simply insufficient to establish a court's jurisdiction under the conspiracy theory.

Here, the plaintiff alleges a conspiracy under 42 U.S.C. § 1985(3). Com pl. ¶¶ 92–101. To establish a conspiracy under § 1985(3), the plaintiff must allege:

> (1) a conspiracy; (2) for the purpose of depriving any person or class of persons of the equal protection of the laws, or of privileges and immunities under the law; (3) motivated by some class based, invidiously discriminatory animus exists; (4) whereby a person is either injured in his person or property, or is deprived of any right or privilege of a citizen of the United States.

Graves v. United States, 961 F.Supp. 314, 320 (D.D.C.1997) (citing *Griffin v. Breckenridge,* 403 U.S. 88, 102–03, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *Hobson v. Wilson,* 737 F.2d 1, 14 (D.C.Cir.1984)). Viewing the plaintiff's complaint in the light most favorable to the plaintiff, this Court simply cannot conclude that the plaintiff has sufficiently pled a claim for conspiracy.

> A civil conspiracy is "a combination of two or more persons acting in concern to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in that damage.' "

Graves, 961 F.Supp. at 320 (quoting *Lenard v. Argento,* 699 F.2d 874, 882 (7th Cir.1983) (citation omitted)). Here, the plaintiff has simply failed to allege facts with particularity that support the existence of a conspiracy. First, the plaintiff's conspiracy claim simply alleges a "government-wide conspiracy" to deprive the plaintiff of various constitutional rights. Com pl. ¶¶ 93–94. This is hardly pleading a conspiracy with particularity. Moreover, ***60** the plaintiff's complaint fails to identify which defendants were allegedly part of the conspiracy, and in fact, the few factual allegations detailing actions allegedly committed by Schlup do not even assert that they were performed as part of, or

to advance an alleged conspiracy. *See* Compl. ¶¶ 33–34. In addition, there is simply no allegation in the complaint that any of the defendants conferred with each other or acted in complicity with each other for the purpose of conspiring to deprive the plaintiff of its constitutional rights. Accordingly, there is simply no basis for this Court to conclude that the plaintiff has pled with particularity the facts necessary to support a conspiracy claim. As such, the plaintiff cannot rely upon an alleged conspiracy as a means for this Court to exercise personal jurisdiction over Schlup.

(C) Conclusion

For the reasons set forth above, this Court concludes that it does not have personal jurisdiction over defendant Schlup. Accordingly, the claims brought against Schlup in his individual capacity must be dismissed.[27]

All Citations

394 F.Supp.2d 34

Footnotes

1 The contents of this memorandum opinion contains only information that is already in the public domain, *i.e.,* the plaintiff's complaint, the defendants' unclassified papers, and the unclassified administrative record.

2 The following papers have been submitted to the Court in connection with this motion: (1) Memorandum in Support of Defendants' Motion to Dismiss and for Summary Judgment ("Defs.' Mem."); (2) Plaintiff's Answer to Defendants' Motion to Dismiss and for Summary Judgment ("Pl.'s Opp'n"); and (3) Reply in Support of Defendants' Motion to Dismiss and for Summary Judgment ("Defs.' Reply").

3 The following papers have been submitted to the Court in connection with this motion: (1) Memorandum of Points and Authorities in Support of Defendant Paul Schlup's Motion to Dismiss ("Schlup's Mem."); (2) the Plaintiff's Answer to Defendant Paul Schlup's Motion to Dismiss ("Pl.'s Opp'n to Schlup's Mot."); and (3) Reply in Support of Defendant Paul Schlup's Motion to Dismiss ("Schlup's Reply").

4 Also before the Court is the Plaintiff's Motion for Reconsideration and to Amend Judgment. This motion is directed at the Court's Order issued in response to the plaintiff's motion for a preliminary injunction. Because this Court concludes that the defendants are entitled to summary judgment or dismissal of all the plaintiff's claims, the plaintiff's motion for reconsideration must be denied. In addition, the plaintiff has filed a Motion to Compel Defendants to Pay Attorney Fees ("Pl.'s Mot."). This motion challenges the decision of the United States Department of the Treasury, Office of Foreign Assets Control ("OFAC"), denying the plaintiff access to blocked funds to pay its attorney's fees. Pl.'s Mot. at 2–3. The plaintiff's motion requires little discussion. The plaintiff concedes that its complaint lacks any facts or claims to support this allegation as this decision to deny access to the blocked funds occurred following the filing of the present action. Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion to Compel Payment of Attorney's Fees at 1. As such, this claim is not properly before the Court and must be denied. *See Johnson v. DiMario,* 14 F.Supp.2d 107, 111 (D.D.C.1998) (noting that a new claim must be asserted in an amended complaint pursuant to Federal Rule of Civil Procedure 15).

5 The Court will refer to the United States entity as "IARA–USA," and the Sudan-based organization as "IARA."

6 Specifically, those officials were: Dr. Mohammed Ibrahim Sulaiman, Jaffar Ahmad, Abdullah Makki, Abdul Aziz Abba Karmuhamad, Khalid Ahmed Jumah Al–Sudani, and Abrahim Buisir. Compl. ¶ 26 & Ex. B.

7 Pursuant to Fed.R.Civ.P. 25, the Court has substituted Alberto Gonzales, the current Attorney General, as the proper defendant, for John Ashcroft, who was the Attorney General when this action was filed.

8 In October 2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), which amended the IEEPA. These amendments added, among other things, authority to block assets pending an investigation, and provided that, in case of judicial review of an IEEPA blocking order, an agency record containing classified information "may be submitted to the reviewing court *ex parte* and *in camera.*" 50 U.S.C. § 1702(c) (emphasis added). Pursuant to this provision, this Court has reviewed the classified portions of the agency record in this case.

9 The vast majority of the plaintiff's claims will be dismissed pursuant to Rule 12(b)(6). However, as discussed later in this opinion, the Court has looked beyond the complaint with regards to the plaintiff's First and Fifth Amendment claims, and accordingly, the Court will review those claims under the summary judgment standard. *See* Fed. R. Civ P. 12(b). Although no discovery has taken place, it is appropriate for this Court to look beyond the complaint and resolve these claims under Rule 56(c), as the plaintiff has had ample opportunity to come forward with, and indeed has provided this Court with, a substantial number of exhibits and declarations to support its positions. Moreover, for several reasons, this Court must

conclude that no further discovery is warranted. First, the plaintiff's principal claim is an APA challenge to the OFAC decision. As such, that challenge is limited to a review of the administrative record. *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (under the APA, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). Moreover, based upon the papers and exhibits currently before the Court, discovery would not produce any evidence that could create a genuine factual dispute, which would be necessary to alter this Court's rulings.

10 In addition to claiming that the OFAC's actions violate various constitutional principles, and thus should be vacated pursuant to the APA, the plaintiff's complaint lists separately various alleged constitutional violations. Compl. ¶¶ 45–78. However, the claims are identical. Because this Court finds that the OFAC's actions do not contravene the Constitution, and thus are not violative of the APA, the constitutional claims, for the reasons stated herein, must fail as well.

11 Despite claiming that the defendants' actions were contrary to established procedures, Pl.'s Opp'n at 18, the plaintiff presents no such argument in his papers submitted to the Court. Thus, this claims will not be addressed.

12 Because the Court relies heavily on portions of the classified administrative record, and viewed the administrative record as a whole in making its decision, the Court's analysis would be incomplete if it detailed only those portions of the unclassified administrative record that supports its decision. Thus, this Court will not delineate the facts in the unclassified administrative record that supports this ruling, as doing so would provide an incomplete and fragmented view of this Court's reasoning. *See, e.g., Edmonds v. Dep't of Justice,* 323 F.Supp.2d 65, 68 n. 3 (D.D.C.2004), *aff'd* No. 04–5386 (D.C.Cir. July 5, 2005). Moreover, because the Circuit Court will have to review this decision *de novo* if it is appealed, this Court's analysis of the administrative record will not be central to the resolution of any such appeal. *See Pharm. Research and Mfrs. Am. v. Thompson,* 362 F.3d 817, (D.C.Cir.2004) ("We review the district court's grant of summary judgment *de novo* pursuant to the [APA]").

13 During the preliminary injunction hearing, the plaintiff also posited that the defendants exceeded their statutory authority by blocking its assets because the aid provided by the IARA–USA fell under the humanitarian aid exception of the IEEPA, 50 U.S.C. § 1702(b). Defs.' Mem. at 31. The defendants again argue that the plaintiff's position has no merit. In the plaintiff's opposition, however, the plaintiff makes no argument to the contrary. Accordingly, this Court will treat this argument as conceded by the plaintiff. *FDIC v. Bender,* 127 F.3d 58, 67–68 (D.C.Cir.1997); *Stephenson v. Cox,* 223 F.Supp.2d 119, 121 (D.D.C.2002). However, even if such a claim was now being made, it is clear that the humanitarian aid exception would not apply in this case. First, 50 U.S.C. § 1702(b) does not, on its face, apply to monetary contributions, but rather is limited to the donation of "articles such as food, clothing, and medicine." 50 U.S.C. § 1702(b)(2); *Holy Land Found. for Relief and Dev. v. Ashcroft.,* 219 F.Supp.2d 57, 68 (D.D.C.2002). Moreover, the humanitarian aid exception has an exception itself. Specifically, it states that the exception applies "except to the extent that the President determines that such donations ... would seriously impair his ability to deal with any national emergency declared under section 1701 of this title ...." 50 U.S.C. § 1702(b). Section 4 of Executive Order 13,224 as originally enacted, and as amended by Executive Order 13,372, specifically invokes this exception to the humanitarian aid exception. Exec. Order 13,224 § 4, 66 Fed.Reg. 49,079 (Sept. 23, 2001); *see also* Exec. Order 13,372 § 1, 70 Fed.Reg. 8499 (Feb. 16, 2005). Accordingly, the humanitarian aid exception would not apply even if it was now being advanced by the plaintiff.

14 Rule 41(g) was originally part of Rule 41(e), and that is how the rule was constructed when the Circuit Court issued its ruling in *Smith.* Under that earlier version of the rule, a party could seek the return of property or suppression of its use as evidence in the district where the property was seized. *See Smith,* 351 F.2d at 814. The rule also provided that the suppression motion could be made in the district where the trial is to be held. *Id.* This rule was amended in 1972, 1989, and 2002, with one result being part of Rule 41(g) becoming Rule 41(h). *See* Fed.R.Crim.P. 41, amend. Under the current version of the Rule, a motion seeking return of property is only proper in the district where the property was seized. Fed.R.Crim.P. 41(g). On the other hand, Rule 41(h) provides that a motion to suppress can be brought only in the district where the trial will occur. Fed.R.Crim.P. 41(h). In this case, the plaintiff is seeking the return of its property.

15 The defendants make this argument in their dismissal motion, but the plaintiff makes no attempt in its opposition to challenge this argument. Accordingly, it appears that the plaintiff concedes that this Court is not the proper forum to challenge the legality of the search warrant. *FDIC,* 127 F.3d at 67–68. Moreover, count seven of the plaintiff's complaint, alleging that the search warrant was based upon a false affidavit, is also a challenge to the sufficiency of the search warrant and, for the reasons stated above, must also be brought in the Western District of Missouri.

16 Much of the plaintiff's Fourth Amendment argument is premised on the assumption that the IARA–USA is an organization that is completely separate from the IARA. Thus, goes the argument, there was no probable cause that the IARA–USA was engaged in any wrongdoing. Pl.'s Opp'n at 36–37. As already noted, however, this Court has concluded that there

is substantial evidence in the administrative record to support the OFAC's decision to block the IARA–USA's assets. Accordingly, because the underlying assumption of the plaintiff's argument is without merit, so to is the argument itself.

17 The equal protection component of the Fifth Amendment is derived from the Amendment's due process clause. *Edmonson v. Leesville Concrete Co., Inc.,* 500 U.S. 614, 616, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

18 The plaintiff does not attempt to argue, nor could it, that terrorists or terrorists organizations are a suspect class that warrant application of the "strict scrutiny" test. *See, e.g., Holy Land Found., for Relief and Dev. v. Ashcroft,* 333 F.3d 156, 165 (D.C.Cir.2003) ("there is no constitutional right to fund terrorism.").

19 The plaintiff has failed to advance any argument in opposition to the defendants' position regarding this claim. Accordingly, they have conceded the issue and this claim could be dismissed without further discussion. *FDIC,* 127 F.3d at 67–68.

20 In addition, as this Court has already noted, if this claim seeks the return of the plaintiff's property seized pursuant to the search warrant, such a claim must be brought in the Western District of Missouri.

21 The principal standards under which First Amendment claims are reviewed are strict scrutiny and intermediate scrutiny. *Am. Soc. of Ass'n Executives v. United States,* 23 F.Supp.2d 64, 68 (D.D.C.1998). However, the Supreme Court has employed "other standards for analyzing the restriction of speech depending on the particulars of the speech or the type of regulation at issue. In analyzing statutes involving taxation or the allocation of public funds the Supreme Court has applied a standard even more deferential than intermediate scrutiny." *Id.*

22 In *Bivens,* the Supreme Court acknowledged the right of citizens to file claims for damages against federal law enforcement officials who violate their constitutional rights. *Bivens,* 403 U.S. at 389, 91 S.Ct. 1999. There, petitioner Bivens alleged he had been subjected to an unlawful search and seizure by federal agents in violation of the Fourth Amendment. *Id.* In reversing the District Court and the Second Circuit's affirmance of the dismissal of Biven's complaint on the ground that he had failed to state a cause of action, the Supreme Court held that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials ...." *Id.* at 395, 91 S.Ct. 1999; *see also Corr. Servs. Corp. v. Malesko,* 534 U.S. 61, 66, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001) ("In Bivens ... we recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights.").

23 In addition, defendant Schlup opines that he is entitled to dismissal of the claims raised against him because (1) this Court is not the proper venue for the plaintiff to assert its claims; (2) he was not properly served with the summons and complaint; (3) the plaintiff cannot state a cognizable Fourth Amendment claim against him because it cannot assert Fourth Amendment protections on behalf of its employees or donors; and (4) he is entitled to qualified immunity. Because this Court concludes that it lacks personal jurisdiction over defendant Schlup, it need not address these alternative positions.

24 Throughout the IARA–USA's opposition, it opines that discovery will provide further support for its contention that this Court has personal jurisdiction over defendant Schlup. Pl.'s Opp'n to Schlup's Mot. at 4–5. Motions for discovery concerning personal jurisdiction are liberally granted whenever a party has "a good faith belief that such discovery will enable it to show that the court has personal jurisdiction over the defendant." *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC,* 148 F.3d 1080, 1090 (D.C.Cir.1998). Moreover, "[a] plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum." *El–Fadl v. Cent. Bank of Jordan,* 75 F.3d 668, 676 (D.C.Cir.1996). But the plaintiff here is not entitled to discovery. First, the IARA–USA merely mentions that discovery would further support its arguments, however, it has not filed a motion seeking such discovery, or represented what information discovery would disclose which would elucidate any of the issues, including the jurisdictional issue. Moreover, even if this Court could conclude that such a request has been made, in the absence of any proffer concerning "allege[d] ... facts remotely suggesting that [Schlup] had any connection to the District of Columbia[,]" the Court concludes that jurisdictional discovery would not shed light on whether it can exercise personal jurisdiction over defendant Schlup. *Caribbean Broad. Sys.,* 148 F.3d at 1090.

25 D.C.Code § 13–423(b) acts as a limitation on § 13–423(a) and "bars... claims unrelated to the acts forming the basis for personal jurisdiction." *See Dickson,* 831 F.Supp. at 897 n. 5; *Pollack v. Meese,* 737 F.Supp. 663, 666 (D.D.C.1990) (citing *Willis v. Willis,* 655 F.2d 1333, 1336 (D.C.Cir.1981)). The limitation in § 13–423(b) is "meant to prevent 'the assertion of claims in the forum state that do not bear some relationship to the acts in the forum state relied upon to confer jurisdiction.' " *Cohane,* 385 A.2d at 158 (quoting *Malinow v. Eberly,* 322 F.Supp. 594, 599 (D.Md.1971)). Therefore, if a claim is related to the defendants' acts in the District of Columbia, the requirement of § 13–423(b) is satisfied. *Dickson,* 831 F.Supp. at 897.

26 The burden imposed on the non-resident defendant from being haled into a foreign court will "in an appropriate case be considered in light of other relevant factors, including the interest of the forum state in adjudicating disputes...; the

plaintiff's interest in obtaining convenient and effective relief...; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interests of the several [s]tates in furthering fundamental substantive social policies." *World–Wide Volkswagen,* 444 U.S. at 292, 100 S.Ct. 559 (internal citations omitted).

27 As already indicated, the claims against John Snow, Secretary of the Treasury, and Alberto Gonzales, Attorney General of the United States, in their official capacities are dismissed. In addition, the claims against the various unidentified FBI Agents, Paul Schlup, and other unidentified Department of the Treasury employees are dismissed as they relate to actions taken in their official capacities. Moreover, this Court lacks personal jurisdiction over Paul Schlup, thus the claims against him individually must be dismissed. Accordingly, this Court will dismiss this action. However, the Court recognizes that the claims against the various unidentified FBI agents and unidentified Department of the Treasury employees in their individual capacities might still be cognizable. Specifically, the plaintiff might be able to pursue, for example, *Bivens* claims against these individual defendants once their identities are known. It is likely, however, that this Court would lack personal jurisdiction over any such defendant, just as it lacks jurisdiction over defendant Schlup, as they are likely residents of Missouri and also work there. However, the Court will provide the plaintiff 30 days in which to request reinstatement of this action if it is able to identify these defendants and can demonstrate that this Court can exercise personal jurisdiction over them.

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ANNEX 219

477 F.3d 728
United States Court of Appeals,
District of Columbia Circuit.

ISLAMIC AMERICAN RELIEF AGENCY (IARA–USA), Appellant
v.
Alberto GONZALES, In His Official Capacity as Attorney General of the U.S., et al., Appellees.

No. 05–5447.
|
Argued Nov. 20, 2006.
|
Decided Feb. 13, 2007.

Synopsis

Background: Islamic relief organization brought action against Treasury Secretary, Attorney General, and government agents, alleging, inter alia, that the blocking of its assets, pursuant to a finding that it was a branch office of an organization which had been designated a Specially Designated Global Terrorist (SDGT), violated its First, Fourth, and Fifth Amendment rights, as well as the International Emergency Economic Powers Act (IEEPA). The United States District Court for the District of Columbia, 394 F.Supp.2d 34, Reggie B. Walton, J., awarded summary judgment for defendants, and organization appealed.

Holdings: The Court of Appeals, Sentelle, Circuit Judge, held that:

substantial evidence supported decision to block organization's assets;

government did not exceed its statutory authority by blocking organization's assets;

government did not violate organization's First Amendment right to freedom of association; and

remand was required for consideration of organization's motion to amend its complaint so as to seek to compel access to the blocked funds for the purpose of paying attorney fees.

Affirmed in part and remanded in part.

***730** Appeal from the United States District Court for the District of Columbia (No. 04cv02264).

Attorneys and Law Firms

Shereef H. Akeel argued the cause for appellant. With him on the briefs was John Kenneth Zwerling.

Douglas Letter, Litigation Counsel, U.S. Department of Justice, argued the cause for appellees. With him on the brief was Peter D. Keisler, Assistant Attorney General. Sharon Swingle, Attorney, entered an appearance.

Before: SENTELLE and TATEL, Circuit Judges, and EDWARDS, Senior Circuit Judge.

Opinion

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge.

****95** The Islamic American Relief Agency ("IARA–USA"), based in Columbia, Missouri, challenges the district court's decision upholding the blocking of its assets. The government concluded that the organization was a branch office of a Specially Designated Global Terrorist and invoked its authority under anti-terrorism laws to block IARA–USA assets. In this appeal, IARA–USA contends that the district court erroneously held that the record supports the government's conclusion, and that it erroneously dismissed and entered summary judgment for defendants on IARA–USA's claims under the Administrative Procedure Act and the Constitution. IARA–USA also argues that it should have been permitted to amend its complaint to request access to its blocked funds for payment of attorneys' fees. Because we conclude that the designation was supported by the record and was not contrary to law, we affirm the district court's disposition of the case, but on the question of attorneys' fees we remand for further proceedings.

I

In 1985, a Sudanese immigrant founded IARA–USA as the Islamic African Relief Agency. Since then, the entity has engaged in humanitarian activities around the world, often in partnership with similar organizations. In 2000, IARA–USA ****96 *731** changed its name from the "Islamic *African* Relief Agency" to the "Islamic *American* Relief Agency" (emphasis added). Meanwhile, the entity in Sudan calling itself the Islamic African Relief Agency ("IARA") continued to exist under that name.

On October 13, 2004, the Office of Foreign Assets Control in the Department of the Treasury ("OFAC") designated IARA as a Specially Designated Global Terrorist ("SDGT"). The designation was based on OFAC's conclusion that IARA "provides financial support or other services to persons who commit, threaten to commit or support terrorism" in violation of anti-terrorism laws. Although IARA–USA was not independently designated, OFAC considered it to be the United States branch of IARA and included it in the blocking notice. This meant that none of IARA–USA's financial assets or property could be "transferred, withdrawn, exported, paid, or otherwise dealt in without prior authorization from OFAC." IARA–USA could not receive "any contribution of funds, goods, or services," nor could it continue to use its offices or remove any items of corporate property. Any violation of the blocking notice could subject IARA–USA to criminal and civil penalties.

IARA–USA immediately contested the blocking, maintaining that it is a separate entity from IARA. It requested that OFAC review the designation and permit IARA–USA to access its blocked funds for the limited purpose of paying attorneys' fees. In late December 2004, having failed to persuade OFAC to unblock its assets, IARA–USA filed a complaint in district court, naming as defendants the Attorney General, the Secretary of the Treasury, and other unidentified FBI agents and Treasury personnel.[1] Relevant to this appeal, it claimed that (1) the blocking is unsupported by the record and thus violates the APA and the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707; (2) the blocking violates IARA–USA's constitutional rights of equal protection, free exercise of religion, and free association; and (3) IARA–USA should be permitted to pay attorneys' fees from the blocked funds. In a memorandum opinion and order issued on September 15, 2005, the district court dismissed or entered summary judgment in favor of defendant on all claims. *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F.Supp.2d 34 (D.D.C.2005) ("*IARA–USA* "). The district court held that the record supported OFAC's conclusion that IARA–USA was a branch of IARA, and that the blocking was proper under applicable laws and the Constitution. It also denied the motion to access blocked funds for attorneys' fees.

In this appeal, IARA–USA argues that the district court erred in rejecting the three arguments described above, and that it erred in failing to ensure that the Government complied with an internal regulation requiring it to declassify record evidence and in denying discovery before entering summary judgment. IARA–USA does not challenge the district court's ruling on its other claims.

II

We note at the outset that the designated entity, IARA, is not a party to this case, and IARA–USA does not challenge the evidentiary basis for the designation of its alleged parent. Rather, the question here is whether the record supports OFAC's conclusion that IARA–USA is a branch of IARA. If so, as IARA–USA conceded at oral argument, OFAC's blocking of its assets was a proper consequence of the designation.

***732 **97** We review de novo the district court's entry of summary judgment in favor of the defendants. We will affirm if, viewing all evidence in the light most favorable to IARA–USA, "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see McCready v. Nicholson*, 465 F.3d 1, 7 (D.C.Cir.2006). A dispute over a material fact is " genuine" if the evidence is "such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 7 (quoting *George v. Leavitt*, 407 F.3d 405, 410 (D.C.Cir.2005)). Under the same de novo standard, the dismissal of claims under Federal Rule of Civil Procedure 12(b)(6) will be affirmed if "it appears beyond doubt that [IARA–USA] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). We accept the complaint's factual allegations as true and give IARA–USA the benefit of all inferences that can reasonably be drawn therefrom. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C.Cir.2002). This Court need not, however, accept inferences that are unsupported by the facts set out in the complaint, nor will it accept legal conclusions cast in the form of factual allegations. *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C.Cir.1994).

Our review of an SDGT designation falls under the APA, and thus its highly deferential standard of review applies. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C.Cir.2003). Under that standard, we will set aside OFAC's action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We may not substitute our judgment for OFAC's, but we will require it to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks omitted); *see also Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 507 (D.C.Cir.2003). Thus, with respect to the APA claims, if OFAC's actions were not arbitrary and capricious and were based on substantial evidence, we must affirm the district court's decision. 5 U.S.C. § 706(2)(A); *Holy Land*, 333 F.3d at 162.

A

This case is the first in this Court challenging an SDGT designation based on a branch relationship with an entity that supports terrorists. Our prior cases involved entities that directly supported terrorists. IARA–USA suggests that because of this factual difference, we should review the blocking as we would review an alias designation in a Foreign Terrorist Organization ("FTO") case. In those cases, we require evidence that the designated entity "so dominates and controls" the alleged alias entity that they can be considered one and the same. *Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 157 (D.C.Cir.2004) ("*NCRI* "). On IARA–USA's theory, then, blocking its assets based on the designation of IARA was proper only if IARA "dominates and controls" IARA–USA. The Government disagrees, arguing that the alias test is not applicable here because this blocking was not based on an alias theory. It urges instead that the blocking may stand if there is sufficient evidence that IARA–USA and IARA are the same organization, even in the absence of evidence that one controls the other.

We conclude that the Government has the better argument. To determine ****98 *733** whether the evidence is sufficient, we must employ a test that reflects the theory on which the assets were blocked. The "dominates and controls" test is appropriate for reviewing the existence of a principal-agent relationship because, where there is sufficient evidence to find an agency relationship, substantial evidence of the principal's unlawful activity is sufficient to justify the designation or blocking of the agent. *See NCRI*, 373 F.3d at 157 (concluding that the "dominates and controls" test is an appropriate basis for upholding an alias designation, because of the " ordinary principle[ ] of agency law" that "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created ... one may be held liable for the actions of the other") (internal quotation marks and citation omitted). In this case, however, OFAC's theory was that IARA–USA and IARA, along with other branch offices, comprised a single global organization. The Government argues that their relationship, therefore, is more accurately described as one between different offices of the same entity. It follows that, if the record contains substantial evidence that IARA–USA is a branch of IARA, then it was proper for OFAC to subject IARA–USA to the blocking as a result of IARA's designation.

The district court applied the proper standard. It entered summary judgment on the APA claims, concluding that the record contained "substantial evidence" to support OFAC's conclusion that IARA–USA "is related and connected to the IARA," and accordingly that the designation was not arbitrary and capricious. *IARA–USA*, 394 F.Supp.2d at 45–46. As did the district court, we shall limit our review of the designation to the administrative record. *Holy Land*, 333 F.3d at 162.

With this framework in mind, we turn to the unclassified record. While the record contains a great number of documents, we discuss here only a sampling of the most pertinent. IARA–USA was founded by an immigrant from Sudan, the site of IARA's offices, and was incorporated with a name identical to IARA's from its founding until 2000, when IARA–USA made the minor change of replacing "African" in its name with "American." IARA–USA's Articles of Incorporation describe it as "Islamic African Relief Agency United States Affiliate" and include the purpose of "effect[ing] the Objectives and Means of the Islamic African Relief Agency as set forth in its Constitution." In the event of IARA–USA's dissolution, the Articles of Incorporation provided that IARA, among other entities, should receive its assets.

Since its founding, IARA–USA has continued to engage in conduct that evinces a branch relationship with IARA. In 1998, for example, IARA–USA applied to the Treasury Department for a license to transfer funds to "Islamic African Relief Agency, Sudan," in which it described itself as "The Islamic African Relief Agency, United States Affiliate." It described "the Islamic African Relief

Agency, Sudan" as its "partner in Sudan." In a letter to the *Washington Times* on October 10, 1995, IARA–USA's Executive Director identified himself as speaking on behalf of "IARA and its partners," implicitly accepted the newspaper's characterization of IARA as the "Khartoum-based 'Islamic Relief Agency,' " and acknowledged IARA's "branch offices in the United States" and other countries. Solicitation materials used by IARA–USA stated that its "international headquarters are in Khartoum, Sudan." Additionally, IARA–USA maintained financial connections with at least one other IARA branch and its address was listed on IARA websites as a United States branch office.

***734 **99** IARA–USA denies that this evidence reveals a branch relationship. The initial identity and current similarity in the entities' names, it claims, is purely coincidental: the founder of IARA–USA, though aware of IARA's existence, chose the name because it was descriptive of the organization's mission. Although IARA–USA offers no explanation for the references to IARA in its Articles of Incorporation, it nonetheless categorically denies that the organization was founded as a branch.

IARA–USA's arguments fail in the face of clear and substantial evidence in the record. The evidence supports the conclusion that, at its founding, IARA–USA considered itself a branch of IARA. An entity's "genesis and history" may properly be considered by OFAC in making the designation or blocking, at least where the ties have not been severed. *Holy Land*, 333 F.3d at 162. Although it is true that IARA–USA subsequently amended its name, there is no indication that it severed the relationship, particularly in light of the more recent evidence discussed above. Indeed, since IARA–USA itself does not concede that it was ever a branch of IARA, it cannot argue that the name change effected a severance of the relationship. Rather, IARA–USA would have us believe that the amended name, as the initial name, was chosen simply because it was descriptive, without any intention of aligning with IARA. We need not pass on the credibility of this explanation, however, because we hold that the other evidence in the record is sufficient to support OFAC's interpretation of the evidence.

We acknowledge that the unclassified record evidence is not overwhelming, but we reiterate that our review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential. *Cf. Holy Land*, 333 F.3d at 166 (noting the unique nature of reviewing an SDGT designation as "involving sensitive issues of national security and foreign policy"); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir.2000) (noting that, where a "regulation involves the conduct of foreign affairs, we owe the executive branch even more latitude than in the domestic context" and stating that the high degree of judicial deference to the decision to designate an entity as an FTO "is a necessary concomitant of the foreign affairs power"). Under that standard, the record—containing various types of evidence from several different sources, and covering an extended period of time—provides substantial evidence for the conclusion that IARA–USA is part of IARA. Furthermore, although we deem it unnecessary to sustain OFAC's actions, the classified record contains extensive evidence that IARA–USA is a branch of IARA.

OFAC's conduct was also lawful under the relevant statute and Executive Orders. In the wake of the attacks of September 11, 2001, the President invoked the authority of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707 ("IEEPA") by declaring a national emergency with respect to the "unusual and extraordinary threat to national security" posed by terrorists. *Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism*, Exec. Order No. 13,224, 66 Fed.Reg. 49,079 (Sept. 23, 2001), as amended by Exec. Orders No. 13,268, 67 Fed.Reg. 44,751 (July 2, 2002) and No. 13,372, 70 Fed.Reg. 8499 (Feb. 16, 2005). In that Order, the President described the types of conduct that could subject an entity to blocking of its assets, such as providing financial support to terrorists. He named a number of entities whose assets would be blocked immediately, and authorized the ****100 *735** Treasury Department to designate additional entities that it determines are within the purview of the Order. Exec. Order No. 13,224, §§ 1, 7, 66 Fed.Reg. at 49,079, 49,081.

IARA–USA argues that OFAC cannot block an entity's assets unless it determines that the entity itself poses an "unusual and extraordinary threat to national security." The district court rejected this argument, holding that the threat need not be found with regard to each individual entity. *IARA–USA*, 394 F.Supp.2d at 46. We agree with the district court. The President may exercise his authority under the IEEPA "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701(a). Thus, once the President has declared a national emergency, the IEEPA authorizes the blocking of property to protect against that threat. *Id.* § 1702(a)(1)(B). It is that authority OFAC invoked when it blocked IARA–USA's assets. We hold that the district court correctly dismissed this claim

because IARA–USA could prove no set of facts that would entitle it to relief.

B

We turn next to IARA–USA's claims that the blocking violated its rights under the Constitution. As an initial matter, we note that IARA–USA's constitutional claims rest on a misinterpretation of OFAC's basis for the designation. IARA–USA argues that the blocking was unconstitutional because the Government has not shown that IARA–USA is controlled or dominated by IARA. But as explained above, OFAC's basis for the blocking was that IARA–USA functions as a branch of IARA. Thus, the "dominates and controls" test is not relevant to whether the blocking was constitutional. And since we have concluded that there was substantial evidence that IARA–USA was a branch of IARA, these constitutional claims lose their footing. As we have noted previously, "there is no First Amendment right nor any other constitutional right to support terrorists." *Holy Land*, 333 F.3d at 166; *see also Humanitarian Law Project*, 205 F.3d at 1133 ("[T]here is no constitutional right to facilitate terrorism" with materials or funding.).

Our analysis of IARA–USA's constitutional arguments is informed by our recent decision in *Holy Land*, 333 F.3d at 164–67. In that case, Holy Land Foundation ("HLF") challenged its designation as an SDGT under the First, Fourth, and Fifth Amendments. *Id.* The district court rejected HLF's First and Fifth Amendment claims, and we affirmed, on the basis that "the law is established that there is no constitutional right to fund terrorism." *Id.* at 165. Thus, where an organization is found to have supported terrorism, government actions to suspend that support are not unconstitutional. *Id.* (noting that HLF could not have "produced evidence upon which a reasonable trier of fact could have found that the designation and the blocking of assets violated its First or Fifth Amendment rights" because "there is no constitutional right to fund terrorism" and the record evidence established that HLF did fund a terrorist organization).

IARA–USA contends that OFAC violated its right to equal protection under the Fifth Amendment by singling it out as a Muslim organization. As evidence that OFAC treated it differently than similar organizations, IARA–USA notes that UNICEF's funds were not blocked even though it also provided financial support to IARA. The district court entered summary judgment after concluding that IARA– ****101 *736** USA had not shown that it was similarly situated to UNICEF. *IARA*, 394 F.Supp.2d at 50–51. As the district court noted, to survive summary judgment IARA–USA must show that it was treated differently than a similar organization with similar ties to an SDGT. *Cf. Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (" [T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (quoting *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 84 L.Ed. 1124 (1940))). IARA–USA asserts that UNICEF entered into a contract in which it agreed to provide financial support to IARA. But a single contact of this nature does not begin to approximate the extensive relationship between IARA–USA and IARA. As the district court held, IARA–USA and UNICEF are not similarly situated, and as a result their disparate treatment by OFAC cannot itself support a claim that IARA–USA has been denied equal protection of the law. IARA–USA's equal protection claim thus was properly rejected by the district court.

IARA–USA also argues that OFAC violated its rights of association and free exercise of religion under the First Amendment. Its freedom of association claim is that the blocking inhibits its ability to engage in the associational activity of making financial contributions and that its association, even with an unpopular entity, cannot form the basis of the decision to block its assets. Following *Holy Land*, the district court dismissed the claim, concluding that the blocking did not implicate IARA–USA's association rights because it did not prevent or punish the associational activity of IARA–USA, but rather was directed at its funding of terrorists, as a branch of IARA. *IARA–USA*, 394 F.Supp.2d at 54. We agree with the district court. Our decision in *Holy Land* relied on the Ninth Circuit's recent decision in *Humanitarian Law Project*. *Holy Land*, 333 F.3d at 166 (holding, with regard to HLF's freedom of association claim, "that there is no First Amendment right nor any other constitutional right to support terrorists" with funding) (citing *Humanitarian Law Project*, 205 F.3d at 1133). In *Humanitarian Law Project*, entities designated as FTOs argued that preventing them from making donations in support of humanitarian and political activities violated their First Amendment right of association, at least where it was not shown that they intended their donations to support unlawful activities. 205 F.3d at 1133. The Ninth Circuit noted that freedom of association is implicated where people are punished merely for "membership in a group or for espousing its views, whereas the statute in question only prohibited the act of giving material support." *Id.* (citing

Claiborne Hardware Co., 458 U.S. 886, 920, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982)). Similarly, it held that the requirement to show intent to aid unlawful acts was not applicable in the context of donations to terrorist groups, because the money could be used for unlawful activities regardless of donor intent. *Id.* at 1133–34.

Here, as in *Holy Land*, we adopt the Ninth Circuit's reasoning. The blocking was not based on, nor does it prohibit, associational activity other than financial support. The blocking of IARA–USA's assets does not punish advocacy of IARA's or any other entity's goals. *See Humanitarian Law Project*, 205 F.3d at 1133–34 (distinguishing financial support from advocacy and noting that, just as "there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions," neither is there any "right to provide resources with which terrorists can buy weapons and explosives"). We hold that OFAC's blocking of IARA– ****102 *737** USA's assets does not implicate IARA–USA's First Amendment right of association.

Nor is the Government required to show that IARA–USA funded terrorist organizations with an intent to aid their unlawful activities. Although the Supreme Court has previously imposed such an intent requirement, it is limited to cases in which liability was imposed by reason of association alone. *See Healy v. James*, 408 U.S. 169, 186, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972) (noting that where First Amendment rights are denied based on "guilt by association alone, without (establishing) that an individual's association poses the threat feared by the Government ... [t]he government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims") (internal quotation marks and citations omitted). In this case, however, OFAC's decision to block IARA–USA's assets was not based on association. Rather, as we have explained above, the decision was based on OFAC's finding that IARA–USA is a branch of an SDGT. Thus we do not require a showing that IARA–USA intended its funding to support terrorist activities. *Cf. Humanitarian Law Project*, 205 F.3d at 1133–34 ("We therefore do not agree ... that the First Amendment requires the government to demonstrate a specific intent to aid an organization's illegal activities before attaching liability to the donation of funds.").

As to IARA–USA's free exercise of religion claim, we conclude that the district court properly entered summary judgment for defendants. IARA–USA argues that the blocking "substantially burdens" the religious exercise of its members because they intended their donations to fulfill their religious obligation to engage in humanitarian charitable giving. Blocking those funds before they could be distributed, IARA–USA contends, interfered with that religious expression. As we explained in *Holy Land*, "[a]cting against the funding of terrorism does not violate the free exercise rights protected by ... the First Amendment. There is no free exercise right to fund terrorists." 333 F.3d at 167. We have already concluded that there was sufficient evidence in the administrative record that IARA–USA did, through its relationship with IARA, support terrorism. We thus affirm the district court's dismissal of IARA–USA's free exercise claim.

IARA–USA argues that, had it been permitted to engage in additional discovery on its constitutional claims, it might have found evidence sufficient to survive summary judgment. The district court held that discovery was not warranted because, based on the record presented, discovery would not have produced any evidence to create a genuine factual dispute and thus could not have changed its disposition of the claims. *IARA–USA*, 394 F.Supp.2d at 43 n. 9. "The district court has broad discretion in its handling of discovery, and its decision to allow or deny discovery is reviewable only for abuse of discretion." *Brune v. IRS*, 861 F.2d 1284, 1288 (D.C.Cir.1988) (quoting FED. R. CIV. P. 26(b)(1) (internal quotation marks and citation omitted)). The district court's review of the APA claims were limited to the administrative record, but IARA–USA "had ample opportunity" to—and indeed did—come forward with additional evidence during the administrative proceeding to support its other claims. *IARA–USA*, 394 F.Supp.2d at 43 n. 9. *See Holy Land*, 333 F.3d at 166 (noting that there was an adequate record where the designated entity had "every opportunity and incentive to produce the evidence sufficient to rebut" the evidence supporting the designation in order to create a genuine factual ****103 *738** dispute). We thus conclude that the district court did not abuse its discretion in denying discovery.

C

IARA–USA also argues that the district court erred in failing to ensure that the Government complied with an internal regulation governing the declassification of record material in judicial proceedings. The regulation, promulgated by the Department of Justice, states in relevant part that when that agency is required "to produce classified information" in litigation, it "shall immediately determine from the agency originating the

classified information whether the information can be declassified." 28 C.F.R. § 17.17(a)(1). In a hearing in early 2005, the district court accepted DOJ's representation that it had complied with the regulation. Even if it had not, the regulation provides no private right of action, as IARA–USA itself conceded at oral argument before this Court. *Cf. Alexander v. Sandoval*, 532 U.S. 275, 285–86, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (noting, in the context of anti-discrimination legislation, that a regulation does not make actionable conduct that is not prohibited by the statute). We thus find no basis on which we could conclude that the district court erred with respect to the agency's compliance with its internal regulation.

* * *

Finally, IARA–USA maintains that the district court erred in denying its motion to compel payment of attorneys' fees. The blocking notice stated that OFAC would consider "requests for specific licenses to ameliorate the effects" of the blocking, including permitting "the payment from blocked funds ... of attorneys' fees and expenses related to legal representation of the organization in this matter." In its motion, IARA–USA argued that OFAC acted arbitrarily and capriciously in denying its request to access the blocked funds for the purpose of paying attorneys' fees connected with the litigation. The district court denied the motion, concluding that the motion raised a new claim that was collateral to the complaint and thus that the issue was not properly before the court. *IARA–USA*, 394 F.Supp.2d at 39 n. 4. On appeal, IARA–USA concedes that the issue was not raised in its complaint, but argues that the district court should have permitted it to amend its complaint. Indeed, it notes, it requested leave to amend its complaint in its motion to compel attorneys' fees: "If the Court adopts Defendants' argument, then by virtue of this Motion, Plaintiff seeks leave to appeal to amend its Complaint for OFAC's wrongful denial of its attorney fees, in violation of APA." The district court nowhere addressed the request for leave to amend, though this is hardly surprising as this one sentence was buried in an eight-page motion. *IARA–USA*, 394 F.Supp.2d at 39 n. 4 (denying the motion to compel without reference to its alternative request for leave to amend the complaint).

Leave to amend one's complaint is liberally permitted. FED. R. CIV. P. 15(a) (leave to amend a pleading "shall be freely given when justice so requires"); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). We also note that there is some evidence in the record suggesting that IARA–USA's decision to omit the issue from its complaint and the district court's decision to deny the motion may have been based on communications by OFAC implying that it intended to grant the request. IARA–USA's request for leave to amend, therefore, should be considered. We express no opinion on how the district court should rule, but we believe it should consider the motion. We therefore remand on this issue in order to ****104 *739** give the district court an opportunity to consider the motion for leave to amend.

III

As the district court held, the blocking of IARA–USA's assets was not unlawful. OFAC's determination that IARA–USA functions as a branch of IARA was supported by substantial evidence in the unclassified record, and was proper under the relevant anti-terrorism laws, the APA and the Constitution. Accordingly, IARA–USA's claims are without merit and were properly dismissed or disposed of on summary judgment by the district court. The judgment of the district court is affirmed in all respects except that portion relating to IARA–USA's motion for leave to amend its complaint. On that issue, the case is remanded to the district court for further proceedings.

So ordered.

All Citations

477 F.3d 728, 375 U.S.App.D.C. 93

Footnotes

1 For simplicity, we refer to the remaining defendants collectively as "the Government."

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ANNEX 220

219 F.Supp.2d 57
United States District Court,
District of Columbia.

HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, Plaintiff,
v.
John ASHCROFT, in his official capacity as Attorney General of the United States, et al., Defendants.

No. Civ.A. 02–442(GK).
|
Aug. 8, 2002.

Synopsis
Muslim charitable foundation brought action against United States government, challenging its designation as terrorist organization and blocking of its assets. On government's motion in limine and to strike, government's motion to dismiss and for summary judgment, and foundation's motion for preliminary injunction, the District Court, Kessler, J., held that: (1) terrorist designation was not subject to de novo review; (2) foreign national was not required to have legal interest in foundation's assets for blocking to apply; (3) organization was barred from making monetary donations for humanitarian aid; (4) designation was not arbitrary and capricious; and (5) First and Fifth Amendment violations did not ensue from designation; but (6) government's alleged entry onto foundation's premises and removal of property without warrant was sufficient to state claim for unreasonable search and seizure.

Motions granted in part, and denied in part.

Attorneys and Law Firms

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Sandra Marguerite Schraibman, U.S. Department of Justice Federal Programs Branch, Elizabeth Jane Shapiro, U.S. Department of Justice Civil Division, Washington, DC, for Defendants.

MEMORANDUM OPINION

KESSLER, District Judge.

Plaintiff, Holy Land Foundation for Relief and Development ("HLF"), the largest Muslim charitable foundation in the country, brings this action challenging its designation as a terrorist organization and the resulting blocking of its assets as arbitrary, capricious and unconstitutional.

On December 4, 2001, the Office of Foreign Asset Control ("OFAC") of the United States Department of Treasury designated HLF as a specially designated terrorist ("SDT"), as a specially designated global terrorist ("SDGT"), and blocked all of its assets pursuant to the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.* ("IEEPA"), and Executive Orders 13224 and 12947.

Defendants are John Ashcroft, Attorney General; the United States Department of Justice; Paul O'Neill, Secretary of the Treasury; the United States Department of the Treasury; Colin Powell, Secretary of State; and the United States Department of State (collectively the "Government").

In this action, HLF seeks to enjoin Defendants from continuing to block or otherwise interfere with access to or disposition of its assets. Plaintiff alleges that the blocking order violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq;* the First, Fourth and Fifth Amendments of the United States Constitution; and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA").

The matters now before the Court are Plaintiff's Motion for a Preliminary Injunction [# 3], Defendants' Motion to Dismiss and For Summary Judgment [# 17], and Defendants' Motion *In Limine* and to Strike [# 31]. Upon consideration of the motions, oppositions, replies, the arguments presented at the lengthy motions hearing on July 18, 2002, and the entire record herein, for the reasons stated below, the Court **denies** Plaintiff's Motion for a Preliminary Injunction, **grants in part and denies in part** Defendants' Motion to Dismiss and for Summary Judgment, and **grants** Defendants' Motion *In Limine* and to Strike.

I. STATUTORY FRAMEWORK

A. The International Emergency Economic Powers Act

In 1917, Congress enacted the Trading With the Enemy Act ("TWEA"), which granted the President "broad authority" to

"investigate, regulate, ... prevent or prohibit ... transactions" in times of war or declared national emergencies. 50 U.S.C. app. § 5(b).

***63** In 1977, Congress amended the TWEA and enacted the IEEPA to delineate the President's exercise of emergency economic powers in response to both wartime and peacetime crises under the TWEA and the IEEPA respectively. The 1977 legislation granted the President broad emergency economic power in wartime under the TWEA, and granted him similar, but not identical, emergency economic power in peacetime national emergencies under the IEEPA.

The IEEPA authorizes the President to declare a national emergency "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a). Upon declaration of a national emergency, the IEEPA further authorizes the President to

> investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

Id. § 1702(a)(1)(B).

B. Executive Order 12947

Pursuant to his authority under the IEEPA, President Clinton issued Executive Order 12947 on January 23, 1995. President Clinton found that "grave acts of violence committed by foreign terrorists who threaten to disrupt the Middle East peace process" constitute an "unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." E.O. 12947.

The Executive Order blocks all property and interests in property of the terrorist organizations and persons designated in the Order, known as specially designated terrorists, or SDTs. *Id.* § 1. The Islamic Resistance movement (commonly known as "Hamas"), a Palestinian military and political organization, is one of the SDTs identified in the Order. The Executive Order also permits the Secretary of the Treasury to designate additional SDTs if they are found, *inter alia,* to be "owned or controlled by, or to act for or on behalf of" an entity designated in that Order. *Id.* § 1(a)(iii).

C. Executive Order 13224

After the September 11, 2001 terrorist attacks on the United States, President Bush issued Executive Order 13224, declaring a national emergency with respect to the "grave acts of terrorism ... and the continuing and immediate threat of further attacks on United States nationals or the United States." E.O. 13224.

As with the Executive Order issued by President Clinton, Executive Order 13224 blocks all property and interests in property of the designated terrorist organizations, known as specially designated global terrorists, or SDGTs. On October 31, 2001, the President designated Hamas as one of the SDGTs subject to the Order.

The Executive Order also authorizes the Secretary of the Treasury to designate additional SDGTs whose property or interests in property should be blocked because they "act for or on behalf of" or are "owned or controlled by" designated terrorists, or they "assist in, sponsor, or provide ... support for," or are "otherwise associated" with them. *Id.* § 1(c)–(d).

***64** II. PROCEDURAL BACKGROUND

HLF is a non-profit corporation organized in 1989, with its headquarters in Richardson, Texas. It was originally incorporated under the name Occupied Land Fund ("OLF"), and changed its corporate name to Holy Land Foundation for Relief and Development on September 16, 1991. Shukri Abu Baker is HLF's co-founder and has been Chief Executive Officer from its founding to the present. [1]

HLF alleges in its Complaint, that it is a § 501(c)(3) charitable organization that provides humanitarian aid throughout the

world, although its primary focus has been to provide aid to the Palestinian population in the West Bank and Gaza.

On December 4, 2001, the Secretary of Treasury determined that HLF was subject to Executive Orders 12947 and 13224 because HLF "acts for or on behalf of" Hamas. [2] Accordingly, HLF was designated as an SDT under Executive Order 12947 and as an SDGT under Executive Order 13224. Pursuant to the designation, OFAC issued a "Blocking Notice" freezing all of HLF's funds, accounts and real property. At that time, OFAC also removed from HLF headquarters, all documents, computers, and furniture. Pursuant to the Blocking Notice, all transactions involving property in which HLF has any interest are prohibited without specific authorization from OFAC.

Plaintiff filed this action on March 11, 2002, seeking to enjoin Defendants from continuing to block or freeze its assets. Plaintiff alleges that the designation of HLF as an SDT and SDGT and attendant blocking violates (1) the APA; (2) the Due Process Clause of the Fifth Amendment; (3) the Takings Clause of the Fifth Amendment; (4) the Fourth Amendment; (5) First Amendment rights to freedom of speech and association; and (6) the Religious Freedom Restoration Act.

On May 31, 2002, the Government moved for summary judgment on the APA claim and moved to dismiss the remaining constitutional and RFRA claims. On June 24, 2002, the Government filed a Motion *In Limine* and To Strike, seeking to exclude evidence beyond the administrative record, to preclude the taking of evidence in an evidentiary hearing, and to strike the exhibits attached to Plaintiff's Opposition and Reply brief. [3]

III. ANALYSIS

A. Motion *In Limine* and to Strike

HLF contends that the Court should supplement the administrative record with the exhibits attached to its Opposition to Defendants' Motion to Dismiss and for Summary Judgment and Reply in Support of Plaintiff's Motion for a Preliminary Injunction, and that the Court should permit Rule 56(f) discovery and supplement the administrative record accordingly. [4] The ***65** Government has filed a Motion *In Limine* and to Strike in response. For the reasons discussed below, the Court grants the Government's Motion.

It is well-established that the scope of review under the APA is narrow and must ordinarily be confined to the administrative record. *See Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). HLF contends that courts have recognized circumstances under which the reviewing court may consider extra-record evidence, and that such circumstances are present here.

First, the heart of HLF's argument is that the Government must furnish "[t]he 'whole' administrative record," which includes " 'all documents and materials directly or indirectly considered by agency decision-makers and includ[ing] evidence contrary to the agency's position.' " *Thompson v. Dep't of Labor,* 885 F.2d 551, 555 (9th Cir.1989) (citations omitted). HLF reasons that the administrative record in this case is incomplete because OFAC likely considered evidence that it did not include in the record.

HLF's contention is entirely speculative, and it has failed to identify any documents that OFAC directly or indirectly considered and excluded from the 3130 page administrative record. [5] OFAC has certified that the administrative record on file is "complete and accurate." *See* Certification signed by James W. McCament (May 31, 2002). That certification is entitled to "a presumption of administrative regularity and good faith." *Federal Trade Commission v. Invention Submission Corp.,* 965 F.2d 1086, 1091 (D.C.Cir.1992). Accordingly, HLF's speculative statements are insufficient to overcome this presumption and the well-settled principle that judicial review is confined to the administrative record.

Second, HLF contends that the Court should consider evidence outside the administrative record because OFAC has demonstrated bias and bad faith, and inadequacy of factfinding procedures, thereby warranting *de novo* review under 5 U.S.C. § 706(2)(F). Specifically, HLF contends that OFAC's redesignation of HLF as a terrorist [6] was a "sham," because that process had a predetermined outcome, and because the agency failed to consider virtually all of the evidence HLF submitted, and continued to rely on evidence that HLF had discredited.

HLF has made only conclusory allegations of bad faith and inadequate procedures. It has failed to provide any factual basis for its charges. The fact that OFAC redesignated HLF based, in part, on evidence that HLF contends is flawed is

insufficient to suggest bias or inadequate procedures. OFAC did include in the record a significant portion of HLF's evidence challenging OFAC's factual determinations.[7] As addressed *infra* Part III.B.5.d., ***66** it was reasonable for OFAC to determine that the main declaration submitted by HLF was not credible, and that determination does not evidence bias or inadequacy in OFAC's procedures. Moreover, HLF was afforded an opportunity to submit further evidence to the agency, but failed to do so.[8]

In sum, HLF has not demonstrated that the Court should depart from traditional record review analysis in this case.[9] Accordingly, the Court will not permit discovery on the APA claim,[10] and the exhibits attached to Plaintiff's Motion to Dismiss and for Summary Judgment and Reply in Support of Plaintiff's Motion for a Preliminary Injunction will not be considered by the Court. The Court's review of the APA claim is therefore limited to the administrative record.

B. Administrative Procedure Act

As noted above, Plaintiff contends that OFAC's designation of HLF as an SDT and SDGT, resulting in the blocking of its assets, violates the APA. HLF makes three major arguments: (1) OFAC exceeded its statutory authority under the IEEPA because Hamas does not have a legally enforceable interest in HLF's property; (2) the blocking order violates the statute's humanitarian aid exception; and (3) the OFAC action was arbitrary, capricious, and without substantial evidence in the record. The Government has moved for summary judgment on the entire APA claim.

1. Summary Judgment Standard of Review

Under Fed.R.Civ.P. 56, a motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

2. APA Standard of Review

An agency's action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In making this determination, the Court "must consider whether the decision was based on a consideration of ***67** the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). If the "agency's reasons and policy choices ... conform to 'certain minimal standards of rationality' ... the rule is reasonable and must be upheld," *Small Refiner Lead Phase–Down Task Force v. EPA,* 705 F.2d 506, 521 (D.C.Cir.1983) (citation omitted), even though the Court itself might have made different choices.

As noted above, under arbitrary and capricious review, the Court does not undertake its own fact-finding. Instead, the Court must review the administrative record assembled by the agency to determine whether its decision was supported by a rational basis. *See Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

3. The IEEPA Does Not Require a Legally Enforceable Interest

The IEEPA provides, in relevant part, that the President may block "property in which any foreign country or a national thereof has any interest." IEEPA, 50 U.S.C. § 1702(a)(1)(B). HLF contends that this "interest" must constitute a "legally enforceable interest." Accordingly, HLF reasons that OFAC exceeded its statutory authority because it cannot establish that Hamas had any such interest in HLF's property. The Government argues that the IEEPA does not impose any such requirement of a legally enforceable interest on the President's authority. It reasons that OFAC need only determine that Hamas has "any interest" in HLF's property, which it reasonably did in this case. It is clear that both the text of the statute and the cases interpreting it support the Government's position.

First, the plain text of the IEEPA authorizes the blocking of property in which the designated foreign national or country has "*any* interest." IEEPA, 50 U.S.C. § 1702(a)(1)(B) (emphasis added). The language imposes no constraints on that term. Moreover, Congress explicitly authorized the Executive to define the statutory terms of the IEEPA. *See id.* § 1704.[11] OFAC carried out that mandate and defined "interest" to mean "an interest of *any nature whatsoever,* direct or indirect." 31 C.F.R. 500.311–.312 (emphasis added). It is clear, then, that the plain text of the statute, as well as its implementing regulations, broadly define the term "interest," and do not impose the limitation advanced by Plaintiff.

Second, courts have repeatedly upheld OFAC's authority to interpret broadly the term "any interest" in the identical

provisions of the IEEPA, and its predecessor statute, the TWEA. *See Regan v. Wald,* 468 U.S. 222, 224, 225–26, 233–34, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984) (repeatedly stating that the phrase "any interest" must be construed in the broadest possible sense); *Consarc Corp. v. Iraqi Ministry,* 27 F.3d 695, 701–02 (D.C.Cir.1994) ("*Consarc I* ") (finding that OFAC may choose and apply its own definition of property interests, subject to deferential judicial review, and that OFAC's application of its own regulations, "receives an even greater degree of deference than the *Chevron* standard, and must prevail unless plainly inconsistent with that regulation"); *Consarc v. OFAC,* 71 F.3d 909 (D.C.Cir.1995) ("*Consarc II* ") (referring to the expansive statutory grant of power under the IEEPA, and finding that a challenge ***68** to OFAC's interpretation of its own regulation must either demonstrate that the statute clearly forbids the agency's interpretation or that the interpretation is unreasonable).

Third, in those cases where courts have found that a foreign nation or national had an interest in property under the IEEPA, they have not based that ruling on any statutory requirement that the interest be "legally enforceable." *See, e.g., Consarc II,* 71 F.3d at 909; *Consarc I,* 27 F.3d at 695; *Milena Ship Management Co. v. Newcomb,* 995 F.2d 620 (5th Cir.1993). [12]

In sum, in light of the plain text of the IEEPA and OFAC's regulations broadly defining the term "interest," the deference that must be afforded to OFAC's interpretation of its own regulations, and the relevant case law, the Court concludes that the IEEPA does not limit the President's blocking authority to the existence of a legally enforceable interest.

4. The Humanitarian Aid Exception Authorizes Donations of "Articles," But Not of Money

The humanitarian aid exception under the IEEPA provides, in relevant part, that "[t]he authority granted to the President by [the IEEPA] does not include the authority to regulate or prohibit, directly or indirectly ... donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering." IEEPA, 50 U.S.C. § 1702(b)(2). HLF contends that OFAC's blocking order violates this exception because HLF is prohibited from making any humanitarian aid contributions. The Government advances two arguments in response.

First, the Government contends that the humanitarian aid exception does not apply to blocked entities such as HLF. It reasons that this conclusion is compelled by the thrust of the statute, which prohibits a blocked entity such as HLF from using its funds for any purpose (including provision of humanitarian aid) without a license from OFAC.

In fact, the plain text of the statute compels the contrary conclusion. The statute explicitly states that the President's authority to *issue* the blocking order does not include the authority to prohibit humanitarian aid. [13] Accordingly, it is clear that the humanitarian aid exception applies to blocked entities such as HLF, and that the blocking itself cannot prohibit HLF from providing humanitarian aid to non-blocked entities.

Second, the Government contends that, even if the humanitarian aid exception applies to blocked entities, the exception does not cover transfers of money. Both the text of the statute and case law do support this conclusion.

***69** The statute explicitly refers to donations "of articles, such as food, clothing, and medicine," without any reference to monetary donations. *See* 50 U.S.C. 1702(b)(2). Moreover, the legislative history of the humanitarian aid exception makes it clear that Congress specifically chose to exclude monetary contributions from the exception. *Veterans Peace Convoy Inc. v. Schultz,* 722 F.Supp. 1425, 1431 (S.D.Tex.1988) (determining after review of legislative history that statute "authorized donations of articles, but not monetary funds, thereby 'increasing the likelihood that the donation would be used for the intended purpose.' ") (quoting testimony from Senate hearing).

Accordingly, the Court concludes that OFAC exceeded its statutory authority to the extent that it has prohibited HLF from providing humanitarian donations "of articles, such as food, clothing, and medicine." [14] OFAC did not, however, exceed its statutory authority by prohibiting HLF from making monetary contributions for humanitarian purposes.

5. Designation of HLF as a Terrorist and Seizure of Its Assets Do Not Constitute Arbitrary and Capricious Agency Action

The seven volume, 3130 page administrative record in this case provides substantial support for OFAC's determination that HLF acts for or on behalf of Hamas. Specifically, as the following analysis demonstrates, the administrative record

contains ample evidence that (1) HLF has had financial connections to Hamas since its creation in 1989; (2) HLF leaders have been actively involved in various meetings with Hamas leaders; (3) HLF funds Hamas-controlled charitable organizations; (4) HLF provides financial support to the orphans and families of Hamas martyrs and prisoners; (5) HLF's Jerusalem office acted on behalf of Hamas; and (6) FBI informants reliably reported that HLF funds Hamas. [15]

a. HLF Had Early Financial Connections to Hamas

First, the administrative record demonstrates that HLF's financial connections to Hamas began as far back as 1988. Specifically, there is evidence that HLF raised funds for Hamas, that Hamas provided financial support to HLF, and that HLF paid for Hamas leaders to travel to the United States on fund-raising trips.

With respect to HLF's fund-raising on Hamas' behalf, the record contains a December 1988 and a December 1989 publication issued by Hamas. Both publications request that tax deductible donations be sent to OLF, HLF's former corporate name. *See* A.R. 1499–1500, 1511, 1529, 1531–35.

With respect to Hamas' funding of HLF, the evidence establishes that, in 1992, Hamas leaders and activists contributed $210,000 to HLF. The checks were from Hamas political leader Mousa Abu Marzook, [16] Hamas activist and Marzook associate ***70** Ismail Elbarrase, and from Marzook's associate and personal secretary Nasser Alkhatib. *See* A.R. 74, 684–87, 1926–27, 700. Indeed, HLF's 1993 tax return reflected that it received $210,000 from Marzook. *See* A.R. 700.

Further, there is evidence in the record that, at the same time Hamas was funding HLF, it was also funding a network of organizations connected to HLF. There is evidence that at least one of these organizations, Islamic Association for Palestine ("IAP"), has acted in support of Hamas. [17] The Government contends that HLF knew of Hamas' funding of these organizations because HLF's leaders were associated with or related on a familial basis to the leaders of the other funded organizations.

Finally, with respect to HLF's support of Hamas' fund-raising trips, between September 20, 1990 and March 9, 1994, HLF paid for senior Hamas leaders Sheikh Jamil Hamami and Dr. Mohammed Siyam to make eleven trips to the United States. [18] Each of the trips was charged to OLF or HLF's corporate credit card. *See* A.R. 73, 635–38.

b. HLF Officials Met With Hamas Leaders

Second, the administrative record contains evidence of two meetings between Hamas and HLF leaders—a 1993 Philadelphia, Pennsylvania meeting and a 1994 Oxford, Mississippi meeting.

The three-day Philadelphia conference was observed and recorded by the FBI. Five senior Hamas officials and three senior HLF leaders were in attendance. [19] Moreover, senior HLF official Shukri Abu Baker not only attended the conference, but also assisted in planning the meeting and made a presentation to the participants.

With respect to the Oxford, Mississippi meeting, FBI surveillance disclosed that Al–Aqsa Educational Fund (which was run by senior Hamas activist Abdelhaleem Ashqar) and HLF—the two major Muslim charities operating in the United States—had been in conflict over which organization would raise funds in the United States. *See* A.R. 1478, 1482–86. On March 14, 1994, Baker spoke with Hamami, who was in Oxford, Mississippi as part of an Al–Aqsa fund-raising tour. At that time, Hamami read a letter from Marzook to Ashqar directing Ashqar to stop his fund-raising activities in the U.S. until Marzook arrived in the country. *See id.* Baker replied that he had no objection to Marzook resolving HLF's conflict with Al–Aqsa. *See id.*

c. HLF Funds Hamas–Controlled Entities

Third, the administrative record establishes that, since 1992, HLF has made significant contributions to charitable organizations that the Government identifies as controlled or operated by Hamas. Specifically, HLF grant lists reveal that, between 1992 and 1999, HLF contributed approximately 1.4 million dollars to eight Hamas-controlled "zakat" (or charity) committees. ***71** *See* A.R. 1435–36, 86–87, 939–41, 1267. HLF grant lists also establish that, between 1992 and 2001, HLF gave approximately five million dollars to seven other Hamas-controlled charitable organizations, including a hospital in Gaza. *See* A.R. 87–91, 97–98, 100–05, 304–05,

307, 609–29, 732, 815, 843, 856, 858–60, 1127–40, 1143, 1162, 1165–68, 1204, 1209–11, 1253–55, 1796–2000. [20]

In many instances, the Israeli Government provided the information that the charitable organizations HLF funds are controlled by Hamas. HLF contests OFAC's reliance on this information from the Israeli government.

However, agency designations can be based on a broad range of evidence including news reports, intelligence data, and hearsay declarations. *See National Council of Resistance of Iran v. Department of State,* 251 F.3d 192, 196 (D.C.Cir.2001). Moreover, the D.C. Circuit has very recently upheld an agency decision based primarily on foreign governments' intelligence reports. In *32 County Sovereignty Comm. v. Dep't of State,* the Court of Appeals found that the administrative record supported the Secretary of State's determination that petitioners were "foreign terrorist organizations" under the Anti–Terrorism and Effective Death Penalty Act ("AEDPA"), even though the Secretary relied primarily on intelligence reports provided by the British and Irish governments. 292 F.3d 797 (D.C.Cir.2002). Accordingly, it was reasonable for OFAC to rely on the intelligence information provided by the Israeli government.

d. HLF Provides Financial Support to Orphans and Families of Hamas Martyrs and Prisoners

Fourth, the administrative record contains evidence that HLF has provided financial support to the orphans and families of martyred [21] or imprisoned Hamas activists. The majority of this evidence consists of documents recovered from HLF's offices and reports compiled by the Israeli government concerning the recovered documents. Specifically, the administrative record contains the following HLF documents: a binder entitled "Orphans Sponsorship Program, Gaza in July 1999;" 1992 sponsorship forms for needy families; and two letters written by HLF employees. The record also contains two reports prepared by the Israeli government, dated September 20, 1995 and June 5, 1995. [22]

The 1999 Orphans Sponsorship Program binder lists the cause of death of each of the orphan's fathers, specifically distinguishing ***72** between "killing," "martyr," "sickness," and other causes of death. *See* A.R. 1501, 1801–1911. Approximately seventy-seven of the four hundred and forty four orphans in the binder are represented to be children of "martyrs." *See* A.R. 1801–1911.

With respect to HLF's 1992 sponsorship forms for needy families, a space on the form for social worker comments indicates that, in nearly every case, the applicant's parent or guardian was either jailed by the Israeli government for security reasons or martyred. *See* A.R. 1536–1790.

The two letters from HLF employees request the nomination of children and families of martyrs. Specifically, the August 13, 1992 letter from HLF employee Haitham Maghawri states "please nominate a few names of the Martyr's children with a summary on each childs [sic] situation, and how cooperative they are." A.R. 1501, 1791. The second letter, which is not dated, from HLF employee Ibrahim Khalil states: "We asked you for 40 applications forms for needy families from several regions to be sent ASAP, families of the martyrs, if possible would be good." A.R. 1501, 1793–94.

The September 20, 1995 report prepared by the Israeli government is based on that government's analysis of documents it recovered from HLF's Jerusalem office. The recovered documents show funds transferred from HLF to the Islamic Relief Agency [23] for distribution and includes the list of people supported by those funds. The report indicates that people who were not demonstrably connected to Hamas activists received lower payments when compared to those with known Hamas connections. *See* A.R. 78–79, 1285–1396. Finally, the Israeli government's June 5, 1995 report indicates that "some hundred orphans receiving support have been checked" and the "families of several orphans are directly connected with Hamas." A.R. 739.

Plaintiff vigorously contests OFAC's interpretation of the term "martyr" ("shaheed" in Arabic) in its fund solicitations. To that end, Baker, HLF's Chief Executive Officer, submitted a declaration to OFAC contending that HLF's use of that term was not intended to refer to terrorists or suicide bombers. Rather, Baker contends that "martyr" refers to "[a]nyone who died an 'innocent' death under a variety of circumstances .... it is hard to imagine a person who has died in Palestine other than by natural causes, that I would not consider to be 'shaheed.' " Baker Decl. ¶ 22, Pl.Ex. 1. [24]

In light of all of the evidence before OFAC regarding the relationship between HLF and Hamas, it was reasonable for the agency to determine that Baker's explanation was not credible. OFAC's rejection of HLF's definition of "martyr"

is further supported by the fact that the 1999 Orphans Sponsorship Program binder does not differentiate between "innocent" and "natural death," as one would expect given HLF's definition of "martyr." Instead, the binder differentiates between a variety of causes of death, including "martyr," "natural death," "illness," "accident," "killing," ***73** and "electric shock." [25]

e. HLF's Jerusalem Office Supported Hamas

Fifth, there is evidence in the record that HLF's Jerusalem office supported Hamas. The Israeli government closed the office in May 1995, because it was "used for overseeing the channeling of funds to families of Hamas activists who had committed terrorist attacks and for families of Hamas prisoners." A.R. 1305, 1337. The closing was later upheld by the Israeli Supreme Court. *See* A.R. 1360–96.

Moreover, in 1997, the Israeli government arrested Mohammad Anati, the former head of HLF's Jerusalem office, because of his Hamas activities. *See* A.R. 82, 1263. The administrative record contains an Israeli intelligence report summarizing Anati's police interrogations subsequent to his arrest. The report indicates that Anati admitted to being a Hamas activist, and stated that, although HLF provided aid to the needy, some of that money was channeled to Hamas. *See* A.R. 1261, 1266–67, 1278. [26]

f. Unidentified FBI Informants Reported That HLF Funds Hamas

Sixth and finally, the administrative record contains reports from eight unidentified FBI informants. The informants' statements generally recount instances in which HLF leaders stated that HLF funds and supports Hamas. [27]

***74 g. The Administrative Record As A Whole Supports OFAC's Action**

As noted above, the scope of judicial review under the APA "arbitrary and capricious" standard is deferential, and the Court must affirm the agency's decision as long as it is supported by a rational basis.

In this case, the evidence in the administrative record provides ample support for OFAC's conclusion that HLF acts for or on behalf of Hamas. Specifically, there is evidence that HLF had financial connections to Hamas; that HLF and Hamas leaders not only had substantial involvement with one another, but also that an HLF officer agreed to take direction from a senior Hamas activist; and that HLF has provided financial support to Hamas-controlled organizations and to Hamas martyrs and prisoners.

When the Court reviews all of the evidence in the administrative record as a whole, as it must, it is clear that OFAC's decision meets the "minimal standards of rationality," and therefore must be upheld. *Small Refiner Lead Phase–Down Task Force,* 705 F.2d at 521. Plaintiff's arguments challenging the reasonableness of OFAC's determination do not alter the Court's analysis for the following reasons.

First, the heart of HLF's argument is that much of the evidence in the record involves HLF's association with Hamas prior to its designation as a terrorist organization in 1995. HLF reasons that, because the pre–1995 activities were legal, and because the record contains substantially less post–1995 evidence, the administrative record does not support OFAC's determination that HLF acts for or on behalf of Hamas.

Even if HLF were correct that the majority of evidence in the record directly connecting HLF to Hamas involves pre–1995 activities—and the Court is not making that finding—the outcome would not change. HLF does not contend that the pre–1995 evidence may not be considered in evaluating the reasonableness of the agency's action. Certainly, the agency itself may consider the genesis of HLF and the totality of its history. Upon review of the entire administrative record, it is clear that the agency's reliance on pre–1995 evidence does not render its final determination arbitrary and capricious.

Finally, when the pre–1995 evidence is combined with the post–1995 evidence that HLF continued to be controlled by the same individuals who were directly affiliated with Hamas prior to 1995, that HLF continued to fund Hamas-controlled entities and the orphans and families of Hamas martyrs and prisoners, that HLF's Jerusalem office was closely allied with Hamas, and that FBI informants confirmed the funding connection between HLF and Hamas, it was eminently reasonable for OFAC to conclude that HLF continued to act on behalf of Hamas. [28]

Second, HLF contends that much of the post–1995 evidence does not support ***75** OFAC's determination. Specifically, HLF argues that, according to the Government's own evidence, only a very small portion of HLF's donations was made to families of martyrs. HLF also contends that numerous other organizations, including official government entities, contribute to the same zakat committees that HLF funds. What differentiates these organizations from HLF is that they do not have the same connections and association with Hamas that HLF has.

Moreover, the purpose of the Court's inquiry is not to determine whether each and every piece of evidence in the record independently supports OFAC's determination. Nor is it to second-guess the agency on credibility issues or issues involving the Executive Branch's expertise in the area of foreign affairs. *See Regan v. Wald,* 468 U.S. 222, 242, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984). Rather, its function is to conduct a careful review of the entire administrative record and assess whether it demonstrates a reasonable basis for the agency's action. In this case, the administrative record as a whole supports OFAC's determination.

In summary, for all the forgoing reasons, the Court concludes that OFAC's determination that HLF acts for or on behalf of Hamas is supported by substantial evidence in the administrative record and was not arbitrary and capricious. In short, Defendants have not violated the APA.

C. The Constitutional and RFRA Claims

In addition to challenging agency action under the APA, HLF also contends that its designation as a terrorist and the attendant blocking order violate (1) the Due Process Clause of the Fifth Amendment; (2) the Takings Clause of the Fifth Amendment; (3) the Fourth Amendment; (4) First Amendment rights to freedom of speech and association; and (5) the Religious Freedom Restoration Act. The Government has moved to dismiss each of these claims.

For the reasons stated below, the Court concludes that Plaintiff has failed to state a claim under the Fifth and First Amendments and under the Religious Freedom Restoration Act. Plaintiff has, however, sufficiently stated a claim for violation of its Fourth Amendment rights.

1. Motion to Dismiss Standard of Review

For a complaint to survive a Rule 12(b)(6) motion to dismiss, it need only provide a short and plain statement of the claim and the grounds on which it rests. Fed.R.Civ.P. 8(a)(2); *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). A motion to dismiss under Rule 12(b)(6) tests whether the plaintiff has properly stated a claim, not whether the plaintiff will prevail on the merits. Fed.R.Civ.P. 12(b)(6); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Thus, the court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). In deciding ***76** such a motion, the court must accept all of the Complaint's well-pled factual allegations as true and draw all reasonable inferences in the nonmovant's favor. *Scheuer,* 416 U.S. at 236, 94 S.Ct. 1683.

2. Due Process

Plaintiff argues that OFAC's designation of HLF as an SDT and SDGT, resulting in the blocking of its assets, violates the Due Process Clause of the Fifth Amendment. First, HLF contends that OFAC failed to provide pre-designation notice and a hearing in violation of its procedural due process rights. Second, HLF argues that OFAC violated its substantive due process rights by acting arbitrarily and capriciously. For the reasons discussed below, both of these arguments fail.

a. Procedural Due Process

The due process clause generally requires the Government to afford notice and a meaningful opportunity to be heard before depriving a person of certain property interests. *See United States v. James Daniel Good Real Property,* 510 U.S. 43, 62, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993); *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). In this case, it is undisputed that the Government failed to provide HLF any notice or hearing prior to designating it as a terrorist and blocking its assets.[29] For the following reasons, the Government's actions did not, however, violate HLF's right to due process.

HLF relies principally on *National Council of Resistance of Iran v. Department of State,* 251 F.3d 192 (D.C.Cir.2001) ("*NCRI*"), in which the D.C. Circuit held that notice and an opportunity to be heard must be afforded prior to designating an entity as a "foreign terrorist organization" under the AEDPA. However, *NCRI* does not control this case. Here, the agency action was taken pursuant to the IEEPA-based

sanctions program. Action under that program flows from a Presidentially declared national emergency. Thus, this case differs significantly from *NCRI* where neither a declaration of war (as required by the TWEA) nor a Presidentially declared national emergency (as required by the IEEPA) existed to justify the absence of notice and an opportunity to be heard.

The Supreme Court has outlined what circumstances "present[ ] an 'extraordinary' situation in which postponement of notice and hearing until after seizure d[oes] not deny due process." *Calero–Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 679–80, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). To that end, the Government must satisfy the following requirements: (1) the deprivation was necessary to secure an important governmental interest; (2) there has been a special need for very prompt action; and (3) the party initiating the deprivation was a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. *Id.* at 678, 94 S.Ct. 2080.

First, the OFAC designation and blocking order served the important government interest, set forth in the Executive Orders issued by President Bush and President Clinton, of combating terrorism by cutting off its funding. *See Haig v. Agee,* 453 U.S. 280, 307, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981). At the time of HLF's designation, less than three months had ***77** passed since the September 11, 2001 terrorist attacks on United States soil; President Bush had recently declared a national emergency in Executive Order 13224 to deal with the threat of future attacks and the need to curtail the flow of terrorist financing; President Clinton had issued Executive Order 12947 finding that the acts of violence committed by terrorists disrupting the Middle East peace process constituted an extraordinary threat to the United States; and the violence in the Middle East was escalating.

Second, prompt action by the Government was necessary to protect against the transfer of assets subject to the blocking order. Money is fungible, and any delay or pre-blocking notice would afford a designated entity the opportunity to transfer, spend, or conceal its assets, thereby making the IEEPA sanctions program virtually meaningless. Indeed, in issuing the Executive Order, President Bush explicitly determined that, "because of the ability to transfer funds or assets instantaneously, prior notice to such [designated] persons of measures to be taken pursuant to this order would render these measures ineffectual." E.O. 13224 § 10; *see Global Relief Foundation, Inc. v. O'Neill,* 207 F.Supp.2d 779, 804 (N.D.Ill.2002) ("[p]re-deprivation notice would, in fact be antithetical to the objectives of [the IEEPA] sanctions program[ ]"); *Milena Ship Mgmt. Co. Ltd. v. Newcomb,* 804 F.Supp. 846, 854 (E.D.La.1992) (finding that OFAC had to act quickly because "delay would have allowed the assets to leave the United States, thereby thwarting the purpose of the [Executive] Orders").

Third and finally, government officials, and not private parties, initiated the blocking action. OFAC did so pursuant to the IEEPA and two Executive Orders that specifically authorize such action in limited circumstances.

In sum, for the foregoing reasons, the Court concludes that, accepting all of Plaintiff's factual allegations as true, it has not stated a claim for violation of its procedural due process rights.

b. Substantive Due Process

As noted above, HLF also argues that OFAC violated its right to substantive due process by acting arbitrarily and capriciously in designating it as a terrorist and blocking its assets. [30]

This due process challenge must also fail. The Court has determined that OFAC's designation of HLF and blocking of its assets was not arbitrary and capricious under the APA. *See supra* Part III.B. Accordingly, it clear that the agency action did not rise to the level of a constitutional violation.

3. Taking Without Just Compensation

Plaintiff next argues that the blocking of its assets constitutes an uncompensated taking, in violation of the Takings Clause of the Fifth Amendment. [31] The Government argues, first, that the Court lacks jurisdiction to consider this claim, and second, that a blocking order does not, as a matter of law, constitute a taking.

While it is very doubtful that the Court has jurisdiction, [32] even if it did, the ***78** takings claim would fail. The case law is clear that blockings under Executive Orders are temporary deprivations that do not vest the assets in the Government. Therefore, blockings do not, as a matter of law, constitute takings within the meaning of the Fifth Amendment. Accordingly, courts have consistently rejected these claims in the IEEPA and TWEA context. *See Propper*

v. Clark, 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949) (blocking is not a taking because it is a temporary action); *Tran Qui Than v. Regan,* 658 F.2d 1296, 1301 (9th Cir.1981) (rejecting takings claim because blocking under TWEA is not equivalent to vesting); *Global Relief Foundation, Inc. v. O'Neill,* 207 F.Supp.2d 779, 801–02 (N.D.Ill.2002) (finding plaintiff unlikely to succeed on merits of takings claim because IEEPA blocking is temporary); *IPT Co., Inc. v. Dep't of Treasury,* 1994 WL 613371, at *5–6 (S.D.N.Y. Nov. 4, 1994), Def.Ex. E (denying takings claim for IEEPA blocking because blocking is a temporary deprivation). Accordingly, it is clear that, as a matter of law, the blocking order in this case is a temporary deprivation that does not constitute a constitutionally cognizable taking.

Plaintiff may, however, some day have a credible argument that the long-term blocking order has ripened into a vesting of property in the United States. At this stage, HLF's assets have only been blocked for eight months, and it is premature to determine that the temporary deprivation is equivalent to a vesting. It is clear, then, that the current deprivation has not "go[ne] too far," so as to constitute a taking, even though Plaintiff may some day have a more viable claim. *Tahoe–Sierra Preservation Council v. Tahoe Regional Planning Agency,* —— U.S. ——, ——, 122 S.Ct. 1465, 1480, 152 L.Ed.2d 517 (2002); *E–Systems, Inc. v. U.S.,* 2 Cl.Ct. 271, 274–78 (Cl.Ct.1983) (denying motion for summary judgment on takings claim).

Accordingly, the Court concludes that, as a matter of law, the blocking order does not presently constitute an actionable Fifth Amendment taking.

4. Fourth Amendment

HLF further argues that the Government violated its Fourth Amendment rights.[33] Specifically, HLF contends that OFAC's freezing of its bank accounts constitutes an unlawful seizure. Plaintiff also alleges that the Government conducted an unlawful search and seizure by entering its offices, searching them, and removing its documents, office equipment, and other assets without a warrant. It is undisputed that the Government did not obtain a warrant prior to initiating these actions. For the following reasons, the Court concludes that HLF has not stated a Fourth Amendment claim with respect to the freezing of its accounts. However, HLF has stated a claim based on the Government's entry onto its corporate premises and removal of its property without a warrant.

With respect to the freezing of HLF's accounts, the Government contends that its actions do not constitute a seizure within the meaning of the Fourth Amendment. The Government plainly had the authority to issue the blocking order pursuant to the IEEPA and the Executive Orders and the Court has determined that its actions were not arbitrary and capricious. Further, the case law is clear that a ***79** blocking of this nature does not constitute a seizure. *See Tran Qui Than,* 658 F.2d at 1301 (blocking under TWEA is not equivalent to vesting); *D.C. Precision Inc. v. US,* 73 F.Supp.2d 338, 343 n. 1 (S.D.N.Y.1999) (assets blocked by the government are not seized); *Cooperativa Multiactiva de Empleados de Distribuidores de Drogas v. Newcomb,* Civ. No. 98–0949, slip op. at 13–14 (D.D.C. Mar 29, 1999), Def.Ex. F (blocking bars transactions but does not confiscate property and is not tantamount to a forfeiture); *IPT Co.,* 1994 WL 613371, at *5–6 (IEEPA blocking is a temporary freezing and title does not vest in the government); *Can v. US,* 820 F.Supp. 106, 109 (S.D.N.Y.1993) (TWEA blocking does not constitute a vesting merely because it remained in place for a lengthy period of time). Accordingly, the freezing of HLF's accounts is not a seizure entitled to Fourth Amendment protection.

However, the Government's entry into HLF's offices, search of its property, and seizure of its documents and office equipment without a warrant, do raise significant Fourth Amendment concerns. Indeed, these allegations state a classic Fourth Amendment violation. *See G.M. Leasing Corp. v. United States,* 429 U.S. 338, 353–59, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977) (holding that government entry into business premises without a warrant violated the Fourth Amendment).

The Government's arguments to the contrary are not persuasive. First, the Government relies heavily on the nature of its authority pursuant to the IEEPA and the Executive Orders. It reasons that, because the IEEPA expressly allows the freezing of assets, a warrant requirement does not comport with the statutory framework. In support of this contention, the Government argues that OFAC has never sought a search and seizure warrant to effect a blocking, and that procedure has never been required under the IEEPA. The argument is unpersuasive, however, because no court has ever directly addressed the issue.

Moreover, the Government relies on a case that supports the contrary conclusion. In *Global Relief Foundation, Inc. v. O'Neill,* 207 F.Supp.2d 779, 806–07 (N.D.Ill.2002), the Court evaluated the constitutionality of a similar search

and seizure under the IEEPA. The court concluded that the government did not violate the Fourth Amendment precisely because it had obtained a warrant pursuant to the Foreign Intelligence Surveillance Act ("FISA")[34] and because FISA's safeguards provided sufficient protection for the rights guaranteed by the Fourth Amendment.[35] In this case, the Government has ***80** offered no excuse for failing to follow the same procedure by obtaining a warrant from the Foreign Intelligence Surveillance Court to establish the requisite probable cause to enter HLF's corporate premises and remove its property. Its failure to do so, or to otherwise establish the necessary probable cause, states a claim for violation of HLF's Fourth Amendment rights.

Second, the Government contends that a warrant was not necessary because statutory authorization to search or seize supported by an important government interest and adequate safeguards of fairness, may substitute for a warrant or probable cause determination. *See Donovan v. Dewey,* 452 U.S. 594, 599, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981); *New York v. Burger,* 482 U.S. 691, 702, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987); *United States v. Biswell,* 406 U.S. 311, 315–16, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972). The Government is correct that the Supreme Court has delineated this narrow exception in the context of administrative inspections in regulated industries.

However, even if the administrative search exception for commercial entities was analogous to the present factual context, which it is not, a fundamental component of the exception cannot be met in this case. In upholding the warrantless searches, the Supreme Court specifically concluded that the regulatory inspection statutes in question provide a "sufficiently comprehensive and predictable inspection scheme .... that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan,* 452 U.S. at 600, 101 S.Ct. 2534. In this case, neither the IEEPA nor the two Executive Orders provides these essential safeguards of predictability and implicit notice that satisfy the requirements of the Fourth Amendment.

In sum, the Court concludes that HLF has sufficiently stated a Fourth Amendment violation based on the Government's physical entry onto its premises and removal of its property without a warrant. HLF has not, however, stated a claim as to the freezing of its assets, which does not constitute a Fourth Amendment seizure.

5. First Amendment

HLF next argues that the Government has violated the First Amendment by prohibiting it from making any humanitarian contributions.[36] Specifically, HLF contends that its designation as a terrorist organization and the blocking order violate its First Amendment rights to freedom of association and speech. For the reasons discussed below, both of these arguments fail.

a. Freedom of Association

HLF contends that the designation and blocking order are unconstitutional under *NAACP v. Claiborne Hardware Co.,* because the Government has imposed guilt by association and because it has failed to establish that HLF has a "specific intent to further [Hamas'] illegal aims." 458 U.S. 886, 919, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). Each of these arguments is unpersuasive.

First and foremost, this is simply not a case like *Claiborne Hardware,* because OFAC's action was not taken against HLF for "reason of association alone." ***81** *Id.* at 920, 102 S.Ct. 3409. In *Claiborne Hardware,* the Supreme Court reversed a state tort judgment against the National Association for the Advancement of Colored People and members of that organization who had participated in a seven-year boycott of white merchants. The Supreme Court found that liability had been unconstitutionally imposed "by reason of association alone." *Id.* at 920, 102 S.Ct. 3409.

In this case, the IEEPA, the two Executive Orders, and the blocking order do not prohibit membership in Hamas or endorsement of its views, and therefore do not implicate HLF's associational rights. Instead, they prohibit HLF from providing financial support to Hamas, "and there is no constitutional right to facilitate terrorism." *Humanitarian Law Project v. Reno,* 205 F.3d 1130, 1133 (9th Cir.2000) (AEDPA does not impose guilt by association because the statute does not prohibit membership in the designated groups and merely prohibits financial contributions to those groups). Accordingly, the Government has not imposed guilt by association and the agency's action is not unconstitutional pursuant to *Claiborne Hardware.*

Second, the First Amendment does not require the Government to establish that HLF had a "specific intent" to further Hamas' unlawful aims. The *Claiborne Hardware*

court imposed the specific intent requirement on Government restrictions that impose liability on the basis of association alone—classic First Amendment activity. Because the Government in this case has not imposed guilt by association, the *Claiborne Hardware* specific intent requirement is not applicable.

Moreover, imposing a "specific intent" requirement on the Government's authority to issue blocking orders would substantially undermine the purpose of the economic sanctions programs. Regardless of HLF's intent, it can not effectively control whether support given to Hamas is used to promote that organization's unlawful activities. *Humanitarian Law Project,* 205 F.3d at 1133 (First Amendment does not require the government to demonstrate a specific intent to aid an organization's illegal aims because "[m]aterial support given to a terrorist organization can be used to promote the organizations's unlawful activities, regardless of donor intent").

In sum, accepting all of HLF's factual allegations as true, it is clear that HLF has not established any interference with its associational rights.

b. Freedom of Speech

As noted above, HLF also contends that the Government violated its First Amendment right to freedom of speech by prohibiting it from making any humanitarian donations. HLF's humanitarian contributions clearly implicate both speech and nonspeech elements. Accordingly, pursuant to *United States v. O'Brien,* "a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *see also Global Relief Foundation, Inc. v. O'Neill,* 207 F.Supp.2d 779, 806 (N.D.Ill.2002) (applying *O'Brien* standard to deny preliminary injunction for free speech challenge to IEEPA asset freeze); *Humanitarian Law Project,* 205 F.3d at 1135–36 (declining to apply strict scrutiny to AEDPA material support restriction because restriction was not aimed at expressive component of conduct). [37]

***82** Applying the familiar four-part test laid out in *O'Brien,* the Government's restriction passes intermediate scrutiny if (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 376–77, 88 S.Ct. 1673.

In this case, the Executive Orders and blocking order clearly meet these requirements. First, President Bush and President Clinton plainly had the power to issue the Executive Orders pursuant to the IEEPA. Moreover, the IEEPA and the Executive Orders provide OFAC with the authority to designate HLF and block its assets.

Second, as addressed in *supra* Part III.C.2.a., the Executive Orders and OFAC's actions promote an important and substantial government interest—that of combating terrorism by undermining its financial base.

Third, the Government's interest in preventing terrorist attacks is unrelated to suppressing free expression. As addressed above, the Government has merely restricted HLF's ability to provide financial support to Hamas. It has not restricted HLF's ability to express its viewpoints, even if these views include endorsement of Hamas.

Fourth and finally, this incidental restriction is no greater than necessary to further the Government's interest. Money is fungible, and the Government has no other, narrower, means of ensuring that even charitable contributions to a terrorist organization are actually used for legitimate purposes. [38] *See Humanitarian Law Project,* 205 F.3d at 1136 (finding that AEDPA material support restriction is no greater than necessary because money is fungible and even contributions earmarked for peaceful purposes can be used by terrorist organizations for unlawful purposes); *Farrakhan v. Reagan,* 669 F.Supp. 506, 512 (D.D.C.1987) (dismissing free speech claim because "[i]n the face of the national security interests lying behind the [IEEPA] sanctions regulations, ... there is no alternative that would allow organizations to speak through contributions while still allowing the government to effectuate its legitimate and compelling interests in national security"). Accordingly, the Government's restriction in this case is narrowly enough tailored to only further its interest in stopping the flow of American dollars to Hamas.

In sum, OFAC's designation of HLF and attendant blocking order satisfy scrutiny under the *O'Brien* test, and therefore do not violate HLF's First Amendment right to freedom of speech.

***83 6. Religious Freedom Restoration Act and Free Exercise Clause**

Finally, HLF contends that the designation and blocking order substantially burden HLF's exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"). HLF also invokes the free exercise rights of its Muslim employees and donors. Both arguments fail as a matter of law.

a. Substantial Burden on HLF's Exercise of Religion

RFRA prevents the Government from placing a "substantial burden" on the exercise of religion "even if the burden results from a rule of general applicability," unless the Government demonstrates a "compelling government interest" and that it has used the "least restrictive means" of furthering that interest. 42 U.S.C. § 2000bb–1(a), (b). The Court need not address the second and third steps of this inquiry because, accepting all of HLF's factual allegations as true, it has failed to meet its burden of showing that an exercise of its religion has been substantially burdened.

Other than conclusory statements of burdensomeness, HLF makes only two references in its Complaint to its own actual exercise of religion. HLF asserts that "Holy Land's work ... fulfills [its] religious obligations as Muslims to engage in zakat ... [which] is one of the Five Pillars (fundamental tenets) of the Muslim religion." Compl. ¶ 53. HLF also states that "Holy Land's use of ... donations [from its Muslim donors and employees] for charitable and humanitarian purposes, constitute the 'exercise of religion' under [RFRA]." Compl. ¶ 58.

Accepting these factual allegations as true, they simply do not describe any exercise of religion that has been burdened. Although charitable activities may constitute religious exercise if performed by religious believers for religious reasons, HLF has not established that, as an organization, it made these charitable contributions as an exercise of its own religious beliefs. Indeed, nowhere in Plaintiff's Complaint does it contend that it is a religious organization. Instead, HLF defines itself as a "non-profit charitable corporation," without any reference to its religious character or purpose. [39] Compl. ¶ 5.

In sum, Plaintiff's own factual allegations do not identify any exercise of religion that could serve as the basis for a RFRA claim. Accordingly, HLF does not, as a matter of law, state a viable RFRA claim on its own behalf. As the following analysis demonstrates, neither does HLF raise a viable free exercise claim on behalf of its Muslim donors or employees.

b. Free Exercise Rights of HLF's Muslim Employees and Donors

In addition to arguing that its own right to freedom of religion was violated by the Government's actions, HLF also invokes the free exercise rights of its Muslim donors and employees. HLF reasons that, pursuant to *Hunt v. Washington State Apple Advertising Commission,* it has "associational standing" to raise these claims because (1) its donors and employees "would otherwise have standing to sue in their own right;" (2) the interests HLF seeks to protect are "germane to [its] purpose" as a Muslim charity; and (3) "neither the claim asserted nor the relief requested requires the participation of individual [donors and employees] in the lawsuit." 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

***84** It is clear that Plaintiff has failed to meet these *Hunt* requirements. With respect to the third inquiry, the Supreme Court has stated that free exercise claims are precisely the type of claims that require individual participation in order to show the alleged burdensome effect of an enactment on an individual's religious practice. *See Harris v. McRae,* 448 U.S. 297, 321, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) ("[s]ince 'it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion,' the [free exercise claim] is one that ordinarily requires individual participation") (citations omitted). Accordingly, the individual participation of HLF's employees and donors is necessary to establish any burden on their religious practice, and HLF has therefore not met the third *Hunt* factor.

HLF has further failed to establish that it has associational standing because it does not contend that there is any genuine obstacle preventing its donors or employees from asserting their own free exercise rights. *See Singleton v. Wulff,* 428 U.S. 106, 116, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).

Therefore, as a matter of law, HLF does not have associational standing to invoke the free exercise rights of its Muslim donors and employees.

D. Preliminary Injunction

HLF has moved for a preliminary injunction. In order to prevail on this motion, Plaintiff must demonstrate (1) a substantial likelihood of success on the merits; (2) that it will be irreparably injured if an injunction is not granted;[40] (3) that an injunction will not substantially injure the Government; and (4) that the public interest will be furthered by the injunction. *Taylor v. Resolution Trust Corp.,* 56 F.3d 1497, 1505–06 (D.C.Cir.1995). HLF has not carried its burden for the following reasons.

First, Plaintiff has not demonstrated a substantial likelihood of success on its claims. Although the Court has ruled that HLF has stated a constitutional claim on its Fourth Amendment claim and will be afforded an opportunity to prove it, the Court is not prepared to determine that HLF has a substantial likelihood of success on those allegations in light of the strong arguments advanced by the Government in support of its position. As to Plaintiff's likelihood of success on the APA, RFRA, and remaining constitutional claims, the Court has already concluded that they have no merit.

Second, it is also clear that the injury to the Government and the public interest weigh against granting the preliminary injunction. Both the Government and the public have a strong interest in curbing the escalating violence in the Middle East and its effects on the security of the United States and the world as a whole. *Milena Ship Mgmt. Co. Ltd. v. Newcomb,* 804 F.Supp. 846, 854 (E.D.La.1992) (denying motion for preliminary injunction to unblock assets, despite showing of irreparable harm, because "[t] he public interest overarches all else because of the world backdrop against which OFAC's action was taken"). Blocking orders are an important component of U.S. foreign policy, and the President's choice of this tool to combat terrorism is entitled to particular deference.

In sum, the Court concludes that HLF does not have a substantial likelihood of ***85** success on the merits, and that the balance of harms and public interest weighs in favor of denying HLF's motion for a preliminary injunction.

IV. CONCLUSION

For the foregoing reasons, the Court **denies** Plaintiff's Motion for a Preliminary Injunction, **grants in part and denies in part** Defendants' Motion to Dismiss and for Summary Judgment, and **grants** Defendants' Motion *In Limine* and to Strike. Defendants' Motion to Dismiss and for Summary Judgment is granted with respect to the APA, Fifth Amendment, First Amendment, and Religious Freedom Restoration Act claims. Defendants' Motion is denied with respect to the Fourth Amendment claim.

ORDER

The matters now before the Court are Plaintiff's Motion for a Preliminary Injunction [# 3], Defendants' Motion to Dismiss and For Summary Judgment [# 17], and Defendants' Motion *In Limine* and to Strike [# 31]. Upon consideration of the motions, oppositions, replies, the arguments presented at the motions hearing on July 18, 2002, and the entire record herein, for the reasons discussed in the accompanying Memorandum Opinion, it is this ___ day of August 2002 hereby

ORDERED, that Plaintiff's Motion for a Preliminary Injunction is **denied;** it is further

ORDERED, that Defendants' Motion to Dismiss and for Summary Judgment is **granted in part and denied in part;** and it is further

ORDERED, that Defendants' Motion *In Limine* and to Strike is **granted.**

All Citations

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Footnotes

1 As addressed below, the administrative record contains evidence that Baker is involved with Hamas and raises funds on its behalf. HLF vigorously contests the accuracy of this evidence.

2 The parties do not dispute that Hamas is a terrorist organization. As noted above, Hamas was designated as an SDT and SDGT on January 23, 1995, and on October 31, 2001, respectively.

3 On May 1, 2002, the Government filed a Motion to Submit Classified Evidence *In Camera* and *Ex Parte.* The Court has determined that it is not necessary to reach the merits of that issue in order to rule on the pending motions.

4 HLF also argues that the Court should conduct an evidentiary hearing, which evidence would be added to the administrative record. The Court denied that request during the motions hearing conducted on July 18, 2002.

5 Indeed, the Government specifically asserted at the motions hearing that the main documents HLF contends were improperly excluded from the record—Mohammad Anati's police interrogation statements and the transcript of his plea hearing—were not before OFAC when it made its determination.

6 On May 31, 2002, the Government redesignated HLF as an SDT and SDGT based on the record of the first designation, additional unclassified and classified information, and a second evidentiary memorandum from the FBI to OFAC. *See* Newcomb Decl. ¶ 42.

7 The exhibits attached to HLF's Motion for a Preliminary Injunction were considered by OFAC and incorporated into the administrative record. *See* Defs.' Reply Mem. in Supp. of Mot. *In Limine* and to Strike at 11.

8 On April 30, 2002, OFAC sent HLF formal notification that it was considering redesignating HLF as an SDT and SDGT. At that time, HLF was afforded a 15–day period in which to respond to the administrative proceeding. On May 14, 2002, Plaintiff responded by requesting an additional thirty days to respond. OFAC did not agree to the extension, but committed to consider any information that Plaintiff submitted prior to the agency's action on the redesignation, and that it would also accept any information submitted after the redesignation decision was made. Plaintiff did not submit any further materials to OFAC and, on May 31, 2002, OFAC redesignated HLF.

9 HLF also contends that the Court should consider extra-record evidence pursuant to *Esch v. Yeutter* because (1) OFAC did not adequately explain its decision in the record before the Court; (2) it failed to consider factors that are relevant to its final decision; (3) the case is so complex that the Court needs more evidence; and (4) evidence arising after the agency action shows that OFAC's decision was not correct. 876 F.2d 976, 991 (D.C.Cir.1989). Again, HLF has made only conclusory allegations and has failed to demonstrate that any of these exceptions applies in this case.

10 The Government has moved to dismiss, not for summary judgment, on the remaining constitutional and RFRA claims. Because the Court has not converted the motion to dismiss to one for summary judgment, HLF's request for Rule 56(f) discovery is inapplicable to those claims.

11 "The President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by this chapter." 50 U.S.C. 1704.

12 HLF relies heavily on *Centrifugal Casting Mach. Co. v. American Bank & Trust Co.,* 966 F.2d 1348 (10th Cir.1992), which is the only IEEPA case requiring a "legally enforceable interest." To the extent that the *Centrifugal Casting* court imposed such a requirement under the IEEPA, it did so against the weight of judicial authority to the contrary. Not only is this Court not persuaded by its reasoning, but it is not bound by a decision from the Tenth Circuit, especially in light of *Consarc I* and *Consarc II* from this Circuit.

13 The main case the Government relies on, *American Airways Charters, Inc. v. Regan,* 746 F.2d 865, 866 (D.C.Cir.1984), merely states the general rule that a designated entity must obtain an OFAC license prior to engaging in any transaction involving its assets. *American Airways* does not address the applicability of the humanitarian aid exception to blocked entities, and is therefore inapplicable to this case.

14 The Court realizes that, in reality, this may be a distinction without a difference. If HLF cannot access its bank accounts, it cannot purchase food, clothing, and medicine. HLF counsel acknowledged as much at oral argument.

15 HLF vigorously contests the accuracy, interpretation and context of this evidence, as well as the sufficiency of the record. These challenges are addressed *infra.*

16 The record contains evidence that Marzook has been the leader of the political wing of Hamas since at least 1991. *See* A.R. 73–74, 639–78. In 1996, a federal court determined that Marzook should be extradited to Israel to face murder charges resulting from his alleged terrorist activity. *See* A.R. 269–91, 324–32; *see also Marzook v. Christopher,* 924 F.Supp. 565 (S.D.N.Y.1996).

17 There is evidence in the record that IAP distributes information on behalf of Hamas. *See* AR 1499–1535.

18 The record contains evidence that Hamami is a co-founder of Hamas, and that Siyam is a Hamas leader. *See* A.R. 72, 609–39.

19 The following Hamas leaders and activists were at the meeting: Abdelhaleem Ashqar, Akram Kharroubi, Mohammad Al–Hanooti, Ismail Elbarasse, and Muin Kamel Mohammed Shabib. The HLF leaders in attendance were HLF co-founders Shukri Abu Baker and Ghassan Elashi, and HLF employee Haitham Maghawri. *See* A.R. 68, 251–65, 1400–11.

20 The record contains evidence that the political, as opposed to military, activities of Hamas include a broad network of charitable organizations including zakat committees, hospitals, schools, and institutions. This charitable component is an effective way for Hamas to maintain its influence with the public, indoctrinate children and recruit suicide bombers. Moreover, there is evidence that Hamas' charitable organizations "serve[ ] as a screen for its covert" component, thereby

permitting the transfer of funds to its terrorist activities. *See* A.R.1916–17. Accordingly, "it is not always possible to distinguish between the 'innocent' activity of the charity associations and the funding of covert, subversive and terrorist activity." *See* A.R.1916–17, 1502. To that end, both President Bush and President Clinton have designated all of Hamas as a terrorist organization, and determined that even charitable contributions to Hamas impair the "ability to deal with the national emergency." E.O. 13224 § 4; E.O. 12947 § 3.

21 As addressed below, HLF vigorously contests OFAC's interpretation of the term "martyr."

22 HLF vigorously objects to OFAC's reliance on the Israeli government's reports. However, as addressed in *supra* Part III.B.5.c., it was reasonable for OFAC to rely on such information.

23 The Islamic Relief Agency was closed by the Israeli government in 1996 for providing support to the families of Hamas activists involved in terrorist attacks in Israel. *See* A.R. 101–02, 1127–40.

24 Although HLF also submitted a declaration by an investigator who investigated the causes of death of the fathers listed as "martyrs" in the 1999 Orphans Sponsorship Program binder, that declaration was not before the agency when it made its determination, is not part of the administrative record, and therefore cannot be considered by the Court.

25 HLF also contests OFAC's determination on the ground that, according to the Government's own evidence, only a very small portion of HLF's donations was made to families of martyrs. This argument is addressed *infra.*

26 HLF vigorously opposes OFAC's reliance on Anati's confession because (1) the statements were likely given after he had been tortured by the Israeli police; and (2) the Israeli summary of his statements is incomplete, misleading, and does not contain the exculpatory statements that are included in the translations of his statements.

First, it was reasonable for OFAC to rely on information derived from Israeli police interrogations, despite HLF's contention about the prevalence of torture by the Israeli police. In determining whether to consider factual statements made to a foreign police officer, courts consider the totality of circumstances to determine whether the statements are reliable. *See United States v. Welch,* 455 F.2d 211, 213 (2d Cir.1972) (courts must consider totality of the circumstances to determine whether a statement was voluntary); *In re Extradition of Atta,* 706 F.Supp. 1032, 1052 (E.D.N.Y.1989) (in extradition proceeding, accomplices' statements supported probable cause finding, despite allegations that statements were the product of torture, because there was no evidence the statements were coerced or unreliable, the statements had factual detail, were not recanted, and were corroborated). In this case, Anati's statements are corroborated by other evidence in the record.

Second, as addressed in *supra* Part III.A., the translations of Anati's statements were not before OFAC when it made its determination, and are therefore not part of the administrative record. Moreover, as addressed in *supra* Part III.B.5.c., it was reasonable for OFAC to rely on the Israeli intelligence report.

Third, even if the translations of Anati's statements were part of the administrative record, they would not advance Plaintiff's argument. HLF not only failed to provide any evidence that Anati was tortured, but Anati's lawyer, an eminent civil rights attorney, did not elicit testimony from him at his plea hearing that he was tortured. Indeed, Anati testified during that hearing that his confessions to the police were "generally true." *See* Pl.Ex. R–1 at 1. Accordingly, it was reasonable for OFAC to rely on the police interrogations to inform its administrative decision.

27 HLF contests OFAC's reliance on these statements because the Government did not provide any basis to believe they are reliable, did not describe the basis for the informants' knowledge, and did not include any versions of their statements in the unclassified administrative record.

However, courts have recognized the usefulness of information from confidential sources when presented in combination with corroborating evidence. *See United States v. Bruner,* 657 F.2d 1278, 1297 (D.C.Cir.1981) (finding that magistrate judge properly concluded that informants' credibility was sufficiently established because informants' statements were corroborated and they had provided reliable information in the past). Here, there are eight corroborating and independent sources, in addition to the corroborating evidence detailed above. Further, the FBI indicated that the sources had been reliable in the past (admitting that one source had been both reliable and unreliable), and provision of such information supports OFAC's consideration of their statements. *See id.* at 1297.

28 HLF also contests OFAC's determination because the Government knew about HLF's alleged connection to Hamas since it was designated as a terrorist in 1995 and failed to take any action against HLF for nearly six years. However, the duration of the Government's knowledge is irrelevant to the Court's determination of whether the agency's action was reasonable. Executive Branch decisions to designate an entity as a terrorist are complex and involve significant political ramifications. Accordingly, the Court must defer to the Executive's discretion on the timing of those foreign policy and national security decisions.

29 As noted above, on May 31, 2002, the Government redesignated HLF as an SDT and SDGT. The Government did provide HLF notice and an opportunity to be heard prior to the redesignation, and that procedure is therefore not the subject of the procedural due process claim.

30 The parties devoted little attention to this claim in their briefs.

31 The Takings Clause forbids the Government from taking private property for public use without just compensation. U.S. Const. amend. V.

32 Pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department...."

33 The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

34 FISA was enacted in 1978 to create a "secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights." S.Rep. No. 95–604, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3916. To oversee the Executive's exercise of powers granted by FISA, the statute established the Foreign Intelligence Surveillance Court to review applications for authorization of electronic surveillance aimed at obtaining intelligence information. *See* 50 U.S.C. § 1803. In 1994, FISA was amended to give the Foreign Intelligence Surveillance Court jurisdiction to hear applications for physical searches as well as electronic searches. *See id.* § 1804(a).

35 It is true that the government in *Global Relief* did not obtain the warrant prior to entering plaintiff's premises and seizing its property. However, FISA permits a warrantless search in emergency situations, and authorizes the government to submit a warrant application to the Foreign Intelligence Surveillance Court within 72 hours of the warrantless search. In *Global Relief,* the government submitted the warrant application within the requisite time period, and it was approved by the Foreign Intelligence Surveillance Court.

36 The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble." U.S. Const. amend. I.

37 HLF argues that the Government's restriction of HLF's freedom of speech requires strict scrutiny under *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and its progeny. However, *Buckley* involved restrictions on political contributions, which implicate the core First Amendment right of political expression in a democratic society. *See Buckley,* 424 U.S. at 14, 96 S.Ct. 612 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression...."). In this case, HLF does not contend that it has made contributions to political organizations or that its contributions are a means of political expression or advocacy. Instead, HLF asserts that its contributions involve "charitable and humanitarian aid." Compl. ¶ 6. Such charitable contributions plainly do not involve political expression, and therefore do not warrant strict scrutiny under *Buckley.*

38 Even if the contributions could be limited to charitable purposes only, non-HLF contributions would be freed up for funding of terrorist activities.

39 Significantly, in its 501(c)(3) application to the I.R.S. for tax exemption, HLF described itself as a charitable, not a religious or Muslim, organization.

40 The Government concedes irreparable injury, and therefore the Court need not address that factor.

ANNEX 221

207 F.Supp.2d 779
United States District Court,
N.D. Illinois,
Eastern Division.

GLOBAL RELIEF FOUNDATION, INC., Plaintiff,
v.
Paul H. O'NEILL, Colin L. Powell, John Ashcroft, R. Richard Newcomb, and Robert S. Mueller, III, Defendants.

No. 02 C 674.
|
June 11, 2002.

Synopsis

United States-based Islamic global humanitarian relief organization whose office was searched by the FBI and whose assets were frozen by the Office of Foreign Asset Control brought action against government officials, seeking declaratory and injunctive relief for the unfreezing of its assets and the return of property seized in the search. On the relief organization's motion for preliminary injunction, the District Court, Andersen, J., held that corporation was not likely to succeed on claims that the government's actions violated the Foreign Intelligence Surveillance Act (FISA), were not authorized by the International Emergency Economic Powers Act (IEEPA), or violated numerous constitutional provisions, and thus, was not entitled to preliminary injunction for return of seized property and unfreezing of assets on those grounds.

Motion denied.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

ANDERSEN, District Judge.

This case is before the Court on the motion of plaintiff Global Relief Foundation, Inc. for preliminary injunctive relief pursuant to Federal Rule of Civil Procedure 65. For the following reasons, the motion is denied.

OVERVIEW

Before addressing the motion for preliminary injunction filed by the plaintiff, Global Relief Foundation ("Global Relief"), a brief description of this case is in order.

On December 14, 2001, the Federal Bureau of Investigation ("FBI") searched the headquarters of Global Relief and the home of its executive director. Pursuant to the searches, materials were seized for analysis by the FBI. Global Relief contends that both the search and seizure were unauthorized by law and unconstitutional. ***785** The defendants maintain that both the search and seizure were lawfully authorized by the Foreign Intelligence Surveillance Act and that they were constitutional. This Court agrees with the defendants.

Also on December 14, 2001, the Office of Foreign Asset Control ("OFAC") of the United States Department of the Treasury issued a blocking order freezing the financial assets of Global Relief pending the FBI's investigation of what relationship, if any, Global Relief might have to the terrorists behind the September 11, 2001 attacks on the World Trade Center and the Pentagon. Global Relief contends that the order temporarily "freezing" its assets was not authorized by statute, executive order or the Constitution. The defendants maintain that this blocking order was both lawful and constitutional. They cite the International Emergency Economic Powers Act, as amended by the USA Patriot Act, as the statutory basis for the authority to issue the blocking order. This authority was granted first to the President and then delegated by him to the Treasury pursuant to Executive Order Number 13224. Once again, this Court agrees with the defendants.

The assets seized for analysis and the funds blocked by OFAC's order have been seized and blocked "pending investigation" of Global Relief and others. Thus far, no

agency of the United States government has declared or requested any forfeiture of assets to the government. Nor have any individuals or Global Relief been charged with any crimes. Hence, Global Relief's request for a preliminary injunction is directed only to the release of funds and materials seized for investigative purposes while the investigation itself is ongoing.

To justify its emergency search and, to some extent, the blocking order, defendants have asked this Court to review materials, *in camera* and *ex parte,* without revealing them to Global Relief or its attorneys. In accordance with our order of April 5, 2002, we have reviewed materials furnished by the FBI to us and have concluded that they are relevant to the ongoing investigation and that their disclosure to Global Relief, while the investigation is pending, could undermine this investigation and others of national significance.

BACKGROUND

Global Relief began operating in 1992 as a domestic, non-profit corporation chartered and headquartered in Illinois. According to its complaint, Global Relief claims to be a charitable organization that funds humanitarian relief programs throughout the world. These programs allegedly distribute food, fund schools for orphans, and provide medical services.

Global Relief characterizes itself as the largest U.S.-based Islamic charitable organization "with respect to the geographic scope of its relief programs." (Complaint ¶ 12.) As contributions to Global Relief increased (in 1995, the organization reported accepting donations totaling $431,155; by 2000, it reported nearly $3.7 million), it appears to have expanded the reach of its efforts. In 1995, it reported funding programs in Chechnya, Bosnia, Pakistan, Kashmir, and Lebanon. It reported funding additional programs in Afghanistan and Azerbaijan in 1996, Bangladesh in 1997, Iraq and Somalia in 1998, Albania, Belgium, China, Eritrea, Kosovo, and Turkey in 1999, and, eventually, Ethiopia, Jordan, Palestine, and Sierra Leone in 2000. Global Relief also has funded programs in Gaza and the West Bank. (Complaint ¶ 11.) To assist with the distribution of humanitarian aid abroad, Global Relief established regional offices in Belgium, Azerbaijan, and Pakistan. Reportedly, such offices received hundreds of thousands of dollars in contributions, in addition to the amounts ***786** reported by the headquarters in the United States. Although Global Relief has funded relief programs in the United States, over 90 percent of its donations have been sent abroad.

On September 11, 2001, terrorists attacked the United States. Individuals hijacked four commercial airliners containing passengers and crew and flew them deliberately into the two towers of the World Trade Center in New York City as well as into the Pentagon near Washington, D.C. The fourth plane was diverted from its path and crashed in rural Pennsylvania. Over 3,000 people were murdered.

On September 24, 2001, President George W. Bush declared a national emergency with respect to the "grave acts of terrorism and threats of terrorism ... and the continuing and immediate threat of further attacks on United States nationals or the United States." Exec. Order No. 13224, 66 Fed.Reg. 49074 (2001). The President determined that the acts perpetrated on September 11 constituted "an unusual and extraordinary threat to national security, foreign policy, and economy of the United States." In light of the "pervasiveness and expansiveness of the financial foundation of terrorists," the President cited the need for financial sanctions against individuals or organizations that engage in or support terrorism throughout the world.

On December 14, 2001, pursuant to the Foreign Intelligence Surveillance Act, then-acting Deputy Attorney General Larry D. Thompson authorized the search of Global Relief's Bridgeview, Illinois office and the residence of its executive director. The FBI's Chicago Division Joint Terrorism Task Force conducted both searches. From the Global Relief office, the FBI seized items including computers and servers, modems, a cellular phone, hand-held radios, video and audio tapes, cassette tapes, computer diskettes, a credit card imprinter, foreign currency, U.S. mail, photographs, receipts, documents, and records. From the executive director's residence, the FBI seized computers, computer diskettes, video and audio tapes, cassette tapes, date books, a cellular telephone, a camera, a palm pilot, credit cards, foreign currency, photographs, documents, records, and $13,030 in U.S. currency. Since being seized, the items removed from both the Global Relief office and the executive director's residence have been secured in FBI custody for review and analysis.

Also, on December 14, 2001, pursuant to the International Emergency Economic Powers Act and President Bush's Executive Order, OFAC issued a "Blocking Notice and Requirement to Furnish Information" to Global Relief, which

"froze," until further notice, the funds, accounts, and business records in which the organization had an interest. OFAC has claimed that it acted on the basis of substantial classified and unclassified information related to Global Relief's possible connections with terrorist organizations.

The blocking order advised Global Relief of the administrative procedures available to it should it choose to contest OFAC's action, including the right to challenge the blocking and to seek licenses to resume operations in whole or in part. Although Global Relief applied for and was granted licenses to access limited blocked funds to pay for legal expenses, salaries, payroll taxes, health insurance, rent, and utilities, it did not challenge the blocking order itself through administrative procedures.

On January 28, 2002, Global Relief filed a petition for declaratory judgment and injunctive relief and for a writ of mandamus with this Court, naming Paul H. O'Neill, Colin L. Powell, John Ashcroft, R. Richard Newcomb, and Robert S. Mueller, ***787** III, in their official capacities, as defendants (collectively, the "defendants"). In its petition, Global Relief requested that the defendants be ordered to "unfreeze" its assets and return the items seized during the search of the organization's office and the executive director's residence. In addition, on February 12, 2002, Global Relief filed a motion for preliminary injunction, arguing that the blocking of its assets and records was both unlawful and unconstitutional.

DISCUSSION

In its motion, Global Relief has requested a preliminary injunction from this Court that would serve to enjoin the defendants from: 1) blocking or otherwise controlling Global Relief's property; 2) barring Global Relief from doing business; 3) withholding Global Relief's records; 4) "smearing" its name; and 5) punishing Global Relief's donors for making donations to the corporation. (Global Relief Prelim. Injunction Brief at 2.) In this circuit, to obtain a preliminary injunction, Global Relief must show: 1) a reasonable likelihood of success on the merits; 2) the existence of an irreparable harm without the injunction; and 3) an inadequate remedy at law. *Anderson v. U.S.F. Logistics (IMC), Inc.,* 274 F.3d 470, 474–75 (7th Cir.2001); *Re/Max North Central, Inc. v. Cook,* 272 F.3d 424, 429 (7th Cir.2001); *Ty, Inc. v. Jones Group, Inc.,* 237 F.3d 891, 895 (7th Cir.2001). If Global Relief satisfies this initial burden, then the Court must balance the irreparable harm to the non-moving party if the injunction is granted against the irreparable harm to the moving party if the injunction is denied. *See Graham v. Medical Mutual of Ohio,* 130 F.3d 293, 295 (7th Cir.1997); *Grossbaum v. Indianapolis–Marion County Bldg. Auth.,* 100 F.3d 1287, 1291 (7th Cir.1996), *cert. denied,* 520 U.S. 1230, 117 S.Ct. 1822, 137 L.Ed.2d 1030 (1997); *Publications Int'l, Ltd. v. Meredith Corp.,* 88 F.3d 473, 478 (7th Cir.1996). The Court must also consider the public interest in denying or granting the injunction. *See Ty, Inc.,* 237 F.3d at 895.

In addition to these traditional preliminary injunction requirements, Global Relief faces additional burdens. Because Global Relief is requesting that this Court order the defendants to perform certain acts (i.e. "unfreeze" its assets and return the collected documents), it is essentially seeking a mandatory preliminary injunction. As the Seventh Circuit has previously held, since a "mandatory injunction requires the court to command the defendant to take a particular action, 'mandatory preliminary writs are ordinarily cautiously viewed and sparingly issued.' " *Graham,* 130 F.3d at 295 (citing *Jordan v. Wolke,* 593 F.2d 772, 774 (7th Cir.1978). *See also W.A. Mack, Inc. v. General Motors Corp.,* 260 F.2d 886, 890 (7th Cir.1958)) (finding that "mandatory injunctions are rarely issued and interlocutory mandatory injunctions are even more rarely issued, and neither except upon the clearest equitable grounds"). The burden is on Global Relief to establish that this extraordinary relief is justified.

Furthermore, by seeking injunctive relief against the decision to block its assets pending a federal investigation, Global Relief is in essence challenging the power of the Executive Branch of the United States government to conduct foreign policy. In so doing, Global Relief is asking this Court to approach the outer limit of its constitutional authority. Chief Justice Rehnquist, writing for the Court in *Regan v. Wald,* 468 U.S. 222, 242, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984), *reh'g denied,* 469 U.S. 912, 105 S.Ct. 285, 83 L.Ed.2d 222 (1984), quoted from *Harisiades v. Shaughnessy,* 342 U.S. 580, 589, 72 S.Ct. 512, 96 L.Ed. 586 (1952), which stated that "[m]atters related 'to the conduct ***788** of foreign relations ... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.' " As a general principle, therefore, this Court should avoid impairment of decisions made by the Congress or the President in matters involving foreign affairs or national security. *See Haig v. Agee,* 453 U.S. 280, 292, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); *Palestine Info. Office v. Shultz,* 674

F.Supp. 910, 918 (D.D.C.1987), *aff'd,* 853 F.2d 932 (1988) (same). Accordingly, we conclude that, in order to succeed on its complaint for injunctive relief, Global Relief must make an "*exceptionally strong showing* on the relevant [preliminary injunction] factors." *Palestine Info. Office,* 674 F.Supp. at 918 (citing *Washington Metro. Area Transit Com'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C.Cir.1977)) (emphasis in original).

With these considerations in mind, we will now turn to the merits of Global Relief's motion for a preliminary injunction. At its core, Global Relief's motion raises two primary arguments. First, Global Relief contends that the blocking of its assets and the "seizure" of its records and documents pending an ongoing investigation by the FBI and OFAC were acts outside the powers granted to those agencies by congressional statutes. Second, Global Relief argues that both the blocking of its assets and the search of the headquarters and the executive director's home violated numerous constitutional principles. We will address each of these arguments in turn.

I. *Likelihood of Success on the Merits*

The threshold factor for a preliminary injunction is the likelihood of success on the merits, *see Rust Env't & Infrastructure v. Teunissen,* 131 F.3d 1210, 1213 (7th Cir.1997), so we will proceed to analyze Global Relief's claims to determine whether they are likely to succeed.

A. Global Relief Has Not Shown A Likelihood Of Success On The Merits Of Its Statutory Arguments

1. *The Foreign Intelligence Surveillance Act*

As the first part of its statutory argument offered in support of its motion for a preliminary injunction, Global Relief contends that the search of its headquarters and the subsequent search of the home of Global Relief's executive director was an *ultra vires* action (which is defined as an act which is beyond the powers conferred on executive agencies by Congress). In response to this argument, the defendants have asserted that the searches conducted on December 14, 2001 were in accordance with the procedures identified in the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.,* (hereinafter "FISA").

FISA was passed by Congress in 1978 to "put to rest a troubling constitutional issue" regarding the President's "inherent power to conduct warrantless electronic surveillance in order to gather foreign intelligence in the interests of national security." *U.S. v. Squillacote,* 221 F.3d 542, 552 (4th Cir.2000) (citing *ACLU Found. of S. California v. Barr,* 952 F.2d 457, 460 (D.C.Cir.1991)). FISA was enacted to create by statute a "secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights." S.Rep. No. 95–604, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3916.

To oversee the exercise of the powers granted by FISA to the Executive Branch and to ensure that the new investigatory ***789** power is used constitutionally and lawfully, FISA established the Foreign Intelligence Surveillance Court, which is composed of seven federal district court judges appointed by the Chief Justice of the United States, to review applications for authorization of electronic surveillance aimed at obtaining intelligence information. *See* 50 U.S.C. § 1803. In 1994, FISA was amended to give the Foreign Intelligence Surveillance Court jurisdiction to hear applications for physical searches as well as electronic searches. *See* 50 U.S.C. § 1821–29. Each application to the Foreign Intelligence Surveillance Court must first be personally approved by the Attorney General. *See* 50 U.S.C. § 1804(a). The application must contain, among other things, a statement of facts to justify the belief that the target of the search is a foreign power or an agent of a foreign power, that the premises or property to be searched contains foreign intelligence information, and that the premises or property to be searched is owned, used, or possessed by a foreign power or an agent of a foreign power. Additionally, the application must contain a certification by a senior Executive Branch official that the information sought is foreign intelligence information which could not reasonably be obtained by normal investigative techniques. *See* 50 U.S.C. § 1823(a).

When the target of the surveillance is a "United States person" (which the parties concede Global Relief is), the Foreign Intelligence Surveillance Court may issue an order authorizing the surveillance only if a FISA judge concludes there is "probable cause" to believe that the target of the surveillance is a foreign power or agent of a foreign power, that proposed "minimization procedures" are sufficient under the terms of the statute, that the certifications required by section 1823 have been made, and that the certifications are not "clearly erroneous." 50 U.S.C. § 1824(a)(3)—(5). Under the statute, an agent of a foreign power is any person "who knowingly engages in clandestine intelligence

gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States." 50 U.S.C. § 1801(b)(2)(A). FISA authorizes the federal district courts to review warrant applications and probable cause determinations made by the Foreign Intelligence Surveillance Court. *See* 50 U.S.C. § 1825(d)—(g).

Furthermore, FISA provides that, when the United States intends to use in a district court information derived from a FISA search or when an aggrieved party requests discovery of information related to a FISA application, the Attorney General must file "an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C. § 1825(g). Attorney General John Ashcroft has filed such an affidavit in this case. This having been done, the statute requires us to "review *in camera* and *ex parte* the application, order, and such other materials relating to the physical search as may be necessary to determine whether the physical search of the aggrieved party was lawfully authorized and conducted." *Id.* As we noted in our April 5, 2002 ruling denying Global Relief's motion to prevent consideration of certain materials *in camera* and *ex parte, see Global Relief Foundation, Inc. v. O'Neill,* 205 F.Supp.2d 885, 887–88 (N.D. Ill.2002), this Court decided to consider these submissions. We have done so on an *ex parte* basis and have not permitted counsel for Global Relief to review the submissions with us.

With this analytical framework in mind, we now turn to the facts of the case currently before us. As was discussed above, agents of the FBI arrived at the corporate headquarters of Global Relief and the ***790** home of its executive director on December 14, 2001 and seized a considerable amount of material they felt was relevant to their investigation of Global Relief's activities. As the defendants have conceded in their briefs, no warrant had been obtained before the FBI arrived either at Global Relief's headquarters or the executive director's residence. Nevertheless, FISA includes a provision which states that, when the Attorney General declares that "an emergency situation exists with respect to the execution of a search to obtain foreign intelligence information" prior to the Foreign Intelligence Surveillance Court acting on the application, a warrantless search is authorized. 50 U.S.C. § 1824(e)(1)(B)(i). When such an emergency situation arises, the government must submit a warrant application to the Foreign Intelligence Surveillance Court within 72 hours of the warrantless search for approval. *See* 50 U.S.C. § 1824(e), *as amended by,* P.L. 107–108, 115 Stat. 1394, 1402 (2001). In this case, the failure of the FBI agents to present a FISA warrant on December 14 was caused by the Assistant Attorney General's declaration that an emergency situation existed with respect to the targeted documents and material. The defendants did submit a warrant application to the Foreign Intelligence Surveillance Court on December 15, as required by 50 U.S.C. § 1824(e). We have reviewed the warrant that issued and the submissions to the Foreign Intelligence Surveillance Court in support of that warrant.

We conclude that the FISA application established probable cause to believe that Global Relief and the executive director were agents of a foreign power, as that term is defined for FISA purposes, at the time the search was conducted and the application was granted. We are also satisfied that Global Relief and the executive director were not targeted because of any protected First Amendment activities in which they may have engaged. Given the sensitive nature of the information upon which we have relied in making this determination and the Attorney General's sworn assertion that disclosure of the underlying information would harm national security, it would be improper for us to elaborate further on this subject. *See Squillacote,* 221 F.3d at 554 (finding probable cause to authorize FISA surveillance and declining to comment further on the probable cause issue when the Attorney General filed an affidavit); *United States v. Isa,* 923 F.2d 1300, 1304 (8th Cir.1991) (same).

This Court has concluded that disclosure of the information we have reviewed could substantially undermine ongoing investigations required to apprehend the conspirators behind the September 11 murders and undermine the ability of law enforcement agencies to reduce the possibility of terrorist crimes in the future. Furthermore, this Court is persuaded that the search and seizure made by the FBI on December 14 were authorized by FISA. Accordingly, we decline plaintiff's request that we declare the search invalid and order the immediate return of all items seized.

2. *The International Emergency Economic Powers Act*

Global Relief also asserts that the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.,* (hereinafter "IEEPA") does not authorize OFAC's blocking order freezing its assets. Specifically, Global Relief raises the following three arguments: 1) IEEPA did not grant the authority to block purely domestic assets "during the pendency of an investigation;" 2) the blocking order in this case directly violated IEEPA's humanitarian relief exception; and 3) the President never legally delegated the authority to OFAC to

block the assets of an organization "during the pendency of an investigation." Additionally, ***791** we note that Global Relief raised for the first time in its reply brief the argument that 18 U.S.C. § 2339B, and not IEEPA, is the proper statutory mechanism "to prevent [persons] subject to the jurisdiction of the U.S. courts from supporting designated foreign terrorist organizations." (Global Relief Reply Brief at 12.) Because the defendants have not cited this particular statutory provision in their briefs to justify OFAC's blocking order, we will not address it. *Cf. Marie O. v. Edgar,* 131 F.3d 610, 614 n. 7 (7th Cir.1997) (it is generally not appropriate to consider new arguments raised for the first time in a reply brief); *United States v. Magana,* 118 F.3d 1173, 1198 n. 15 (7th Cir.1997) (same); *Kastel v. Winnetka Bd. of Educ.,* 946 F.Supp. 1329, 1335 (N.D.Ill.1996).

i) *Statutory and Regulatory Background*

For most of this country's history, the United States government has utilized economic sanctions as a tool of its foreign policy. For most of the 20th Century, government imposed sanctions were controlled by the Trading with the Enemy Act (hereinafter the "TWEA"), which was enacted in 1917. As amended in 1933, TWEA granted the President "broad authority" to "investigate, regulate ... prevent or prohibit ... transactions" in times of war or declared national emergencies. *See* 50 U.S.C. app. § 5(b); *Dames & Moore v. Regan,* 453 U.S. 654, 672, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

In 1977, Congress enacted IEEPA and amended TWEA to govern "the President's authority to regulate international economic transactions during wars or national emergencies." S.Rep. No. 95–466, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4540, 4541. IEEPA provides that the economic powers granted the President "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701(a); *Regan v. Wald,* 468 U.S. 222, 228, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984). As with TWEA, IEEPA authorized the President to:

> investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest ... by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. § 1702(a)(1)(B). As originally enacted, this language was identical to the grant of power to the President under the parallel provision of TWEA.

In response to the September 11 terrorist attacks, Congress in October 2001 enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub L. 107–56, 115 Stat. 272 (the "USA Patriot Act"), which, *inter alia,* expanded the authority of the President and his designees under IEEPA. Specifically, section 106 of the new act added the words "block during the pendency of an investigation" after the word "investigate" in the above-quoted section of IEEPA's section 1702(a)(1)(B). The USA Patriot Act also provided that, in case of judicial review of an IEEPA blocking order, any classified information upon which the blocking determination was made "may be submitted to the reviewing court ex parte and in camera." 50 U.S.C. § 1702(c) *as added by* 115 Stat. at 278.

***792** Shortly after the September 11 attacks but before the enactment of the USA Patriot Act, President Bush issued Executive Order 13224, effective on September 24, 2001, declaring a national emergency with respect to the "grave acts of terrorism ... and the continuing and immediate threat of further attacks on United States nationals or the United States." Exec. Order No. 13,224, 66 Fed.Reg. 49,079 (2001). In determining that actual and threatened terrorist acts constituted "an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States," the President invoked the powers granted by, *inter alia,* IEEPA. *Id.* The Executive Order designated 27 terrorists, terrorist organizations, and their supporters, and blocked their property and property interests that have been in the United States, that subsequently will come within the United States, or that come within the "possession or control" of U.S. persons. *Id.*

In addition, the Executive Order authorized the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to designate as subject to the provisions of the order any "foreign persons" whom he determines "have committed or ... pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States." *Id.* The order also authorized the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to designate "persons" (defined in the order as individuals or entities) whose property or interests in property should be blocked because they "act for or on behalf of" or are "owned or controlled by" designated terrorists, or they "assist in, sponsor, or provide ... support for," or are "otherwise associated" with them. *Id.* Finally, for purposes of this opinion, the Executive Order also granted the Secretary of the Treasury the power "to employ all powers granted to the President by IEEPA ..." *Id.* The President authorized the Secretary of the Treasury to promulgate rules and regulations to carry out the purposes of the order and to re-delegate such functions if he so chose. *Id.*

Pursuant to a delegation of authority from the Secretary of the Treasury, OFAC has promulgated general regulations governing the various sanctions programs. *See* 31 C.F.R. pt. 500; *see also Wald,* 468 U.S. at 226 n. 2, 104 S.Ct. 3026. These regulations permit a designated individual or entity, or one whose assets have been blocked, to seek a license from OFAC to engage in any transaction involving blocked property. *See* 31 C.F.R. §§ 501.801–.802. In addition, the regulations establish a procedure to allow a person to "seek administrative reconsideration" of a designation if a party believes an error has been made. *See* 31 C.F.R. § 501.807.

Believing that Global Relief "may be engaged in activities that violate" the Executive Order and IEEPA, on December 14, 2001, the Secretary of the Treasury issued a notice temporarily blocking Global Relief's accounts and business records pending further investigation. The notice informed Global Relief of its right to submit evidence to challenge the blocking and/or request agency licenses. The record indicates that Global Relief has filed numerous applications for licenses since December 14, most of which have been approved by OFAC.

In situations such as this when a plaintiff is challenging an agency's interpretation of its own regulations, we note that such an interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." ***793** *Stinson v. United States,* 508 U.S. 36, 45, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993); *see also Paradissiotis v. Rubin,* 171 F.3d 983, 988 (5th Cir.1999); *Consarc Corp. v. Iraqi Ministry,* 27 F.3d 695, 701 (D.C.Cir.1994); *D.C. Precision, Inc. v. U.S. Government,* 73 F.Supp.2d 338, 344 (S.D.N.Y.1999). This is especially true in matters which involve foreign policy and national security considerations. In these cases, we are "particularly obliged to defer to the discretion of executive agencies interpreting their governing law and regulations." *Paradissiotis,* 171 F.3d at 988 (citing *Haig v. Agee,* 453 U.S. 280, 292, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981) and *Miranda v. Secretary of Treasury,* 766 F.2d 1, 3–4 (1st Cir.1985)). With this in mind, we now turn to the substance of Global Relief's statutory contentions.

ii) *Does IEEPA grant the defendants the power to block domestic assets?*

Global Relief argues that IEEPA does not allow the government to block or freeze the purely domestic assets of a U.S. person (which for purposes of the statute includes a charitable entity incorporated in the U.S.). Instead, Global Relief asserts that IEEPA only authorizes the President to regulate property in which foreign persons have an interest. (Global Relief Prelim. Injunction Brief at 7.) Because Global Relief is a U.S. person and its property is exclusively domestic, plaintiff reasons that OFAC did not have authority under IEEPA to block its assets pending investigation. We disagree with this limited reading of IEEPA and its implementing regulations.

As modified by the USA Patriot Act, section 1702(a)(1)(B) of IEEPA explicitly states that the President may "block during the pendency of an investigation ... any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of ... any right, power, or privilege with respect to ... any property in which any foreign country or a national thereof has *any* interest by any person ... subject to the jurisdiction of the United States." (Emphasis added). Congress' decision to use repeatedly the word "any" in this section of the statute guides our interpretation of the President's power to block during the pendency of an investigation. It is clear that Congress intended to provide the President with sweeping power to regulate all relevant property upon his declaration of a national emergency. Furthermore, if Congress had intended to only authorize the President to block foreign assets that were located within the United States, it could have made that intention clear. However, repeated use by Congress of the

word "any" as well as its choice of the phrase "any property, subject to the jurisdiction of the United States," without an indication that it meant only *foreign* property, compels our conclusion that the powers granted to the President under IEEPA include the ability to block purely domestic assets of a U.S. person pending an investigation.

Having said this, however, we must turn our attention to what constitutes an "interest" in property for purposes of IEEPA. In the regulations promulgated by OFAC with respect to IEEPA, "interest" is defined as "an interest of any nature whatsoever, direct or indirect" which can include "any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent." 31 C.F.R. §§ 535.311–.312, 595.310. Considering the high level of deference we are required to give an agency's interpretation of its own regulations, *see Stinson,* 508 U.S. at 45, 113 S.Ct. 1913, *supra,* we agree with the other courts that have interpreted IEEPA and its regulations that the term "any interest" must be construed in the broadest possible sense. *See Wald,* 468 U.S. at 224, 225–26, 233–34, 104 S.Ct. 3026 (repeatedly stating that the phrase ***794** "any interest" is to be broadly defined); *Consarc Corp.,* 27 F.3d at 701–02 (same). Therefore, we conclude that the plain language of IEEPA does not limit the ability to block the domestic assets of a U.S. corporation during the pendency of an investigation when there is evidence that a foreign country or a national thereof has any interest in those assets.

With respect to the facts of this case, both parties agree that Global Relief is a United States citizen. However, the parties vigorously dispute to what extent any foreign national has had an interest in Global Relief and what the statutory consequences of that interest are. Global Relief claims that the nationality of its directors is irrelevant since the organization itself was incorporated in the United States. The defendants, however, argue that IEEPA sanctions their decision to block all of Global Relief's assets pending an investigation because Global Relief is "operated and controlled by foreign nationals, [uses] numerous foreign offices, and it raises the overwhelming majority of its money for the very purpose of sending it overseas to foreign countries and nationals." (Defendants Brief in Opp. at 24.)

As even Global Relief has conceded, at least two of the three directors of Global Relief were, at all relevant times, foreign nationals. The organization's executive director and Rabih Haddad are both foreign citizens who have resided legally in the United States for many years. While Global Relief has attempted to downplay this foreign connection in its briefs, we conclude that both the executive director and Haddad are "foreign nationals," as that term is used in IEEPA. Furthermore, there can be no dispute that both of these individuals had a direct "interest" in the solicitation and distribution of Global Relief's assets and that Global Relief's executive director was instrumental in deciding which overseas entities and individuals were to receive Global Relief's contributions. In light of these facts, we are compelled to conclude that the defendants were authorized to block the assets of Global Relief pending an investigation pursuant to IEEPA because certain foreign nationals, including the executive director, had, at all relevant times, an "interest" in the operation of Global Relief. Therefore, we find that the blocking order issued by OFAC on December 14, 2001 was not an *ultra vires* act, but rather was authorized by IEEPA.

While our result comports with the plain language of IEEPA, we note that Global Relief's reading of the statute could completely undermine the statutory purposes of the act. If Global Relief's interpretation of IEEPA were correct, then any foreign person or entity could create a corporation under the laws of any state and then use that "domestic" corporation to direct and fund acts of terror against the United States. We disagree. The simple act of domestic incorporation is not sufficient to exempt an organization from IEEPA regulation if, as the statute says, a foreign national has "any interest" in the organization or its funds.

iii) *Does IEEPA's humanitarian exception apply in this case?*

The second prong of Global Relief's statutory argument is that OFAC's blocking order was an *ultra vires* action because it directly violated IEEPA's humanitarian relief exception. This provision states:

> [t]he authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly ... donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing and medicine, intended to be used to relieve human suffering, except to the extent that the President determines ***795** that such donations (A) would seriously impair his ability

> to deal with any national emergency declared under section 1701 of this title, (B) are in response to coercion against the proposed recipient or donor ....

50 U.S.C. § 1702(b)(2). This language makes it clear that, notwithstanding the declaration of a national emergency, Congress intended that IEEPA would exempt humanitarian aid donations from executive regulation *unless* the President makes further findings that humanitarian aid would seriously impair his ability to deal with the emergency or would endanger U.S. armed forces. *See Veterans Peace Convoy, Inc. v. Schultz,* 722 F.Supp. 1425, 1429 (S.D.Tex.1988).

Nevertheless, Global Relief asserts that "the power to regulate humanitarian activities by U.S. persons is limited to issuing blocking orders prohibiting all U.S. persons from providing aid to specified foreign persons or in specified foreign locales and is not a power to single out a particular U.S. person as subversive and strip it of the right to provide humanitarian aid to anyone." (Global Relief Prelim. Injunction Brief at 12.) We disagree.

No doubt cognizant of the humanitarian relief exception included in section 1702(b)(2) of IEEPA, President Bush explicitly stated in his Executive Order that "the making of donations of the type specified in section [1702(b)(2)] by United States persons to persons determined to be subject to this order would seriously impair [the President's] ability to deal with the national emergency declared in this order, and would endanger Armed Forces... and [the President] hereby prohibit[s] such donations." Exec. Order 13224, § 4. This statement clearly was intended to trigger the presidential findings proviso of section 1702(b)(2) whereby Congress specifically authorized the President to block or stem the flow of humanitarian relief in cases of national emergency.

This Court must be guided by what we view as the intent of Congress in passing the humanitarian relief exception, and, in this regard, the language of the statute speaks for itself. *See United States v. Turkette,* 452 U.S. 576, 580, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) (if statutory language is unambiguous, that language must be regarded as conclusive). The humanitarian relief exception applies explicitly to "articles, such a food, clothing, and medicine, intended to be used to relieve human suffering." 50 U.S.C. § 1702(b)(2). This means that any charitable aid that Global Relief provides both domestically and abroad falls within the scope of the statute.

Once it has been shown that humanitarian aid is within the ambit of the statute, Congress has explicitly determined that the President can directly block its distribution as long as he determines that the donations "would seriously impair his ability to deal with any national emergency." *Id.* It is important to note that Congress did not include any sort of temporal or geographic limitation on the President's ability to block humanitarian aid. There is no statement that the President can only block the distribution of international aid or that he can only block aid to specific foreign persons in specified foreign locations. Instead, Congress enacted broad, sweeping language which authorized the President to block any and all humanitarian efforts by the targeted entity so long as he declares that the provision of such relief would jeopardize his ability to deal with a national emergency.

In this case, we have already noted that President Bush made the required declaration in his Executive Order that the making of charitable donations by the targeted entities would impair his power to deal with the national emergency following ***796** the September 11 attacks. OFAC then used the powers delegated to it by the Secretary of the Treasury to block the ability of Global Relief to dispense its humanitarian aid both domestically and internationally. Therefore, based on our review of the statute and the discussion above, we find that OFAC's actions in issuing the blocking order were not *ultra vires* because the defendants strictly complied with the unambiguous language of section 1702(b)(2) of IEEPA. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 636–37, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (an action "executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.") (Jackson, J. concurring).

iv) *Did the President legally delegate to OFAC the authority to block assets during the pendency of an investigation?*

In its final statutory argument in support of its motion for a preliminary injunction, Global Relief asserts that OFAC was never legally delegated the power to block assets "during the pendency of an investigation" pursuant to IEEPA. Specifically, Global Relief contends that the blocking order was *ultra vires* because President Bush only delegated to the defendants in section 1(c) of his Executive Order the power

"to block" property of persons *determined* to be sponsoring terrorism. Global Relief further argues that, because the defendants have not *determined* that it acted for or was associated with a terrorist organization, the blocking order was outside the authority delegated to OFAC by the President and the Secretary of the Treasury. Additionally, Global Relief argues that President Bush "could not have delegated the power 'to block during the pendency of an investigation' in Executive Order 13224 even if he had expressed such an intent because President Bush did not have that power to delegate when he signed the Executive Order." (Global Relief Prelim. Injunction Brief at 15.) We will address each of these arguments in turn.

First, Global Relief argues that "[i]nstead of granting all his power, including the power to nullify, void, prevent, and prohibit any acquisition or transfer of property, President Bush only delegated to defendants the power 'to block' property of persons determined to be sponsoring or associated with other blocked entities." (*Id.* at 14.) We must reject this argument because it focuses only on one isolated section of the Executive Order without considering the order as a whole.

Global Relief is correct that section 1(c) of the Executive Order does limit the effect of the order's blocking provision to those entities determined by the Secretary of the Treasury (as well as the Secretary of State and the Attorney General) to be connected with foreign terrorists. Section 1(c) states that the property of "persons determined by the Secretary of the Treasury ... to be owned or controlled by ... persons to be subject to subsection 1(b), 1(c), or 1(d)(i) of this order" is blocked. Exec. Order 13224, § 1(c). However, Global Relief seems to have assigned some special meaning to the word "determined." Apparently, Global Relief feels that the Secretary of the Treasury and OFAC have not "determined" that it is sponsoring or associated with foreign terrorists. This is a curious argument for Global Relief to make. Global Relief's complaint and numerous briefs paint a vivid picture of the damage it has allegedly suffered as a result of the defendants' "determination" that Global Relief was associated with funding foreign terrorists.

***797** Nevertheless, even putting Section 1(c) of the Executive Order aside, Section 5 of the order authorizes the Secretary of the Treasury (and his designee) to "take such other actions than the complete blocking of property or interest in property as the President is authorized to take under IEEPA ... if the Secretary of the Treasury ... deems such other actions to be consistent with the national interests of the United States." Exec. Order 13224, § 5. Our reading of this section of the order informs us that a blocking of assets "during the pendency of an investigation" is contemplated as a permissible course of action because such a blocking order is expressly authorized by section 1702(a)(1)(B) of IEEPA, as amended by the USA Patriot Act. In other words, OFAC's December 14 order blocking the assets of Global Relief during the pendency of its investigation certainly falls within the scope of section 5 of the Executive Order. Therefore, we conclude that OFAC's actions in blocking Global Relief's assets pending investigation were the result of a legal delegation of authority in the Executive Order from the President to OFAC.

This conclusion ties neatly into our analysis of Global Relief's second statutory delegation argument. In this section of its brief, Global Relief asserts that President Bush could not legally delegate to the Secretary of the Treasury and OFAC the power to block certain assets pending an investigation because, at the time he signed the Executive Order, IEEPA had not yet been amended by the USA Patriot Act to add this particular blocking power to the President's arsenal of economic weapons. In Global Relief's own words, "[t]o construe President Bush's invocation of IEEPA on September 23 to delegate powers that President Bush did not even have would violate fundamental canons of statutory construction." (Global Relief Prelim. Injunction Brief at 15.) For the following reasons, we reject this argument.

To address this contention properly, we must revisit the factual background of this case. Executive Order 13224, which delegated any and all presidential powers under IEEPA to the Secretary of the Treasury and his designee OFAC, was implemented on September 23, 2001. On October 26, 2001, President Bush signed the USA Patriot Act, which, as we have said before, added the ability to block "during the pendency of an investigation" to his other powers when a national emergency is declared under IEEPA. It is important to remember that the Executive Order delegated to the Secretary of the Treasury and his designee the authority "to employ all powers granted to the President by IEEPA." Exec. Order 13224, § 7. Finally, on December 14, 2001, OFAC issued and executed a blocking order freezing all of Global Relief's assets pending an investigation of its conduct.

Given this sequence of events, it is clear that on December 14, OFAC was empowered by IEEPA and the USA Patriot Act to issue the order blocking Global Relief's assets pending investigation. The USA Patriot Act amendments to IEEPA

had been in effect for at least a month prior to the execution of the blocking order against Global Relief. Therefore, we cannot accept Global Relief's argument that President Bush did not legally delegate his blocking powers under IEEPA to the Secretary of the Treasury and OFAC.

We reach this conclusion despite Global Relief's argument that the powers of IEEPA are not self-executing and that neither the President nor OFAC were authorized to block during the pendency of an investigation unless he had first amended his Executive Order by publication in the Federal Register. Global Relief argues, in effect, that every time a statutory ***798** change or new enactment has the effect of altering the scope or the applicability of an Executive Order, the Executive Order must be republished to legally incorporate within it the change of powers caused by the new statute. As a matter of regulatory efficiency, this argument makes little sense. To avoid this problem, presidents draft their executive orders in such a way as to foresee the future enactment of statutes by Congress. In terms of Executive Order 13224, section 7 states that the Secretary of the Treasury is authorized to "employ *all powers* granted to the President by IEEPA." Such open-ended wording leaves little doubt that the President intended to delegate to his subordinates the fullest extent of his statutory powers, including new and/or different powers subsequently granted by Congress to the President. Accordingly, we conclude that the defendants' actions in implementing the December 14 blocking order were the result of a legal delegation of the President's authority under IEEPA and the USA Patriot Act. Thus, the blocking order was not an *ultra vires* act.

3. *Summary*

In the first part of its motion for a preliminary injunction, Global Relief argued there was a likelihood that it would succeed on the merits of its claims concerning FISA and IEEPA. Specifically, Global Relief asserted that the search of its corporate headquarters and the home of its executive director violated FISA and that the order blocking Global Relief's assets pending an investigation was not authorized under IEEPA. As discussed in significant detail above, we have rejected these arguments. Rather, we hold that the search of the headquarters and the executive director's home complied with the statutory safeguards of FISA. With respect to IEEPA, we hold that IEEPA does not as a matter of law apply only to the foreign property interests of foreign nationals. Instead, the powers included in IEEPA can be directed toward purely domestic assets of an U.S. citizen as long as some foreign national has an interest in the domestic corporation. Furthermore, OFAC's December 14 blocking order did not violate IEEPA's humanitarian relief exception. Finally, we conclude that President Bush legally delegated his authority under IEEPA to block assets during the pendency of an investigation to the Secretary of the Treasury and his designee OFAC. Therefore, based on these holdings, we find that Global Relief has not established that there is a likelihood that it would succeed on the merits of its statutory claims.

B. Global Relief Has Not Shown That It Has A Reasonable Likelihood Of Success On the Merits Of Its Constitutional Arguments

In its motion for preliminary injunction, Global Relief argues that the defendants' actions violated numerous provisions of the Constitution. We will analyze each of these constitutional claims to determine whether Global Relief is likely to succeed on the merits of its claims.

1. *The Bill of Attainder Clause*

Global Relief first argues that the defendants' actions in "designating it as a terrorist" and "seizing and forfeiting its assets" and "outlawing other U.S. persons from transacting business with it" violate the Bill of Attainder Clause, U.S. Const. art. 1, § 9, cl. 3.

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Selective Serv. Sys. v. Minnesota PIRG,* 468 U.S. 841, 846–47, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984) (quoting ***799** *Nixon v. Adm'r of Gen. Services,* 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977)). *See also Dehainaut v. Pena,* 32 F.3d 1066, 1070 (7th Cir.1994), *cert. denied,* 514 U.S. 1050, 115 S.Ct. 1427, 131 L.Ed.2d 309 (1995). Global Relief argues that, in this case, Congress determined it to be worthy of punishment, designated it guilty and proceeded to impose punishment in violation of the Bill of Attainder Clause.

We find that Global Relief is not likely to succeed on this claim because there is no "law" involved and because the defendants' actions did not inflict "punishment."

i) *Congress Took No Action Against Global Relief*

In this case, there is no *law* that legislatively inflicted punishment on Global Relief. Contrary to Global Relief's assertions, *Congress* did not place Global Relief on any list of suspected terrorists or potential supporters of terrorism.

Global Relief is complaining about the actions of OFAC, an executive agency, and the issuance of its temporary blocking order. The actions of OFAC, however, did not *legislatively* determine guilt. *See Selective Service,* 468 U.S. at 846, 104 S.Ct. 3348. "The bulk of authority suggests that the constitutional prohibition against bills of attainder applies to legislative acts, not to regulatory actions of administrative agencies." *Walmer v. United States Dep't of Defense,* 52 F.3d 851, 855 (10th Cir.1995) (citations omitted). "No circuit court has yet held that the bill of attainder clause, U.S. Const. art I, § 9, cl. 3, applies to regulations promulgated by an executive agency." *Paradissiotis,* 171 F.3d at 988 (citing *Walmer,* 52 F.3d at 855); *Dehainaut,* 32 F.3d at 1070–71; *Cooperativa Multiactiva de Empleados de Distribuidores de Drogas "Coopservir LTDA." v. Newcomb,* Civ. Action No. 98–0949, slip op. at 10 (D.D.C. Mar. 29, 1999) ("*Coopservir*"), *aff'd* 221 F.3d 195 (2000). Therefore, Global Relief is not likely to prevail in proving a violation of the Bill of Attainder Clause because there was no action taken against it by Congress and no law that legislatively determined Global Relief's alleged guilt.

ii) *Defendants' Actions Do Not Constitute "Punishment"*

In addition, the defendants' actions do not inflict "punishment" upon Global Relief "without provision of the protections of a judicial trial." *See Nixon v. Administrator of General Services,* 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). Neither the identification of Global Relief as one to be investigated for possible support of terrorism nor the seizure and temporary blocking of Global Relief's assets is likely to constitute punishment under the Bill of Attainder Clause.

In determining whether legislation inflicts "punishment" such that it implicates the Bill of Attainder Clause, the Supreme Court has considered three factors: 1) whether the challenged statute falls within the historical meaning of legislative punishment; 2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes;" and 3) whether the legislative record "evinces a congressional intent to punish." *Selective Service,* 468 U.S. at 852, 104 S.Ct. 3348.

In this case, we find that OFAC's identification of Global Relief as one to be investigated for possible support of terrorism and its temporary blocking of Global Relief's assets does not constitute "punishment" within the meaning of the Bill of Attainder Clause. Not all harm or inconvenience resulting from governmental authority constitutes "punishment." *See Nixon,* 433 U.S. at 472, 97 S.Ct. 2777; ***800** *DeVeau v. Braisted,* 363 U.S. 144, 160, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960). Moreover, the temporary blocking of Global Relief's assets does not inflict a type of punishment historically viewed as prohibited by the Bill of Attainder Clause, such as a death sentence, imprisonment, banishment, or a punitive confiscation of property. *Id.* Although Global Relief's assets are temporarily blocked during OFAC's investigation, such a blocking does not constitute a punitive confiscation of property because no forfeiture in favor of the government has occurred and because Global Relief has received OFAC licenses to continue some of its operations.

Second, defendants' actions seem motivated by a desire to protect the health and well-being of the nation by reducing the likelihood of future terrorist attacks against the United States and its interests rather than by a desire to punish Global Relief. Hence, these actions do not constitute punishment pursuant to the Bill of Attainder Clause, because that "will be found only where the statutory burden is ... 'so disproportionately severe and so inappropriate to nonpunitive ends' ... that a legislative desire to punish can be discerned." *640 Broadway Renaissance Co. v. Cuomo,* 740 F.Supp. 1023, 1035 (S.D.N.Y.1990), *aff'd* 927 F.2d 593 (2d Cir.1991) (quoting *Nixon,* 433 U.S. at 474, 97 S.Ct. 2777). Global Relief bears the burden of showing "that the legislature's action constituted punishment and not merely the legitimate regulation of conduct." *Nixon,* 433 U.S. at 476 n. 40, 97 S.Ct. 2777. In this case, Global Relief is not likely to meet this burden. *Cf. Dehainaut,* 32 F.3d at 1071–72; *Coopservir,* slip op. at 11 ("[T]he Notice 'reasonably can be said to further nonpunitive legislative purposes,' namely protection of national interests....") (citation omitted).

Third, in determining whether legislation constitutes "punishment," the Supreme Court has narrowly construed this to require "unmistakable evidence of punitive intent" in the legislative history before an enactment may be invalidated on this basis. *Selective Service,* 468 U.S. at 855 n. 15, 104 S.Ct. 3348 (quoting *Flemming v. Nestor,* 363 U.S. 603, 619, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960)). Global Relief can point to nothing in the legislative history of IEEPA, the history of Executive Order 13224, or the history of the blocking notice that evinces any intent to punish it. *See Coopservir,* slip op. at 12. Moreover, at least one court has held that "[t]he mere publication of [a] name in the [OFAC] list did not evince an 'intent to punish.' " *Paradissiotis,* 171 F.3d at 989.

For all of these reasons, the temporary blocking order and designation of Global Relief as an entity to be investigated for possible support of terrorism do not amount to "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Moreover, two courts have rejected nearly identical bill of attainder claims arising out of other OFAC blocking orders pursuant to sanctions programs under the IEEPA. *See Paradissiotis,* 171 F.3d at 989; *Coopservir,* slip op. at 10–12. Therefore, we find that Global Relief is not likely to succeed in proving a violation of the Bill of Attainder Clause.

2. *Ex Post Facto Clause*

Global Relief next claims that the USA Patriot Act, which amended IEEPA, is an ex post facto law. The Ex Post Facto Clause prohibits four types of laws: 1) laws that denominate an action as criminal even though the action was taken before the passing of the law and was innocent when taken; 2) laws that aggravate a crime or make it greater than it was when committed; 3) laws that change the punishment, and inflict a greater punishment, ***801** than the law applied to the crime when committed; and 4) laws that alter the legal rules of evidence and receive less, or different, testimony than the law required at the time of the commission of the offense in order to convict the offender. *Carmell v. Texas,* 529 U.S. 513, 521–22, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000).

In determining whether legislation violates the Ex Post Facto Clause, courts use a three-pronged test. In order to violate the Ex Post Facto Clause: 1) the legislation must be penal or criminal in nature; 2) the legislation must be retrospective; and 3) the legislation must "disadvantage the offender affected by it." *United States v. Couch,* 28 F.3d 711, 713 (7th Cir.1994), *cert. denied,* 513 U.S. 993, 115 S.Ct. 495, 130 L.Ed.2d 405 (1994) (citations omitted).

In this case, the USA Patriot Act's amendments to IEEPA do not satisfy the first two prongs of the test. First, the modifications to IEEPA are not penal or criminal in nature, and the Ex Post Facto Clause only applies to criminal laws. *See Collins v. Youngblood,* 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); *Flores–Leon v. INS,* 272 F.3d 433, 440 (7th Cir.2001). The USA Patriot Act made six changes to IEEPA. Only two changes are relevant to this case. One provision now explicitly permits the President and his designees to block assets of entities "during the pendency of an investigation." Pub.L. No 107–56, § 106, 115 Stat.272, 277. Another provision authorizes the Executive Branch to submit an agency record containing classified information "ex parte and in camera" for judicial review. *Id.* at 278. Neither provision is penal or criminal in nature. *Cf. United States v. Arch Trading Co.,* 987 F.2d 1087, 1093–95 (4th Cir.1993).

Moreover, the recent changes to IEEPA were intended to help address the national emergency concerning the terrorist attacks on September 11 and the threat of future attacks—they were not intended to punish Global Relief. Contrary to Global Relief's assertions, the defendants' temporary seizure and blocking of Global Relief's assets do not constitute a forfeiture or an unauthorized punishment. *Cf. Gilbert v. Peters,* 55 F.3d 237, 238 (7th Cir.1995) ("Although 'criteria for determining whether or not legislation is punitive have yet to be fully developed,' one significant factor for consideration is the legislation's purpose.") (citation omitted). For all of these reasons, the USA Patriot Act's amendments to IEEPA are not penal or criminal in nature and do not satisfy the first prong of the test.

Second, even if the USA Patriot Act's amendments to IEEPA could be construed as penal or criminal in nature, the Ex Post Facto Clause still would not apply because the amendments are not retrospective. *See Weaver v. Graham,* 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); *United States v. Szarwark,* 168 F.3d 993, 998 (7th Cir.1999). The USA Patriot Act was passed in October 2001, over a month before the FBI removed Global Relief's records and property and OFAC issued a blocking notice temporarily freezing Global Relief's assets. Therefore, the legislation is not retrospective.

Finally, contrary to Global Relief's claims, the USA Patriot Act is *not* "unquestionably a law 'that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.' " *Carmell,* 529 U.S. at 530, 120 S.Ct. 1620. The USA Patriot Act's amendments to IEEPA do not change the sufficiency of evidence needed to obtain a criminal conviction. The actions being contested here—the seizing of records and the temporary ***802** blocking of assets during an investigation—are not criminal penalties.

In sum, because the USA Patriot Act's changes to IEEPA are neither penal nor retrospective in nature, nor do they change the rules of evidence necessary to obtain a criminal conviction, Global Relief is not likely to succeed on its ex post facto claim.

3. *Taking Without Just Compensation*

The Takings Clause of the Fifth Amendment forbids the government from taking private property for public use without just compensation. Global Relief claims that defendants' seizure of its assets and the temporary blocking order effects an uncompensated taking. This argument is incorrect for two reasons.

First, a person claiming an uncompensated taking resulting from an action taken pursuant to IEEPA must typically bring a claim for monetary relief under the Tucker Act, 28 U.S.C. § 1491, in the Court of Federal Claims. *Dames & Moore,* 453 U.S. at 688–90, 101 S.Ct. 2972. *See also* 28 U.S.C. § 1346(a)(2); *Paradissiotis,* 171 F.3d at 989 (noting that "the Court of Federal Claims has exclusive jurisdiction for all claims for monetary relief against the United States greater than $10,000"). Accordingly, this claim is filed in the wrong court.

In addition, even if this Court had jurisdiction, Global Relief's takings claim would fail. Takings claims have often been raised—and consistently rejected—in the IEEPA context. Many courts have recognized that a temporary blocking of assets does not constitute a taking because it is a temporary action and not a vesting of property in the United States. *See, e.g., Tran Qui Than v. Regan,* 658 F.2d 1296, 1304 (9th Cir.1981); *Miranda,* 766 F.2d at 5. As the *Tran Qui Than* court held, "[w]e recognize that blocking involves a deprivation of the enjoyment of a property interest. That deprivation is temporary, however, and is not equivalent to vesting." *Tran Qui Than,* 658 F.2d at 1304.

For all of these reasons, Global Relief is not likely to succeed in proving a violation of the Fifth Amendment's Takings Clause.

4. *The Executive Order is Not Unconstitutionally Vague*

Global Relief next argues that Executive Order 13224 is unconstitutionally vague because it neither defines "associated with" nor gives sufficient notice of the type of conduct which is prohibited. As stated earlier, the Executive Order allows OFAC to freeze an entity's assets if it is determined by the President, or those persons delegated by the President, that the person acted for, sponsored, or was otherwise associated with a person determined to be a terrorist.

We find that this argument lacks merit because this claim is not yet ripe for review. In this case, OFAC blocked Global Relief's assets pending investigation to determine if further blocking or designation should take place under one or more criteria of the Executive Order. There has not yet been any determination under the Executive Order as to whether designation or further blocking should take place. Thus, Global Relief's challenge is not ripe for review. *See Freedom to Travel Campaign v. Newcomb,* 82 F.3d 1431, 1441 (9th Cir.1996); *American–Arab Anti–Discrimination Comm. v. Thornburgh,* 970 F.2d 501, 511 (9th Cir.1991) ("Even in the case of a pre-enforcement challenge such as this, the exercise of jurisdiction without proper factual development is inappropriate."); *Western Mining Council v. Watt,* 643 F.2d 618, 627 (9th Cir.1981) ("The mere possibility that [an official] may act in an arguably unconstitutional manner... is insufficient to establish the 'real and substantial ***803** controversy' required to render a case justiciable under Article III").

Therefore, Global Relief cannot establish a likelihood of success on its claim that the Executive Order is unconstitutionally vague.

5. *Due Process*

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." Global Relief argues that defendants are violating its right to due process by temporarily blocking Global Relief from its property and business without any judicial oversight.

i) *Pre–Deprivation Procedures*

The due process clause generally requires the government to afford notice and a meaningful opportunity to be heard before depriving a person of certain property interests. *See United States v. James Daniel Good Real Property,* 510 U.S. 43, 62, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). However, when exigent circumstances are present and the government demonstrates a "pressing need for prompt action," the Supreme Court has long struck the procedural due process balance so as to dispense with the requirement for a pre-deprivation hearing. *James Daniel Good,* 510 U.S. at 56, 114 S.Ct. 492; *Calero–Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 679, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). "It is by now well established that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances ... [W]here a State

must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert v. Homar,* 520 U.S. 924, 930, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997) (citations and internal quotations omitted).

In *Calero–Toledo,* the Supreme Court upheld a statute that permitted seizure of assets without pre-deprivation process because "[t]he considerations that justified postponement of notice and hearing in [prior] cases are present here":

> First, seizure under the [applicable] statutes serves significant governmental purposes .... Second, preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized ... will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given. And finally, ... seizure is not initiated by selfinterested private parties; rather, [government] officials determine whether seizure is appropriate under the provisions of the... statutes. In these circumstances, we hold that this case presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process.

Id. at 679–80, 94 S.Ct. 2080 (citing *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972)). *See also Federal Deposit Ins. Corp. v. Mallen,* 486 U.S. 230, 240–41, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988).

Due to the exigencies of national security and foreign policy considerations, the Executive Branch historically has not provided pre-deprivation notice in sanctions programs under IEEPA. The actions taken by the Executive Branch pursuant to these statutes are procedurally and substantively different from other types of governmental conduct in that they first require a declaration of war or national emergency arising, at least in substantial part, outside the United States. *See* 50 U.S.C. §§ 1701–02, app. § 5(b). Because of the Executive's need for speed in these matters, and the need to prevent the flight ***804** of assets and destruction of records, the President and his designees cannot provide pre-deprivation notice under these circumstances. *See Haig,* 453 U.S. at 307, 101 S.Ct. 2766 ("no governmental interest is more important than the security of the Nation"); *Palestine Information Office v. Shultz,* 853 F.2d 932, 942–43 (D.C.Cir.1988).

Pre-deprivation notice would, in fact, be antithetical to the objectives of these sanctions programs, and, as a result, it is OFAC policy when initiating a blocking pursuant to IEEPA not to provide pre-blocking notice. (Newcomb Decl. ¶ 11–12.) Summary process in these circumstances simply maintains the status quo, protects against transfer or dissipation of assets subject to the blocking order, and furthers the compelling government interest in promoting its declared national security and foreign policy goals.

In fact, courts repeatedly have held that orders issued without pre-blocking notice in these types of cases do not violate the Due Process Clause. *See, e.g., Milena,* 995 F.2d at 624 ("OFAC had to act quickly following the issuance of the Executive Orders; delay would have allowed the assets to leave the United States, thereby thwarting the purpose of the Orders."); *IPT Co. v. United States Dep't of Treasury,* 1994 WL 613371, at *6 (S.D.N.Y. Nov.4, 1994) (holding that pre-deprivation notice and hearing was not required in connection with an OFAC blocking order).

For all of the foregoing reasons, we find that Global Relief is not likely to succeed in proving its claim that defendants violated Global Relief's due process rights by failing to provide notice and a meaningful opportunity to be heard prior to temporarily blocking Global Relief's assets.

ii) *Post–Deprivation Procedures*

Global Relief also contends that defendants' post-blocking procedures violate the Due Process Clause. However, we find that Global Relief is not likely to succeed on this claim because it chose not to utilize many of the available administrative remedies and, when it did opt to use the OFAC process for obtaining licenses, it did not act promptly.

OFAC provided Global Relief with a variety of post-blocking options which satisfied its due process obligations. First, OFAC delivered a notice to Global Relief on the day of the temporary blocking that informed it that OFAC believed that Global Relief "may be engaged in activities that violate IEEPA." The notice delineated Global Relief's right to present

evidence and/or argument to OFAC if it believed the blocking was made in error, including the right to make submissions by facsimile "to expedite" OFAC's response. The notice also informed Global Relief of OFAC's "licensing authority to help ameliorate the effects of the blocking" of Global Relief's funds and accounts. Through the licensing authority, Global Relief could obtain funds to pay salaries, rent, utility payments, and attorneys fees. The notice also referred Global Relief to relevant agency regulations and provided it with an agency contact and phone number in case any questions arose.

Despite OFAC's notification to Global Relief of its right to submit evidence and argument if it believed the blocking was in error, Global Relief has never availed itself of this opportunity in the almost six months since the temporary blocking order was issued. Global Relief speculates that such an administrative challenge would have been "window dressing," because the "very person who is responsible for prosecuting" Global Relief (the Director of OFAC) would have received the evidence.

***805** Contrary to Global Relief's assertions, the director of OFAC is an appropriate person to consider administrative appeals. *Withrow v. Larkin,* 421 U.S. 35, 56, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). In *Larkin,* the Supreme Court held that it is:

> very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.

Id. at 56, 95 S.Ct. 1456. In fact, in other cases, the OFAC director has revoked blocking orders based upon new information provided by a designated party. That Global Relief opted to ignore its administrative due process rights and choose instead to file this case cannot be considered a constitutional violation on the part of defendants.

Second, as part of its due process obligations, the agency also provided an administrative mechanism to Global Relief to allow it to request licenses for payment of certain expenses. During the past four months, OFAC has issued licenses to Global Relief to allow for payment of legal fees, establishment of a legal defense fund, payment of obligations outstanding as of the date of the temporary blocking, and payment of certain continuing expenses. These licenses have allowed Global Relief to maintain some of its operations during the pendency of the investigation. Although Global Relief complains that OFAC is causing it great hardship, it should be noted that Global Relief waited over a month from the time the agency asked it to submit a proposed operating budget until it did so.

Finally, Global Relief claims that OFAC has denied it due process by not giving it access to its own documents seized on December 14, 2001 and by not providing it with classified documents used to support the temporary blocking action. First, the issue of Global Relief being denied access to its own documents has been addressed by the Court and defendants have been returning documents to Global Relief on an on-going basis.

Moreover, we do not believe that defendants have created a due process violation by denying Global Relief access to classified documents. When, as here, Congress and the President have determined a need for the secrecy of government information, courts have rejected challenges to the *ex parte* use of a classified record. *See, e.g., National Council of Resistance of Iran v. Dep't of State,* 251 F.3d 192, 196 (D.C.Cir.2001) ("The Secretary may base his findings on classified material, to which the organization has no access at any point during or after the proceeding to designate it as a terrorist.").

For these reasons, we find that Global Relief will not likely succeed in proving a due process violation regarding defendants' post-blocking procedures.

6. *First Amendment*

Global Relief next argues that defendants have violated the First Amendment. The First Amendment provides that "Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble...." Global Relief raises two First Amendment arguments to challenge the defendants' actions. First, Global Relief argues that the Executive Order is unconstitutionally overbroad. Second, Global Relief argues that, as applied to United States persons, the Executive Order violates the First

Amendment. We find that Global Relief is unlikely to prevail on these arguments.

***806** First, the Executive Order empowers OFAC to freeze an entity's assets if it is determined that the person acted for, sponsored, or was otherwise associated with a person determined to be a terrorist. Although its argument is vague, Global Relief appears to argue that the Executive Order violates the First Amendment because it is overbroad in that it does not define the term "associated with."

However, because the Executive Order neither "*directly* regulates speech or expression arguably protected by the First Amendment" nor grants "discretion to a delegatee to determine whether particular items of expression may be prohibited on the basis of their content," the question of overbreadth does not arise. *Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs, Region II,* 459 F.2d 676, 681 (3d Cir.1972). To prevent additional terrorist attacks, the Executive Order governs financial arrangements and other types of support; its effects on speech, if any, are incidental. Consequently, it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism,* 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

Moreover, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien,* 391 U.S. 367, 376–77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The *O'Brien* court held that:

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376–77, 88 S.Ct. 1673.

In this case, the Executive Order clearly meets these requirements. First, the President clearly had the power to issue the Executive Order. Second, the Executive Order promotes an important and substantial government interest—that of preventing terrorist attacks. Third, the government's action is unrelated to the suppression of free expression; it prohibits the provision of financial and other support to terrorists. Fourth, the incidental restrictions on First Amendment freedoms are no greater than necessary. *See Humanitarian Law Project v. Reno,* 205 F.3d 1130, 1135–36 (9th Cir.2000); *Palestine Info. Office,* 853 F.2d at 939–40; *cf. Walsh v. Brady,* 927 F.2d 1229, 1234–35 (D.C.Cir.1991). Therefore, it is unlikely that the Executive Order, as applied to United States citizens, violates the First Amendment.

For all of these reasons, we find that Global Relief is unlikely to prevail in proving that defendants' actions violate the First Amendment.

7. *Eighth Amendment*

Global Relief next argues that the government has instituted a civil forfeiture in violation of the Eighth Amendment's prohibition on excessive fines. Before a court can conclude that a fine is excessive under the Eighth Amendment, it must first determine that a fine was in fact paid to the government. The constitutional prohibition concerning excessive fines "was intended to limit only those fines directly imposed by, and payable to, the government." *Browning–Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 268, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).

***807** In this case, Global Relief has failed to show the existence of any such fine. Global Relief has not been required to make any sort of payment in cash, or in kind, to the government. Although Global Relief's funds are held in temporarily blocked accounts, the government has not collected or received any of these funds. Despite Global Relief's assertions, OFAC's blocking notice does not constitute a forfeiture of Plaintiff's property.

For these reasons, we find that it is unlikely that Global Relief will succeed in proving that a civil forfeiture has occurred.

8. *Separation Of Powers*

Global Relief next argues that IEEPA violates the separation of powers. Specifically, Global Relief argues that Congress cannot delegate carte blanche to the President. Moreover,

Global Relief claims that "OFAC's approach combines lawmaker, investigator, prosecutor, fact finder and jailer or executioner into a single office, indeed a single person; this is not a permissible combination of functions, even where administrative process is sufficient."

Global Relief is not likely to succeed on these claims. First, IEEPA grants the President certain emergency powers. The President has inherent Article II powers as commander in chief. The President has delegated his statutory power under IEEPA to OFAC. Pursuant to this authority, OFAC is granted certain powers to investigate, issue blocking orders, and provide certain remedies. Many agencies operate under similar circumstances. Therefore, the provisions of IEEPA and its delegation of authority to OFAC is not likely to violate the separation of powers.

9. *Fourth Amendment*

Global Relief next argues that defendants unconstitutionally searched its offices and seized its property in violation of the Fourth Amendment. The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

We reject Global Relief's argument because FISA's safeguards provide sufficient protection for the rights guaranteed by the Fourth Amendment in the context of foreign intelligence activities. We agree with the many courts which have held that searches conducted pursuant to FISA do not violate the protections afforded by the Fourth Amendment. *See, e.g., United States v. Pelton,* 835 F.2d 1067, 1075 (4th Cir.1987); *United States v. Cavanagh,* 807 F.2d 787, 790–92 (9th Cir.1987); *United States v. Duggan,* 743 F.2d 59, 73 (2d Cir.1984).

For these reasons it is unlikely that Global Relief will succeed in proving a violation of the Fourth Amendment.

10. *Fifth And Sixth Amendments*

Finally, Global Relief claims that it has been deprived of its rights under the Fifth and Sixth Amendments because it is being required to answer for a capital, or otherwise infamous crime, without presentment or indictment of a Grand Jury. Additionally, Global Relief argues that it has been deprived of the right to a speedy and public trial, an impartial jury, notice of the charges, an opportunity to confront witnesses and a compulsory process for obtaining witnesses.

Global Relief's conclusory assertions, however, rely on a false predicate—that Global Relief is facing criminal sanctions. In this case, Global Relief is not being "held to answer for a capital, or otherwise infamous crime." U.S. Const. amend. V. ***808** It also does not currently face a "criminal prosecution[ ]." U.S. Const. amend. VI. Consequently, the protections afforded by these amendments do not apply to Global Relief.

For these reasons, it is unlikely that Global Relief will succeed in proving a violation of the Fifth and Sixth Amendments.

11. *Ex Parte, In Camera Submission*

Finally, Global Relief also argues that the defendants' submission of *ex parte, in camera* documents violates Global Relief's constitutional rights. While it is unclear exactly which provisions of the Constitution Global Relief claims that the *ex parte, in camera* submission violates, Global Relief appears to argue that its right to confront witnesses and its due process rights have been violated by this submission.

The Confrontation Clause of the Sixth Amendment guarantees a defendant in a criminal prosecution the right to confront the witnesses against him. *Davis v. Alaska,* 415 U.S. 308, 315–16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). However, as we have previously stated, the Sixth Amendment is inapplicable because Global Relief is not facing criminal sanctions and is not being charged in a criminal prosecution. Consequently, the protections afforded by the Confrontation Clause of the Sixth Amendment do not apply in this case.

Moreover, we do not believe that the *ex parte, in camera* submission violates Global Relief's due process rights. *Ex parte, in camera* proceedings are extraordinary events in the constitutional framework because they deprive the parties against whom they are directed of the root requirements of due process—notice setting forth the alleged misconduct and an opportunity for a hearing. *See Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Review of *ex parte, in camera* submissions can only be justified by compelling state interests. *See United States v. Bell,* 464 F.2d 667 (2d Cir.), *cert. denied,* 409 U.S. 991, 93 S.Ct. 335, 34 L.Ed.2d 258 (1972). Thus, the nature of the government's interest must be balanced against the private party's interest to determine if a due process violation has occurred.

In this case, the defendants have demonstrated that it would harm the national security of the United States to disclose, while the government's investigation is pending, the materials submitted *ex parte and in camera.* Moreover, the defendants disclosed as much of the material as it could divulge without compromising its investigation and the national security by publicly filing four binders of exhibits on March 27, 2002. Although Global Relief does have a substantial interest in being able to study and respond to the evidence against it, we find that the defendants have demonstrated a compelling state interest in national security which outweighs Global Relief's interest in this case. This is especially true because this case involves a freeze of funds and examination of seized potential evidence to aid an investigation. This case is not a criminal prosecution nor is it a permanent forfeiture of assets. Thus, we find that it is unlikely that Global Relief will succeed on the merits of its due process claim regarding the defendants' use of *ex parte, in camera* documents.

12. *Summary*

In the second part of its motion for a preliminary injunction, Global Relief argues that there is a likelihood that it would succeed in proving that the defendants violated the Constitution. Specifically, Global Relief argues that defendants have violated the Bill of Attainder Clause, the Ex Post Facto Clause, the Fifth Amendment's Takings Clause, the Due Process ***809** Clause, the First, Fourth, Fifth, Sixth and Eighth Amendments to the Constitution. In addition, Global Relief argues that Executive Order 13224 is unconstitutionally vague and that IEEPA violates the separation of powers.

As discussed in significant detail above, we find that these arguments are not likely to succeed on their merits. Therefore, we find that Global Relief is not likely to succeed in proving a violation of its constitutional rights. Coupled with its failure to demonstrate that it is likely to succeed on its statutory claims, Global Relief has failed to satisfy the likelihood of success threshold factor for preliminary injunctive relief.

Accordingly, "[i]f a plaintiff fails to meet just one of the prerequisites for a preliminary injunction, the injunction must be denied." *Cox v. City of Chicago,* 868 F.2d 217, 223 (7th Cir.1989) (citing *Shaffer v. Globe Protection, Inc.,* 721 F.2d 1121, 1123 (7th Cir.1983)). In this case, Global Relief has not proven a reasonable likelihood of success on the merits of its statutory and constitutional claims. Because Global Relief is unable to demonstrate a likelihood of success on the merits, it is not necessary to examine the other elements for preliminary injunctive relief.

CONCLUSION

For the foregoing reasons, we deny the motion of Global Relief Foundation, Inc. for injunctive relief.

All Citations

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Annex 221

ANNEX 222

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, May 30, 2013

Manssor Arbabsiar Sentenced in New York City Federal Court to 25 Years in Prison for Conspiring with Iranian Military Officials to Assassinate the Saudi Arabian Ambassador to the United States

Manssor Arbabsiar, aka “Mansour Arbabsiar,” was sentenced today in New York City federal court to 25 years in prison for participating in a plot to murder the Saudi Arabian Ambassador to the U.S. while the Ambassador was in the U.S., announced John Carlin, Acting Assistant Attorney General for the National Security Division at the Department of Justice and Preet Bharara, U.S. Attorney for the Southern District of New York.

Arbabsiar, a 58 year-old naturalized U.S. citizen holding both Iranian and U.S. passports, was arrested on Sept. 29, 2011, at John F. Kennedy International Airport. He pleaded guilty on Oct. 17, 2012, to one count of murder-for-hire, one count of conspiracy to commit murder-for-hire, and one count of conspiracy to commit an act of terrorism transcending national boundaries before U.S. District Judge John F. Keenan, who also imposed today’s sentence.
“Thanks to the collaborative efforts of many U.S. law enforcement and intelligence professionals, Manssor Arbabsiar is today being held accountable for his role in this assassination plot,” said Acting Assistant Attorney General for National Security John Carlin. “I applaud all those responsible for ensuring that Arbabsiar and his co-conspirators in Iran’s Qods Force failed in their efforts. Today’s sentencing serves as a reminder of the evolving threat environment we face.”
“Manssor Arbabsiar was an enemy among us – the key conduit for, and facilitator of, a nefarious international plot concocted by members of the Iranian military to assassinate the Saudi Ambassador to the United States and as many innocent bystanders as necessary to get the job done,” said U.S. Attorney Bharara. “And but for the vigilance of our FBI and DEA partners, his plot, and the unspeakable harm it would have caused, may well have come to fruition, which is exactly why our commitment to using every resource we have to root out, prosecute and punish people like Arbabsiar, who act as emissaries for our enemies, remains unflagging.”

According to the complaint and indictment filed in federal court:

From the spring of 2011 to October 2011, Arbabsiar and his Iran-based co-conspirators, including members of Iran’s Qods Force, plotted the murder of the Saudi Arabian Ambassador to the U.S. In furtherance of this conspiracy, Arbabsiar met on a number of occasions in Mexico with a DEA confidential source (CS-1) who posed as an associate of a violent international drug trafficking cartel. Arbabsiar arranged to hire CS-1 and CS-1’s purported accomplices to murder the Ambassador with the awareness and approval of his Iran-based co-conspirators. Arbabsiar wired approximately $100,000 to a bank account in the U.S. as a down payment to CS-1 for the anticipated killing of the Ambassador, which was to take place in the U.S, also with the approval of his co-conspirators.

The Qods Force is a branch of the Iranian Islamic Revolutionary Guard Corps (IRGC), which conducts sensitive covert operations abroad, including terrorist attacks, assassinations, and kidnappings, and is believed to have sponsored attacks against Coalition Forces in Iraq. In October 2007, the U.S. Treasury Department designated the Qods Force as a terrorist supporter for providing material support to the Taliban and other terrorist organizations.

Arbabsiar met with CS-1 in Mexico on several occasions between May 2011 and July 2011. During the course of these meetings, he inquired as to CS-1’s knowledge with respect to explosives and explained that he was interested in, among other things, attacking an embassy of Saudi Arabia and the murder of the Saudi Ambassador to the U.S. In a July 14, 2011 meeting in Mexico, CS-1 told Arbabsiar that he would need to use at least four men to carry out the

Ambassador's murder and that his price for doing so was $1.5 million. Arbabsiar agreed and stated that the murder of the Ambassador should be handled first, before the execution of other attacks that he had discussed with CS-1. Arbabsiar also indicated that he and his associates had $100,000 in Iran to give CS-1 as a first payment toward the assassination.

During the same meeting, Arbabsiar also described to CS-1 his cousin in Iran, who he said had requested that Arbabsiar find someone to carry out the Ambassador's assassination. Arbabsiar indicated that his cousin was a "big general" in the Iranian military, that he focuses on matters outside of Iran, and that he had taken certain unspecified actions related to a bombing in Iraq.

In a July 17, 2011, meeting in Mexico, CS-1 noted to Arbabsiar that one of his workers had already traveled to Washington, D.C., to surveil the Ambassador. CS-1 also raised the possibility of innocent bystander casualties. Arbabsiar made it clear that the assassination needed to go forward, despite mass casualties, telling CS-1, "They want that guy [the Ambassador] done [killed], if the hundred go with him f**k 'em." CS-1 and Arbabsiar discussed bombing a restaurant in the U.S. that the Ambassador frequented. When CS-1 noted that others could be killed in the attack, including U.S. senators who dine at the restaurant, Arbabsiar dismissed these concerns as "no big deal."

On Aug. 1 and Aug. 9, 2011, Arbabsiar caused two overseas wire transfers totaling approximately $100,000 to be sent to an FBI undercover account as a down payment for CS-1 to carry out the assassination. Later, Arbabsiar explained to CS-1 that he would provide the remainder of the $1.5 million after the assassination. On Sept. 20, 2011, CS-1 told Arbabsiar that the operation was ready and requested that he either pay one half the agreed upon price ($1.5 million) for the murder or that Arbabsiar personally travel to Mexico as collateral for the final payment of the fee. Arbabsiar agreed to travel to Mexico to guarantee final payment for the murder.

On Sept. 28, 2011, Arbabsiar flew to Mexico, and he was refused entry into the country and placed on a return flight destined for his last point of departure. The following day, Arbabsiar was arrested by federal agents during a flight layover at JFK International Airport in New York. Several hours after his arrest, Arbabsiar was advised of his Miranda rights and he agreed to waive those rights and speak with law enforcement agents. During a series of Mirandized interviews, Arbabsiar confessed to his participation in the murder plot.

In addition, Arbabsiar admitted to agents that, in connection with this plot, he was recruited, funded, and directed by men he understood to be senior officials in Iran's Qods Force. He said these Iranian officials were aware of, and approved of, the use of CS-1 in connection with the plot, as well as payments to CS-1, the means by which the Ambassador would be killed in the U.S., and the casualties that would likely result.

Arbabsiar also told agents that his cousin, whom he had long understood to be a senior member of the Qods Force, had approached him in the early spring of 2011 about recruiting narco-traffickers to kidnap the Ambassador. He told agents that he then met with CS-1 in Mexico and discussed assassinating the Ambassador. Arbabsiar said that afterwards, he met several times in Iran with Gholam Shakuri, aka "Ali Gholam Shakuri," a co-conspirator and Iran-based member of the Qods Force, and another senior Qods Force official, where Arbabsiar explained that the plan was to blow up a restaurant in the U.S. frequented by the Ambassador and that numerous bystanders would be killed. According to Arbabsiar, the plan was approved by these officials.

In October 2011, after his arrest, Arbabsiar made phone calls at the direction of law enforcement to Shakuri in Iran that were monitored. During these calls, Shakuri confirmed that Arbabsiar should move forward with the plot to murder the Ambassador and that he should accomplish the task as quickly as possible, stating on Oct. 5, 2011, "[j]ust do it quickly, it's late…" Shakuri also told Arbabsiar that he would consult with his superiors about whether they would be willing to pay CS-1 additional money. Shakuri, who was also charged in the plot, remains at large.

* * *

In addition to the prison term, Arbabsiar was ordered to pay forfeiture in the amount of $125,000.

This case was investigated by the FBI Houston Division, the DEA Houston Division, and the FBI New York Joint Terrorism Task Force, with the assistance of the Department of Justice's Office of International Affairs, its National Security Division, and the Department of State. The Government of Mexico also cooperated with the investigation.

This case is being handled by the U.S. Attorney's Office for the Southern District of New York, Terrorism and International Narcotics Unit. Assistant U.S. Attorneys Glen Kopp, Edward Kim, and Stephen Ritchin are in charge of the prosecution with assistance from the Counterterrorism Section of the Justice Department's National Security Division.

Component(s):
National Security Division (NSD)

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ANNEX 223

The Oxford Guide to Treaties

Edited by
DUNCAN B. HOLLIS

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The Vienna Convention Rules on Treaty Interpretation

Richard Gardiner

'The Vienna Rules'[1]

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

[1] Rules for treaty interpretation from the 1969 Vienna Convention on the Law of Treaties (VCLT). References in this chapter to 'the Vienna rules' are to the articles reproduced here.

interpretation and, where present, could be determinative. The ICJ has observed that 'the subsequent practice of the parties, within the meaning of Article 31(3)(b) of the VCLT, can result in a departure from the original intent on the basis of a tacit agreement between the parties'.[52] Thus, such an interpretative agreement achieved through practice can trump a meaning that might be derived from application of Article 31(1) alone.

B. Ordinary meaning in context

In examining the manner of the rules' application, one finds numerous cases where dictionaries have been used as the starting point for interpreting a treaty. But these neither show that the Vienna rules are based on McDougal's feared 'conformity-imposing textuality', nor do they even typically suggest a single ordinary meaning. Dictionaries tend to produce a range of probable ordinary meanings. The interpretative exercise therefore rapidly moves on to consider further elements of the general rule. In *Kasikili/Sedudu Island (Botswana/Namibia)*,[53] the ICJ stated that it was interpreting words in a treaty of 1890 between Great Britain and Germany to give them their ordinary meaning, and that it was determining the meaning of 'main channel' of the river forming a disputed frontier by 'reference to the most commonly used criteria in international law'. Judge Higgins, concurring but making her own declaration, found this 'somewhat fanciful'. She considered that no 'ordinary meaning' of the term 'main channel' existed either in international law or in hydrology:

> The analysis on which the Court has embarked is in reality far from an interpretation of words by reference to their 'ordinary meaning'. The Court is really doing something rather different. It is applying a somewhat general term, decided upon by the Parties in 1890, to a geographic and hydrographic situation much better understood today...
>
> The Court is indeed, for this particular task, entitled to look at all the criteria the Parties have suggested as relevant. This is not to discover a mythical 'ordinary meaning' within the Treaty, but rather because the general terminology chosen long ago falls to be decided today...
>
> At the same time, we must never lose sight of the fact that we are seeking to give flesh to the intention of the Parties, expression [*seemingly*: 'expressed'] in generalized terms in 1890. We must trace a thread back to this point of departure. We should not, as the Court appears at times to be doing, decide what *in abstracto* the term 'the main channel' might today mean, by a mechanistic appreciation of relevant indicia.[54]

This comment follows more closely the ILC's scheme that sought, not simply to avoid a 'mechanistic appreciation' of interpretative elements, but more positively to see that context and a treaty's object and purpose informed the ordinary meaning of treaty terms (at least as a precursor to use of further elements of the rules). Although

[52] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* ICJ Judgment of 13 July 2009 [64].

[53] *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045.

[54] Ibid 1113–4 [1]–[4] (Declaration of Judge Higgins).

context is given a broader definition than just immediate context, this does not of course exclude the use of immediate context. The WTO Appellate Body's decision in *Canada—Measures Affecting the Export of Civilian Aircraft* used both elements of context.[55] The case concerned the definition of 'subsidy' in the Agreement on Subsidies and Countervailing Measures (the 'SCM Agreement'). Canada argued that 'subsidy' could mean an amount measured by the cost to the government as much as the benefit to the recipient.

The Appellate Body looked to the immediate context in SCM Article 1's definition of 'benefit', then investigated other relevant elements of that Agreement and the structure of the provision. Finding that a 'benefit does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient', logic implied existence of a recipient as did use of the term 'conferred'. The context supported this reading in that a related provision in the same treaty referred to the 'benefit *to the recipient* conferred *pursuant to paragraph 1 of Article 1* [the provision under interpretation]'. The Appellate Body found the structure of the whole provision to have two discrete elements, viz: 'a financial contribution by a government or any public body' and that 'a benefit is thereby conferred', such structure suggesting that a contribution from the government flowed to a beneficiary.[56] Hence, the term referred to what the beneficiary received, not the cost to the government. It can be seen from this reasoning (if not abundantly obvious already) that reference to context cannot be usefully made in a purely mechanistic fashion and pursuing 'conformity-imposing textuality'.

Even less rule orientated is the requirement to make an interpretation 'in the light of' the treaty's object and purpose. This is not a teleological imperative subordinating terms of the treaty to its purpose. Rather, it is an enabling provision allowing the selection of meaning to take this factor into account.[57] It is not therefore a rule in the sense of a prescriptive formula, even though it is an indication of a factor to be considered.

Finding a treaty's object and purpose is a somewhat open-ended operation. The ILC and the ICJ have linked it with the good faith requirement in the opening words of the general rule to produce a 'principle of effectiveness'. This principle has two aspects: (i) it incorporates the Latin maxim preferring a meaning that ascribes some effect to a term rather than no effect (*ut res magis valeat quam pereat*); and (ii) it imports a teleological element into the interpretation. The ILC noted:

> When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.[58]

[55] WTO, *Canada—Measures Affecting the Export of Civilian Aircraft—Decision AB-1999-2* (2 August 1999) WT/DS70/AB/R.

[56] Ibid 39–40 [155]–[157].

[57] See the account in Gardiner (n 2) chapter 2, section 4, of the Harvard draft articles on the law of treaties where the approach to interpretation made pervasive reference to the treaty's purpose as a guide to interpretation.

[58] 'Commentary on draft articles' [1966] YBILC, vol II, 219 [6].

The ICJ applied both aspects of the principle of effectiveness in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*.[59] Application of the narrower aspect (the Latin maxim) led it to interpret a provision referring to frontiers 'that result from the international instruments' defined in the Annex to the treaty, as meaning *all* the frontiers resulting from those instruments. The Court also applied a more general principle of effectiveness to conclude that the aim of the treaty was to resolve all the issues over these frontiers.[60]

C. Interpretation agreed by the parties

There is relatively little cause for invitations to courts and tribunals to interpret treaties where the parties have themselves reached a clear interpretative agreement. It seems reasonably safe to say that many differences over interpretation will be resolved by the parties' agreement recorded in some form or other. Disputes are most likely to arise where there is uncertainty if there is actually agreement, where agreements are not kept, or where they produce results that one party dislikes and seeks to repudiate. However, the principle seems clear: The parties are the best interpreters of their own agreement.

Adoption of an interpretative agreement may be specifically envisaged in the treaty.[61] Such a situation is really covered by the Vienna provision requiring the context to be taken into account, meaning the full text of the treaty under interpretation. The Vienna provisions on interpretative agreements have an even greater reach than that, including as they do agreement shown by concordant practice. The latter is probably most readily evidenced by practice following an agreement or understanding.[62]

However, the ultimate test of the notion that the parties are the best interpreters of their agreement is whether they can establish by interpretation something others would view as an amendment. If *all* parties agree, it matters little in principle whether they view their agreement as an interpretation or a record of amendment. Unless there is a party who objects to a failure to follow an amending procedure, if such is present, the process of international agreement seems loosely structured in this regard. There may be practical difficulties, particularly if one or more parties has constitutional requirements to follow, but collectively the parties are masters of their own treaty relations subject to the few peremptory rules of international law.

[59] *Territorial Dispute (Libyan Arab Jamahiriya/Chad) (Merits)* [1994] ICJ Rep 6.

[60] Ibid 25–6 [51]–[52].

[61] This can, however, raise difficulties where the parties adopt an interpretation of a provision while it is the subject of an arbitration: see Article 1131 of the North American Free Trade Association Agreement (an interpretation by the NAFTA Commission is to be binding on NAFTA tribunals), and *Arbitration under Chapter Eleven of NAFTA, Pope & Talbot v Canada (Award in respect of Damages)* [2002] 41 ILM 1347.

[62] See, for example, Decision XV/3 of the Fifteenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, where the parties indicated their desire 'to decide... on a practice in the application of Article 4, paragraph 9 of the Protocol by establishing by consensus a single interpretation of the term "State not party to this Protocol", to be applied by Parties' (11 November 2003) UNEP/OzL.Pro.15/9, 44–5.

ANNEX 224

PCA CASE NO. 2010-17:

IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE REPUBLIC OF AUSTRIA AND THE CZECH AND SLOVAK FEDERAL REPUBLIC CONCERNING THE PROMOTION AND PROTECTION OF INVESTMENTS, DATED 15 OCTOBER 1990

-and-

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 15 DECEMBER 1976

-between-

EUROPEAN AMERICAN INVESTMENT BANK AG (AUSTRIA)

("Claimant")

-and-

THE SLOVAK REPUBLIC

("Respondent," and together with the Claimant, the "Parties")

AWARD ON JURISDICTION

Arbitral Tribunal

Sir Christopher Greenwood
Professor Brigitte Stern
Dr Dr Alexander Petsche

Secretary to the Tribunal

Mr Martin Doe

Registry

Permanent Court of Arbitration

22 October 2012

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LIST OF DEFINED TERMS

Amendment I	*Act No. 530/2007 Coll., Amending and Supplementing Act No. 581/2004 Coll. on Health Insurance Companies and Healthcare Supervision, and Amending and Supplementing Certain Acts as Amended,* published on 24 November 2007 and entered into force on 1 January 2008
Amendment II	*Act No. 594/2007 Coll.*, published on 19 December 2007 and entered into force together with Amendment I on 1 January 2008
Agreement	*Agreement between the Republic of Austria and the Czech and Slovak Federal Republic concerning the promotion and protection of investments*, dated 15 October 1990
AMO	The Slovak Anti-Monopoly Office
Apollo	Chemická zdravotná poist'ovňa Apollo
Austria	The Republic of Austria
BIT	Bilateral Investment Treaty, specifically the *Agreement between the Republic of Austria and the Czech and Slovak Federal Republic concerning the promotion and protection of investments*, dated 15 October 1990
Brussels I	*Council Regulation (EC) No.44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters*
Charter	Charter of Fundamental Rights of the European Union
Claimant	European American Investment Bank Aktiengesellschaft
Claimant's Comment	Claimant's Comment on the Observations Submitted by Austria, the Czech Republic and the EU Commission
Counter-Memorial	Claimant's Counter-Memorial on Respondent's Objections to Jurisdiction, dated 14 May 2011
CSFR	The Czech and Slovak Federal Republic
CWS	Claimant's Witness Statement
EC	European Commission
EC Treaty or ECT	*Treaty Establishing the European Economic Community*, as amended by subsequent Treaties, dated 25 March 1957
ECHR	*Convention for the Protection of Human Rights and Fundamental Freedoms*, dated 4 November 1950

ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EIC	EIC a.s., Claimant's Slovak subsidiary
EU	European Union
Euram Bank	European American Investment Bank Aktiengesellschaft
Europe Agreement	*European Agreement establishing an association between the European Communities and their Member States, on the one part, and the Slovak Republic, of the other part*, dated 4 October 1993
Exhibit C	Claimant's Exhibit
Exhibit R	Respondent's Exhibit
ICJ	International Court of Justice
ILC Report	International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006
Memorial	Respondent's Memorial on Jurisdiction, dated 22 February 2011
MFN	Most favoured nation
New York Convention	*Convention on the Recognition and Enforcement of Arbitral Awards*, 1958
Notice of Arbitration	Claimant's Notice of Arbitration, dated 23 November 2009
Parties	The Respondent and the Claimant
PC	The Patent Court
PCA	Permanent Court of Arbitration
Rejoinder	Claimant's Rejoinder on Jurisdiction, dated 18 July 2011
Reply	Respondent's Reply on Jurisdiction, dated 16 June 2011
Respondent	The Slovak Republic
Respondent's Comment	Respondent's Comment on the Observations Submitted by Austria, the Czech Republic and the EU Commission
Statement of Claim	Claimant's Statement of Claim, dated 23 November 2009

Statement of Defence	Respondent's Statement of Defence, dated 5 November 2010
TFEU	*Treaty on the Functioning of the European Union*
Treaty	*Agreement between the Republic of Austria and the Czech and Slovak Federal Republic concerning the promotion and protection of investments*, dated 15 October 1990
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	*Arbitration Rules of the United Nations Commission on International Trade Law*, 15 December 1976
UNCLOS	*United Nations Convention on the Law of the Sea*, 1982
UNCTAD	United Nations Conference on Trade and Development
UNTS	*United Nations Treaty Series*
VCLT	*Vienna Convention on the Law of Treaties*, 1969
WTO	World Trade Organization

I. INTRODUCTION

A. THE PARTIES

1. The Claimant in this arbitration is the European American Investment Bank Aktiengesellschaft (hereinafter the "**Claimant**" or "**Euram Bank**"), a company established under the laws of Austria with its registered office at Palais Esterházy, Wallnerstrasse 4, 1010 Vienna, Austria. The Claimant is represented in these proceedings by:

Dr Erhard Böhm, Specht Böhm, Attorneys at Law
Mr Stanislav Durica, Ružička Csekes.

Until 18 June 2010, the Claimant was represented by Mr Marko Szucsich of Law@Teg7. Between 18 June 2010 and 25 July 2012, the Claimant was represented by Dr Erhard Böhm, Mag. Magda Svoboda-Mascher and Mag. Amelie Starlinger of Baier Böhm, Attorneys at Law and, as of 14 May 2011, also by Mr Stanislav Durica of Ružička Csekes.

2. The Respondent in this arbitration is the Slovak Republic (hereinafter the "**Respondent**," the "**Slovak Republic**" or "**Slovakia**"). The Respondent is represented in these proceedings by:

Ms Andrea Holíková, Ministry of Finance of the Slovak Republic
Mr Mark A Clodfelter, Foley Hoag LLP
Mr David A Pawlak, David A Pawlak LLC
Ms Tafadzwa Pasipanodya, Foley Hoag LLP
Mr Constantinos Salonidis, Foley Hoag LLP.

B. PROCEDURAL HISTORY

3. By **Notice of Arbitration** and **Statement of Claim** dated 23 November 2009, Euram Bank commenced arbitration proceedings against the Slovak Republic, pursuant to Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976 ("**UNCITRAL Rules**") and Article 8(2) of the Agreement between the Republic of Austria and the Czech and Slovak Federal

Republic concerning the Promotion and Protection of Investments, dated 15 October 1990 (the "**BIT**").

4. In its Notice of Arbitration, the Claimant appointed the Hon. Charles N. Brower as the first arbitrator. By letter dated 8 December 2009, the Respondent challenged the Claimant's appointment of Judge Brower. The Claimant accepted the challenge and, by letter dated 15 December 2009, appointed Dr Dr Alexander Petsche as the first arbitrator. By letter dated 14 January 2010, the Respondent notified the Claimant of its appointment of Professor Brigitte Stern as the second arbitrator. The Claimant submitted a challenge to Professor Stern's appointment pursuant to Article 13(2) of the UNCITRAL Rules in a letter dated 28 January 2010. By letter dated 2 February 2010, Professor Stern submitted her comments and affirmed that she was committed to the "deontological requirements for an arbitrator."

5. In a letter dated 15 February 2010, the Claimant proposed to the Respondent the designation of the Secretary-General of the Permanent Court of Arbitration ("**PCA**") as Appointing Authority in this case. The Respondent agreed, by letter of 19 February 2010, that the PCA should act as the Appointing Authority. By letter dated 26 February 2010, the Claimant requested that the Secretary-General of the PCA sustain the Claimant's challenge of Professor Stern. By letter to the Parties dated 8 March 2010, the Secretary-General of the PCA set out a schedule of submissions whereby the Respondent would provide a response to the Claimant's request by 15 March 2010 and Professor Stern would be able to submit comments by 22 March 2010.

6. By letter dated 15 March 2010, the Respondent submitted its response on the challenge to its party-appointed arbitrator, requesting that the challenge be denied. By letter dated 21 March 2010, Professor Stern reiterated her views that she is a "dedicated and scrupulous arbitrator." By letter dated 29 March 2010, the Claimant submitted its rebuttal to the Respondent's response. By letter dated 5 April 2010, the Respondent submitted its comments to the Claimant's rebuttal and requested a reasoned decision by the Appointing Authority. On 12 April 2010, the Secretary-General of the PCA rejected the challenge to Professor Stern in a reasoned decision.

7. By letters dated 25 May 2010 and 8 June 2010, respectively, the Parties agreed to have the Secretary-General of the PCA appoint the presiding arbitrator. On 13 July 2010, the Secretary-General of the PCA appointed, pursuant to the list-procedure foreseen under Article 6(3) of the UNCITRAL Rules, Sir Christopher Greenwood as the presiding arbitrator.

8. On 21 September 2010, the Tribunal held a Preliminary Procedural Meeting at the Peace Palace, The Hague, the Netherlands. Present at the meeting were:

> **The Tribunal**:
> Sir Christopher Greenwood
> Professor Brigitte Stern
> Dr Dr Alexander Petsche
>
> **For the Claimant**:
> Dr Erhard Böhm
>
> **For the Respondent**:
> Mr Radovan Hronsky, Ministry of Finance of the Slovak Republic
> Mr Tomas Jucha, Ministry of Finance of the Slovak Republic
> Mr Mark Clodfelter
> Mr David Pawlak
>
> **For the Permanent Court of Arbitration**:
> Mr Martin Doe
> Ms Sarah Melikian.

9. On 21 September 2010, in the course of the Preliminary Procedural Meeting, the Parties and the Tribunal signed the **Terms of Appointment** providing, *inter alia*, confirmation of the appointment of the members of the Tribunal, stating that the 1976 UNCITRAL Rules would be the applicable procedural rules, and that the PCA would serve as Registry for the proceedings. The Terms of Appointment also detailed the procedure for communications and provided information regarding the initial and supplementary deposits as well as the Tribunal's fees and expenses.

10. On 27 September 2010, taking into account the agreements reached between the Parties and the Tribunal on procedural issues during the 21 September 2010 hearing, the Tribunal issued **Procedural Order No. 1** providing, *inter alia*, that the seat of the arbitration would be Stockholm and that the language of the arbitration would be English. Procedural Order No. 1 also made provision for the written submissions, communications, filings, document production, witnesses, experts, hearings, and

confidentiality. In addition, Procedural Order No. 1 made the following provisions regarding the schedule of proceedings:

9. SCHEDULE OF PROCEEDINGS

9.1. In accordance with the agreement of the Parties, the following schedule shall apply.

9.2. The Respondent shall lodge its Statement of Defence (including any jurisdictional objections) by 5 November 2010.

9.3. Notice has been given that jurisdictional objections may be made and there may be a request for bifurcation. In the event that bifurcation is agreed between the parties or ordered by the Tribunal, a potential schedule envisaged by the Tribunal is attached as an Annex to this order.

…

Annex to Procedural Order No. 1
Proposed Schedule in the Event of Bifurcation

A1.1 Following the submission of Respondent's Statement of Defence on 5 November 2010, the following schedule is proposed in the event of bifurcation.

A1.2 Within 84 days of an agreement or order on bifurcation, Respondent's Memorial on Jurisdiction shall be submitted together with all evidence (documents, as well as witness statements and expert statements, if any) upon which Respondent wishes to rely, in accordance with the sections on evidence above.

A1.3 Within 84 days of Respondent's Memorial on Jurisdiction, Claimants' Counter-Memorial on Jurisdiction shall be submitted together with all evidence (documents, as well as witness statements and expert statements, if any) upon which Claimants wish to rely, in accordance with the sections on evidence above.

A1.4 Within 30 days of Claimants' Counter-Memorial on Jurisdiction, Respondent's Reply Memorial on Jurisdiction shall be submitted together with all evidence (documents, as well as witness statements and expert statements if any) upon which Respondent wishes to rely, in accordance with the sections on evidence above.

A1.5 Within 30 days of Respondent's Reply Memorial on Jurisdiction, Claimants' Rejoinder on Jurisdiction shall be submitted together with all evidence (documents, as well as witness statements and expert statements, if any) upon which Claimants wish to rely, in accordance with the sections on evidence above.

A1.6 On 24 and 25 August 2011, and extending through 26 August 2011 if necessary, a Hearing on Jurisdiction shall be held.

A1.7 As soon as possible after the Hearing on Jurisdiction, the Tribunal will decide on how it will address the question of jurisdiction and inform the Parties by order, award, or otherwise.

11. On 5 November 2010, in accordance with the timetable set out in the annex to Procedural Order No. 1, the Respondent submitted its Statement of Defence and Request for Bifurcation.

12. By letter dated 10 November 2010, the Tribunal invited the Claimant to submit any comments regarding the Respondent's Request for Bifurcation by 18 November 2010. By letter dated 16 November 2010, the Claimant requested additional time to submit comments, and by letter dated 30 November 2010, the Claimant wrote to the Tribunal indicating that it agreed to the bifurcation of the proceedings into a jurisdictional phase and a merits phase.

13. On 2 December 2010, the Tribunal issued **Procedural Order No. 2**, which detailed the deadlines for the jurisdictional phase of the proceeding as follows:

1. The Tribunal notes that, on 5 November 2010, the Respondent filed an objection to the jurisdiction of the Tribunal, together with a request for bifurcation of the proceedings and that, on 30 November 2010, the Claimant sent to the Tribunal a letter accepting the request for bifurcation.

2. In the light of Section 9 of Procedural Order No. 1, and in view of the Claimant's letter of 30 November 2010, the Tribunal concludes that the Parties have agreed that the proceedings should be bifurcated and that issues of jurisdiction should be addressed in the first phase of the proceedings (hereinafter the "jurisdictional phase").

3. Accordingly, the Tribunal, taking account of the Annex to Procedural Order No. 1 and treating the time limits set out in that Annex as being calculated from 30 November 2010, determines that the schedule for the jurisdictional phase of the proceedings shall be as follows:

22 February 2011: The Respondent shall file its Memorial on Jurisdiction, together with all evidence upon which the Respondent wishes to rely in relation to the issues to be considered in the jurisdictional phase.

17 May 2011: The Claimant shall file its Counter-Memorial on Jurisdiction, together with all evidence upon which the Claimant wishes to rely in relation to the issues to be considered in the jurisdictional phase.

jurisdiction". By contrast, the Respondent alleges that the history of the MFN clause is "static", which is why it was not considered by the *Austrian Airlines* tribunal.[478]

431. The Respondent argues that the "treaty practices of both Slovakia and Austria also confirm the conclusions that the State-Parties did not have dispute resolution in mind when they agreed upon the Article 3(1) MFN obligation", a conclusion it alleges is supported by the *Austrian Airlines* tribunal.[479]

432. The Respondent submits that the MFN clause only operates with regard to later treaties, and it contends that all four specific treaties invoked by the Claimant to supplant the instant Treaty's Article 8 entered into force before the BIT, such that they cannot be relied upon to expand the Tribunal's jurisdictional mandate.[480]

433. Finally, the Respondent contends that, even accepting *arguendo* that the different dispute resolution mechanisms constitute "treatment" under Article 3 of the Treaty, the Claimant has still failed to prove such treatment, as it has not shown that other investors have been accorded more favourable treatment.[481] In addition, the Respondent asserts that the Claimant still has an effective recourse available before the Slovak courts and that the Claimant has offered "no basis to judge the insufficiency of the Slovak courts."[482]

2. The Tribunal's Analysis

434. The Tribunal will begin its analysis by disposing of certain arguments which it does not consider to be well-founded.

435. First, the Tribunal is not persuaded by the Respondent's argument that the Tribunal lacks jurisdiction to rule upon the Claimant's Article 3 argument, because Article 3 is not one of the provisions specified in Article 8 of the BIT. That argument confuses, or conflates, two entirely different issues. If the Claimant were seeking to advance before the Tribunal a claim that the Respondent had committed a violation of Article 3 of the BIT, as part of the substantive standards of protection prescribed by the BIT, by

[478] *Ibid*., ¶¶456-460.
[479] *Ibid*., ¶¶461-464, citing *Austrian Airlines*, *supra* note 327, ¶134.
[480] *Ibid*., ¶¶499-503.
[481] *Ibid*., ¶¶504-510.
[482] *Ibid*., ¶¶506-508.

denying the Claimant recourse to arbitration, then the objection that such a claim is not within the scope of the jurisdiction conferred by Article 8 would be a potent one. However, that is not what the Claimant is seeking to do. The Claimant relies on Article 3 of the BIT, not as the substantive basis for a claim, but rather as indicating that each State Party to the BIT intended to make an offer to arbitrate that was wider than the terms of Article 8[483] to the extent that such State Party concluded a treaty with a third State containing an arbitration clause which was wider and more favourable to an investor. The Tribunal agrees with the *Austrian Airlines* tribunal that it has jurisdiction to rule on this argument in the exercise of its *compétence de la compétence*.[484] The Tribunal considers that the same confusion is evident in the Respondent's argument that the Claimant must adduce evidence of a specific investor of a third State who has received treatment more favourable than that accorded to the Claimant. The award in the NAFTA case of *Loewen v. United States*,[485] on which the Respondent bases this argument, is not about the application of an MFN clause but concerns a claim for alleged discrimination. In order to recover damages for discriminatory treatment, a claimant must normally establish the existence of a comparator and then demonstrate that such comparator has received better treatment than that which the claimant has received. But, as explained in the previous paragraph, the Claimant in the present case is not making a claim for relief for an alleged breach of the MFN clause but is arguing that the effect of that clause is that it is entitled to the benefit of higher standards of protection provided for in other treaties. Accordingly, it is not a matter of comparison with the actual treatment accorded to a specific third State investor, but of comparison between the standard of treatment guaranteed to a group of investors by one treaty and the standard of treatment guaranteed to another group of investors by another treaty.

436. Secondly, the Tribunal considers that it can derive only limited assistance from the numerous awards of other tribunals to which the Parties referred. While the Tribunal has paid careful attention to the awards in other cases, it is plain that they reveal no clear arbitral consensus on this issue. Indeed, so far from constituting a *jurisprudence constante*, they manifest a complete lack of consistency, which is the product of a

[483] *See Renta 4*, *supra* note 391, ¶83.
[484] *Austrian Airlines*, *supra* note 327, ¶¶117-118.
[485] *Loewen*, *supra* note 340.

ANNEX 225

KLUWER LAW INTERNATIONAL

Law and Practice of Investment Treaties

Standards of Treatment

By

Andrew Newcombe

Lluís Paradell

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> application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties. These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor and, particularly, to the general (national or international) legal context within which such regime operates, as well as to the access of the foreign investor to the substantive provisions of such regime. Their application cannot therefore be impaired by the principle contained in the most favored nation clause.[161]

The tribunal's above statement that the temporal dimension of the BIT 'go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties' is open to question. It is unclear that rules of treaty interpretation direct the treaty interpreter to distinguish between matters that must be deemed to be specifically negotiated and those that do not. The applicable treaty principle with respect to non-retroactivity is Article 28, Vienna Convention, which states: 'Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.' It is arguable that an MFN clause that applies to all matters in the treaty could be applied to establish the intention of the parties to confer better temporal protection.[162]

§5.15 Application of MFN to investment or investors As noted above, some IIAs accord MFN treatment only to investments,[163] others only to investors,[164] whereas still others accord it to both investments and investors.[165] Two tribunals have stated that they do not attach particular significance to the use of different terms.[166] Where MFN treatment applies to 'investors' and not just 'investment', claimants might argue that they are entitled to treatment as favourable as any other foreign investor, which might include more favourable temporal application of investment protections, broader definition of investments and admission and establishment rights. Further, as noted above, where the MFN clause applies to investors, there may be greater scope for arguing that MFN treatment applies to dispute settlement.

§5.16 The treaty practice response to the application of MFN to investor-state arbitration provisions In recent IIA practice, some states have reacted to the IIA

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161. *Ibid.*, at para. 69.
162. See also *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador* (Award, 31 Jul. 2007) at paras 118-128 regarding temporal application.
163. Art. 10(7), ECT; Art. 3(2); Austria-Chile (1997); Art. 3(2) Netherlands-Romania (1994).
164. Art. 4, Argentina-France (1991).
165. NAFTA Chapter 11, some German, Swiss and UK BITs and BITs based on the new US and Canadian Models.
166. *Plama, supra* note 98 at 190, and *Siemens, supra* note 13 at 92.

MFN jurisprudence by expressly limiting the scope of MFN treatment. In particular, some recent treaties have expressly excluded dispute settlement from the MFN clause.[167] The US approach has been to record in its investment negotiations that MFN is not intended to extend to dispute settlement provisions.[168] With respect to existing treaties, some states have agreed that the MFN clause in an existing treaty does not apply to dispute settlement.[169] A more drastic approach has been to conclude agreements without an MFN clause applying to investment, as in the *India-Singapore Comprehensive Economic Co-operation Agreement* (2005).[170]

IV APPLYING MFN TREATMENT

§5.17 Similarities and differences with the national treatment analysis MFN and national treatment are both relative standards that prohibit discrimination between investors and/or investment. In both cases, the comparison made between the treatment of two investors or investments requires the identification of the applicable comparator and an assessment of whether the investor or investment at issue has been accorded less favourable treatment. As a result, MFN treatment analysis shares many similarities with the national treatment analysis.

Despite similarities in analysis, there are also fundamental differences. National treatment cases typically involve state measures that accord more favourable *de jure* or *de facto* treatment to domestic investors. National treatment cases usually arise as the result of protectionist domestic measures that deprive foreign investors or investments of equality in competitive opportunities. As

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167. See, for example, 2005 *New Zealand - Thailand Comprehensive Economic Cooperation Agreement*, Article 9.8 Most Favoured Nation Treatment with respect to the Promotion and Protection of Investments. Online: <http://mfat.govt.nz>. The Norwegian 2007 Model BIT provides in Art. 4(3) that MFN treatment 'does not encompass dispute resolution mechanisms provided for in this Agreement or other International Agreements.'

168. The final draft text of the CAFTA-DR dated 28 Jan. 2004 records the parties' intentions as follows in a footnote to the MFN treatment clause: 'The Parties note the recent decision of the arbitral tribunal in *Maffezini (Arg.) v. Kingdom of Spain*, which found an unusually broad most-favoured-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision of Jurisdiction §§38-64 (Jan. 25, 2000), *reprinted in* 16 ICSID Rev 212 (2002). By contrast the Most-Favoured-Nation Treatment Article of this Agreement is expressly limited in scope to matters 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.' The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case.' ASIL, International Law In Brief, 6 Feb. 2004. See online: <http://asil.org/search.cfm?displayPage=702#t1>.

169. Argentina and Panama have exchanged diplomatic notes with an 'interpretive declaration' of the MFN clause in their 1996 BIT to the effect that the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention. See *National Grid plc v. Argentina* (Decision on Jurisdiction, 20 Jun. 2006) [*National Grid*] at para. 85.

170. See Chapter 6 (Investment) *India-Singapore Comprehensive Economic Co-operation Agreement* (29 Jun. 2005).

discussed in Chapter 4 above, a key issue in the national treatment analysis is the determination of whether the foreign investor or investment in question is in like circumstances with a domestic competitor and whether differences in treatment can be justified on non-protectionist and rational policy grounds.[171]

In contrast, MFN cases raise different issues. Although host states often seek to provide more favourable treatment to their own investors, it is less common for states to differentiate between foreign investors and investments of different nationalities in their domestic measures. To date, the majority of IIA cases involving the application of MFN treatment involve questions of whether third parties receive more favourable treatment under other IIAs and not whether they are receiving more favourable treatment under domestic measures. As discussed below, the application of MFN treatment raises distinct issues if the question is treatment under a third-party treaty as compared to treatment under domestic measures.

§5.18 The two elements of MFN treatment analysis Despite the variation between MFN clauses, two common issues arise in their application: (i) identifying the relevant comparator; and (ii) comparing the treatment received by the foreign investor or investment and the comparator to determine if there is less favourable treatment. Since MFN treatment is a relative standard, its application always turns on making the appropriate comparison between two different entities or things. In the case of MFN treatment, the comparison will be between third state investors or investments and the foreign investors or investments benefiting under the basic treaty between the home and host state. Identifying the appropriate comparator is a key element in the analysis. Second, there must be a comparison of the treatment afforded to the applicable investors or investments to assess whether the host state accorded less favourable treatment.

A THE COMPARATOR

§5.19 The basis for comparison The majority of IIAs provide no guidance regarding the basis of comparison when applying MFN treatment. Chile-Egypt (1999) and Philippines-Switzerland (1997), reproduced above at §5.7, are typical in not specifying the basis for comparing the investments in question.[172] A small number of treaties, of which NAFTA is the most prominent example, clarify that MFN treatment applies to investors and investments in 'like circumstances.'[173] US,

171. See, *supra* Chapter 4, §4.11 *et seq.*, on the assessing of whether investors or investments are in like circumstances.
172. Recent Austrian, Chilean, Chinese, Danish, French, German, Swiss and UK BITs do not use a comparator. See, for example, Art. 3(1), Austria-Egypt (2001); Art. 3(1), Kyrgyzstan-UK (1999); Art. 4(2), Chile-Tunisia (1998); Art. 4(1), China-Jordan (2001); Art. 3(2), Brazil-Netherlands (1998); Art. 4, Cambodia-France (2000); Art. 3(1), Bosnia and Herzegovina-Germany (2001); and Art. 4(3), Armenia-Switzerland (2003).
173. Art.1103, NAFTA.

Canadian and Turkish BITs also often refer to 'like circumstances' in their MFN treatment clauses. Other IIAs use terms such as 'like situations,'[174] 'similar situations'[175] and 'same circumstances.'[176]

§5.20 Comparing the treatment of investors and investments under third state IIAs In principle, determining the appropriate comparator where the treatment in question is that under a third state IIA is straightforward. The MFN clause will apply where any third state investment or investor is entitled to more favourable treaty protections than those afforded to an investment or investor under the basic treaty. In these cases, the fact that *any* third state investors or investments *are* or *could* be entitled to more favourable treaty protections is sufficient to put the investors or investments in like circumstances for the purpose of applying the MFN clause. For example, in cases involving the application of MFN treatment to avoid local remedy requirements, the threshold issue has been whether any third-party investor or investment would be entitled to avoid the local remedy requirement. The availability of the better treatment did not depend on the investor or investment demonstrating that they were in the same economic sector as third state investors or investments, or indeed that any third state investors or investments existed. These cases support the proposition that the existence of an actual or potential competitive relationship between the investors or investments in question is not a necessary prerequisite to obtaining the benefit of MFN treatment. To recall the words of Georg Schwarzenberger, the MFN clause in this case is operating to provide the maximum of favours conceded to any third State.[177] In this case, a foreign investor is in like circumstances with a third state investor simply by coming within the scope of IIA protection.

§5.21 Comparing the treatment of investors and investments under domestic measures In contrast to comparisons of treatment under different IIAs, where the issue is the treatment of different foreign investors or investments under domestic measures, the MFN treatment like circumstances analysis will be similar to the national treatment analysis discussed in Chapter 4 above. The question will be whether the investors or investments in question are in like circumstances, determining the appropriate comparator and whether there are legitimate grounds for distinguishing between investors or investments.

A good example of this type of analysis is *Parkerings-Compagniet AS v. Lithuania*,[178] where the Norwegian claimant alleged a breach of MFN treatment in Lithuania-Norway (1992)[179] on the basis that a Dutch firm, Pinus Proprius, had

174. Art. 2(2), Senegal-United States (1983).
175. Art. 3(1), Ethiopia-Turkey (2000).
176. Art. 3(1), Belize-UK (1982).
177. *Supra* note 9.
178. *Parkerings-Compagniet AS v. Lithuania* (Award, 11 Sep. 2007).
179. Art. IV(1) provides: 'Investments made by Investors of one Contracting Party in the Territory of the other Contracting Party, as also the Returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third state.'

ANNEX 226

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SUBJECT: Draft Treaty of Amity and Economic Relations

On October 13, 1954, Messrs Rountree and Bray of the Embassy conferred with Iranian officials regarding the results of the work of the Inter-ministerial Committee which had been established under the chairmanship of Dr. Abdoh, Director General of Political Affairs, Ministry of Foreign Affairs, to consider the draft Treaty of Amity and Economic Relations between the United States and Iranian Governments. In addition to Dr. Abdoh, the following Iranian officials were present: Mr. Kia, Chief of the American Division; Dr. Faruher, also of the Ministry of Foreign Affairs, and Mohamed Nemazee, who is serving as Adviser to the Ministry of National Economy on the proposed treaty. With one or two exceptions the Iranian officials explained fully and frankly the issues and problems which had arisen in the course of the review of the draft treaty by the Inter-ministerial Committee. The items considered at the meeting are set forth below according to their order of appearance in the text of the draft Treaty.

1. Preamble

Dr. Abdoh stated that the Government of Iran would like to have a statement in the draft treaty that the agreement was to be applied on a basis of reciprocity, and explained that this was for its effect upon third countries. The Government of Iran wanted, if possible, to avoid the extension of the terms of this treaty to third countries, notably to the Soviet Union, with which the Government of Iran had or might enter into treaties containing most-favored-nation clauses. (The Iranian representatives explained that many of the suggested changes in the draft treaty were motivated by the concern of the Iranian Government over the most-favored-nation clause in treaties which Iran had with other countries.) Dr. Abdoh indicated that the Government of Iran would be satisfied on this point if a phrase were inserted in line 6 of the preamble, so that clause would read: "The United States and Iran, . . . have resolved to conclude on the basis of the principle of reciprocity a Treaty of Amity and Economic Relations, . . .".

The Embassy perceives no objection to this addition and recommends that the Department accept the suggestion of the Iranian representatives.

2. Article II, Paragraph 1

Dr. Abdoh suggested that the provisions of the last sentence of paragraph 1 which concern the right of either party to exclude or expel aliens on grounds

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relating to public order, morals, health and safety, should be applicable to the rights conferred in paragraph 3 as well as to those in paragraph 1 of Article II. He suggested that the present paragraph 3 be renumbered as paragraph 2. The present paragraph 2 should be renumbered as paragraph 4, and a new paragraph 3 added with language along the following lines, which he said had been inspired by a similar text in the treaty between the United States and Japan:

> "The provisions of paragraphs 1 and 2 of the present Article shall be subject to the right of either High Contracting Party to apply measures which are necessary to maintain public order, and to protect public health, morals and safety, including the right of either High Contracting Party to expel, to exclude or to limit the movement of aliens on the said grounds."

Dr. Abdoh explained that the Government of Iran had in mind the need to control the movements and the activities of Soviet and Satellite nationals in Iran, and that it was necessary for the Government to maintain adequate legal authority to do so.

The Embassy recommends that the Department accept the suggestions of Dr. Abdoh on these points.

3. Article II, Paragraph 2, renumbered as paragraph 4 (page 2, lines 7, 10, 11 and 12 of the Department's draft)

a. It was suggested that the text which reads that the "diplomatic or consular representative shall be immediately notified" should be revised to read the "diplomatic or consular representative shall be notified within a reasonable period of time." Regarding this point, Dr. Abdoh stated that communications in Iran in many instances were not efficient enough to enable the Government to notify "immediately" the diplomatic or consular representative. He preferred language which would be more in keeping with the Government's capabilities of making the required notification.

b. With regard to line 10 of this paragraph, which stated that "He shall be . . . allowed ample facilities to defend himself . . .", it was suggested that the text be amended to read that "He shall be . . . allowed the usual facilities to defend himself . . .", or, alternatively, that the word "ample" simply be omitted. On this point Dr. Abdoh stated the Iranian Government was prepared to agree that the facilities to be allowed by Iran for defense would be the same as those allowed to Iranians, but that the definition of what might be considered "ample" presented a difficulty. He asked whether the intent of the Article did not mean that the same facilities would be granted to a national of one contracting party when such a national was taken into custody by the other contracting party on charges of committing a penal offense, as those granted under similar conditions to the nationals of the contracting party taking custody.

The Embassy representatives agreed to seek the Department's advice on this question.

c. Dr. Abdoh suggested that the last phrase in this paragraph (lines 11 and 12), reading ". . ., in accord with modern standards of justice" be revised to

read ", . . in accord with principles of justice." He stated that the Iranians were "touchy" on any matter that suggested that their system of justice was not "in accord with modern standards of justice," but recognized also that it was not universally considered to be so. He said that this kind of language would open the possibility of misunderstanding and difficulty.

The Embassy sees no compelling reason why the Iranian suggestion on these three points should not be accepted.

4. Article III, Paragraph 1

The Iranian officials were particularly concerned with the definition of "companies" which would be eligible to enjoy the benefits of Article III. Again, they were concerned primarily with the effects of this Article on Iran's relations with the U.S.S.R. arising from the principle of most-favored-nation treatment. The Government of Iran desired to avoid extending privileges to Soviet companies operating in Iran similar to those which Iran would like to give to American companies which might invest in Iran. Dr. Abdoh suggested that the words "privately owned" be inserted before "corporation, partnerships," etc., in the second sentence of this paragraph. In addition he proposed that letters be exchanged between the two governments in which it would be stated that, for purposes of interpreting this paragraph, it would be understood that all Iranian companies operating in the United States would enjoy the benefits of Article III, including those Iranian companies which might be financed in whole or in part by the Government of Iran. He believed that reciprocal rights need not be conferred on United States companies operating in Iran financed in whole or in part by funds from the United States Government, since any such companies or corporations operating here would in all probability be doing so on the basis of special agreements.

If the Department does not perceive objections to an exchange of letters interpreting certain articles of the treaty, the Embassy believes that an exchange along the lines suggested by Dr. Abdoh would be helpful in solving this problem, which is a serious one for the Iranian Government.

5. Article III, Paragraph 3

It was indicated that the Ministry of Justice regarded Article III, paragraph 3, as a form of "capitulation". Article 633 of the Iranian Code provides that an Iranian national is not bound by the results of an arbitration proceeding conducted either by alien arbitrators or on a foreign situs. The Embassy representatives explained that the private settlement of disputes, particularly by arbitration, was highly necessary in many commercial and business transactions. Complex technical problems involving the interpretation of commercial contracts, the grading of products entering international trade, the survey of losses covered by insurance, and matters relating to industrial property rights, were frequently settled by private arbitration proceedings of an international character. Dr. Abdoh and Mr. Nemazee agreed that these were important considerations and that the Government of Iran would reconsider its position on this paragraph.

It is likely that the Iranian objection will be withdrawn. However, the

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Embassy would appreciate any additional comments which the Department might have bearing on the interpretation of paragraph 3 and the advantages of such a provision to Iran.

6. Article IV, Paragraph 1 (page 4, line 1 of the Department's draft)

The Iranian officials suggested that the sentence reading "Each High Contracting Party . . . shall refrain from applying unreasonable or discriminatory measures . . ." be amended to read "Each High Contracting Party . . . shall refrain from applying unlawful or discriminatory measures . . .". The Iranian officials did not explain the reasons for this change. It appears clear, however, that the Government of Iran wishes to maintain its right to impair legally acquired rights and interests by lawful measures. On the other hand, the Embassy notes that the concluding clause in paragraph 1 binds the High Contracting Parties to " . . . assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws."

The Embassy would appreciate receiving the Department's advice on this suggestion of the Iranian Government.

7. Article IV, Paragraph 2 (page 4, line 12 of the Department's draft)

Dr. Abdoh suggested that the first two sentences of this paragraph be revised more in line with the United States treaty with Ireland, to read:

> "Property of nationals and companies of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just and effective compensation, nor without compliance with the requirements of international law."

It appears that the original intention of the Iranian representatives was to suggest that the wording quoted above should constitute the entire paragraph. They indicated that the revised wording was based upon the text of Article VIII, Paragraph 2, of the United States treaty with Ireland. A copy of this treaty, however, was not available during the discussion. It later developed that, contrary to the implication given by the Iranian officials, the entire paragraph in the Irish Treaty had not been utilized. This matter was discussed with Dr. Abdoh in a subsequent meeting, and the important omissions in the Iranian suggested text were pointed out. Also, in response to Dr. Abdoh's comments, the Embassy representatives explained why the Iranian text, taken with Article VII of the drafttreaty, would not entirely meet the situation. Dr. Abdoh expressed personal agreement with the position outlined and suggested that the last sentence of the Department's draft paragraph be retained, along with the first part of the paragraph as revised by the Iranian representatives. He could not guarantee that this would be accepted by the Iranian Cabinet members, but said he would endeavor to obtain their agreement.

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The two sentences quoted above and taken from Article VIII, Paragraph 2, of the United States Treaty with Ireland, limit the application of the paragraph on the taking of property to "property of nationals and companies of either Party." The Iranian representatives indicated that one reason they preferred the language in the United States treaty with Ireland was that it omitted any reference to "interests in property" which was included in the Department's draft.

Since the participation of the United States oil companies in the International Oil Consortium and its subordinate companies will be through companies registered in countries other than the United States and Iran, it would appear that neither the investment of the United States oil companies in the oil consortium, nor their right to earnings potentially realizable under terms of the oil agreement between the Government of Iran and the National Iranian Oil Company, on the one hand, and the member companies of the oil consortium, on the other hand, would be covered by the terms of the Iranian draft proposal. These deficiencies might be remedied by including, either in the proposed treaty or in an exchange of notes or letters, a definition of "property of nationals and companies of either Party" which, without specific mention of the U.S. oil operation, would meet the special circumstances of the United States oil companies which are or may become members of the International Oil Consortium.

The Department's comments upon the acceptability of the paragraph as revised (including the last sentence of the Department's draft) is requested. We would appreciate the Department's advice concerning the position which should be taken if the Iranian Government should later insist upon the deletion of the last sentence. Also, if the Department agrees that omission of the phrase "including interests in property" renders the provision of the paragraph inadequate, we would appreciate advice as to whether the problem can be met by an exchange of letters or whether the Iranians should be urged in light of the realities of the situation to agree to the inclusion of the phrase in question.

8. Article V

Two changes were recommended in this article; both appear designed to improve the sentence structure and do not affect the substance of the Article:

a. Under paragraph 1 (a), place the phrase "for the conduct of activities pursuant to the present Treaty" at the head of the paragraph so that this condition will apply to the entire paragraph.

b. Similarly, in paragraph 2, place the phrase "upon compliance with the applicable laws and regulations [, if any,] respecting registration and other formalities" at the head of the paragraph.

Dr. Abdoh explained that the Ministry of Justice preferred the revised arrangement of the latter paragraph also because it would more fully reflect the substance of Iranian regulations on the registration of inventions, trade marks and trade names.

The Embassy perceives no objection to either of the above suggestions.

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9. Article VII, Paragraphs 1, 2 and 3

It was apparent that the scope, intent and standards of execution of Article VII in its entirety had given rise to much concern on the part of the Iranian representatives (see Embtel 787, October 2, 1954). The difficulties which the Iranian officials made explicit included: (a) the conditions which would have to be met before either party could apply restrictions on foreign exchange; (b) the question of who would be the judge as to the extent to which restrictions on foreign exchange transactions could be applied; and (c) in the event restrictions on foreign exchange were applied, the order of priority that would be given to various requirements for the foreign exchange which was being rationed by either contracting party.

With regard to the conditions which would have to be met before either contracting party could apply restrictions on foreign exchange, Mr. Mohamed Nemazee, in particular, stressed his understanding that either party could impose restrictions on foreign exchange whenever it felt that it did not have sufficient exchange to cover the financing of essential imports and to cover the other requirements such as servicing of foreign obligations and transfers relating to foreign investment. Mr. Nemazee stated that his interpretation of paragraph 1 which would govern the interpretation of paragraphs 2 and 3 of Article VII, was that/country should be enabled to cover its requirements for the financing of essential imports and thereafter, to the extent that exchange was available, make reasonable provision for the servicing of loans and other obligations.

In subsequent discussions with Dr. Abdoh regarding Article IV on the taking of property, he indicated that the transfer of payment for compensation would be governed by Article VII. He said that under Article IV the parties would be obligated on the taking of property to make prompt payment in local currency for the full equivalent of the property taken; the extent to which the local currency payment could be converted into acceptable exchange would be determined by the amount of exchange which the party taking the property had available after giving consideration to its special needs for other transactions, including payments for goods and services essential to the health and welfare of its people. The Embassy representatives pointed out that Article IV required that compensation for the taking of property belonging to a national of the other contracting party should be paid in an effectively realizable form and that adequate provision should have been made at or prior to the time of taking for the determination and payment thereof. If, at the time the taking of property was contemplated by one of the parties, it had exchange restrictions in effect which would prevent the payment of compensation from being converted into acceptable exchange, one of the essential conditions in Article IV would not have been met and the party contemplating the taking of property which belonged to a national of the other contracting party should not carry out the contemplated action. Dr. Abdoh said he recognized the merit of this explanation. He added that this was another issue which would have to be resolved.

The question of who was to be the judge as to the need for imposing exchange restrictions and the compatibility of those restrictions with the requirements of

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Article VII, seemed to be uppermost in the minds of the Iranian officials. Dr. Abdoh stated that the Government of Iran felt strongly that each government should be its own judge on these questions. He suggested that language be inserted in Article VII, paragraph 1 (a) to make this point clear, so that the clause would read: "(a) to the extent necessary in its own judgment to assure the availability of foreign exchange for . . .". The Embassy representatives commented that since Iran is a member of the International Monetary Fund sub-paragraph (a) would be subordinate to sub-paragraph (b). The addition of the language suggested would be unnecessary in view of the fact that Iran is a member of the Fund.

The Iranians had given considerable thought to the order of priority among the various requirements for foreign exchange in the event such exchange had to be restricted. As indicated above, they made it clear that the essential import requirements of each country would have overriding priority on available foreign exchange. Dr. Abdoh sought to make this point clearer by placing the phrase in paragraph 2 (c), reading "giving consideration to special needs for other transactions" at the head of the paragraph, so that the first sentence of paragraph 2 would read as follows: "If either High Contracting Party applies exchange restrictions, it shall, after giving consideration to special needs for other transactions, promptly make reasonable provision . . .". In this way it would be clear that either contracting party would have freedom to give consideration to its special requirements for foreign exchange before foreign exchange need be made available to meet the servicing requirements of foreign loans, foreign investment and other foreign obligations.

Similarly, the Iranian officials wanted to remove any suggestion that "commissions" (page 7, line 1) would be eligible for special consideration in the event foreign exchange restrictions were imposed. They also wanted to eliminate any other special priority claims on foreign exchange by deleting the words "or otherwise" appearing later in the same sentence. It appeared that the suggestion regarding the deletion of "commissions" was occasioned by a misunderstanding on the part of most of the Iranian representatives regarding the true meaning of the word, which had to them a connotation that it was an unnecessary payment in connection with a purchase and sale transaction. However, Mr. Nemazee joined with the Embassy representatives in explaining that the term is properly used to identify payments for legitimate and necessary services. The Iranians agreed to reexamine their position on this point.

Dr. Abdoh stated that Mr. A. H. Ebtehaj, head of the Plan Organization and former Governor of Bank Melli, had raised the question whether either government under the terms of paragraph 2 (c) was required by the definition of the term "capital transfers" (page 7, line 3) to make scarce foreign exchange available to facilitate "hot money"(speculative) transfers. He had also raised the question of the eligibility of any foreign capital for special consideration under the terms of Article VII in the event foreign exchange restrictions were applied, if that capital had not entered the country by an authorized bank. On these points the Embassy representatives stated that it was generally understood that capital transfers involving the speculative movement of funds would not enjoy the benefits of Article VII, which was designed primarily to encourage

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foreign investment. Even if speculative movements of foreign capital were to benefit from this article, it was likely that such benefits would be of more importance to Iran than to the United States. With regard to the movement of foreign investment capital through authorized banks, specifically through the Bank Melli, when United States capital moved to Iran, the Embassy representatives said that, to the extent international transfers of investment funds were involved in foreign investment activities, this condition probably could be met. They stated that the suggestions offered by the Government of Iran substantially altered the meaning of Article VII, and that the suggestions would have to be submitted to the Department for its consideration.

The Department's advice on the foregoing issues would be appreciated.

10. Article VIII, Paragraph 6

a. The Iranian officials asked clarification regarding the right of each contracting party to accord special advantages to products of its national fisheries. It was clear that the Iranian officials wanted information on United States policy in this regard which might be helpful in guiding the Government of Iran's policy regarding fishery resources in the Persian Gulf.

b. Mr. Nemazee requested that an additional clause be added to paragraph 6, whereby each contracting party reserved the right to accord special advantages "to barter and clearing agreements." He explained that Iran had important private and governmental barter agreements with several countries. In addition, the Government of Iran had clearing agreements with a number of important countries, including Germany, France and Italy. He said that these clearing agreements conferred important benefits on Iran; for example, the French purchased certain Iranian goods which did not have a good market elsewhere in return for Iran's permission to allow the import of canned goods into Iran, although the import of canned goods from other countries was prohibited. Mr. Nemazee stated that Iran wanted to retain the net advantages which itfelt it was obtaining under these bilateral barter and clearing arrangements and that Iran was not in a position to generalize these concessions to other countries with which Iran had entered into treaties containing the most-favored-nation provision.

An unspoken consideration throughout this discussion may have been the latitude which certain Government of Iran officials wanted to have in negotiations involving the sale of "royalty" oil in competition with the marketings of Iranian oil by the proposed international oil consortium. As the Department is aware, the Government of Iran already has entered into special arrangements regarding the barter of Iranian oil for certain products of Italy and Japan. More of these barter arrangements involving Iranian oil may be under consideration.

The Embassy representatives pointed out that if each contracting party reserved the right to accord special advantages to barter and to clearing arrangements it could be inferred that it was the intention of each party to grant more favorable treatment to these arrangements than to normal commercial transactions. Dr. Abdoh

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stated that he recognized the logic of this position. He said that he was primarily concerned with Iran's need to impose special rules and regulations governing Iran's barter trade with the U.S.S.R. so as to minimize the possibilities of subversive activities being conducted in Iran by Soviet trade representatives. He felt that Iran's need to make special arrangements for barter agreements, primarily with the U.S.S.R., could be met by inserting appropriate language elsewhere in the draft. Mr. Nemazee, however, insisted that the special treatment which Iran wanted to continue to accord to clearing agreements would have to be included in paragraph 6.

The Embassy believes that the issue of special treatment which Iran wants to accord to clearing arrangements will be difficult to overcome. The Embassy would welcome the Department's advice on this problem and suggestions regarding the way Iran's need to regulate barter trade with the U.S.S.R. can be met.

11. Article IX, paragraph 1 (d)

Dr. Abdoh stated that, under Iranian procedure, appeals can be taken from the rulings of lower echelon customs officials to higher competent authorities within the Customs Administration. There is no appeal from the rulings of the Customs Administration to the Iranian courts. In view of the Iranian legal procedure regarding the administration of customs rulings, Dr. Abdoh suggested that paragraph 1 (d) be amended to read as follows: "allow appeals to be taken from rulings of the customs agents to higher competent authorities;".

The Embassy perceives no objection to the Iranian suggestion given above, unless the Department attaches such importance to an independent appeals system going beyond the Customs Administration that it would urge a change in the pertinent Iranian laws.

12. Article X, Paragraphs 2 and 3

The Iranian officials indicated that the Government of Iran did not desire to accord national treatment to the merchant vessels of the United States or of third countries. Mr. Nemazee stated that while Iran did not have a merchant fleet of its own, it had hopes of acquiring one in the future, to which the Government of Iran wished to preserve its right to accord special privileges. Dr. Abdoh said that another and more important consideration was that Iran did not want to accord national treatment to the merchant vessels of the Soviet Union and of Soviet Bloc countries, and that this would be impossible to avoid under the most-favored-nation principle unless the suggested revision were made.

As the Department is aware, Mr. Nemazee has certain plans to register merchant vessels under the Iranian flag. The matter is further complicated by the desire of the Iranian Government that a portion of Iran's oil exports be transported in the future in Iranian flag vessels.

The Embassy would appreciate receiving the Department's views on this problem.

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13. Article XI, Paragraph 1 (a)

Dr. Abdoh recommended that on page 11, line 5, under Article XI, the word "solely" be deleted, and that in line 6, after the word "commercial", the words "and economic" be inserted. The balance of that clause after the word "consideration" would be deleted. That portion of the sentence in paragraph 1 would then read "Each High Contracting Party undertakes (a) that enterprises . . . shall make their purchases and sales involving either imports or exports affecting the commerce of the other High Contracting Party in accordance with commercial and economic considerations; and (b) that . . ." Mr. Nemazee said that this revision was aimed solely at providing an escape for the Government of Iran from accepting possible offers by Soviet and Soviet Bloc trading companies. He stated that it was within the realm of possibility that Soviet trading companies might make especially attractive offers to enterprises owned or controlled by the Government of Iran, and that if only commercial considerations were to prevail the Iranian companies would be required under the language of paragraph 1 of Article XI (which would be generalized to the U.S.S.R.) to accept the offerings of the Soviet trading companies.

The Embassy recommends that the Department accept the suggestion of the Iranian representatives.

14. Article XI, Paragraph 2 (b)

Dr. Abdoh suggested that the language referring to "concessions" be deleted so that sub-paragraph (b) would read "the awarding of Government contracts". He said that this was another instance of a word which had unfavorable connotations in Iran.

The Embassy perceives no objection to Dr. Abdoh's suggestion in this regard.

15. Article XI, Paragraph 4

In the interest of economy in the use of words, Dr. Abdoh suggested that paragraph 4 be revised to read "No enterprise of any kind of either High Contracting Party shall, if it engages in commercial, industrial, shipping of other business activities within the territories of the other High Contracting Party, . . .".

Dr. Abdoh assured the Embassy that no change in substance was intended by this revision.

The Embassy perceives no objection to this suggestion.

16. Article XIII, Paragraph 2

In line 2 of paragraph 2, Dr. Abdoh suggested the words "or application" be deleted. He stated that under Article 36, Paragraph 2, of the Statute of the International Court of Justice, the Court had authority only to interpret treaties. The Government of Iran did not want to confer, by means of a bilateral treaty, competence to the International Court of Justice to rule on or otherwise

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to express a judgment on the application of the terms of a bilateral treaty to which Iran was a party. He would prefer to limit this paragraph of the draft treaty to Article 36, Paragraph 2, of the Court Statute by deletion of the words indicated.

The Embassy requests the views of the Department on this matter, particularly in light of the importance of Article XIII in relation to Article IV (Department's Instruction A-18, July 23, 1954).

17. Additional Items

(a) Dr. Abdoh noted that the present draft treaty did not contain provisions on certain matters which the Iranian representatives thought might usefully be included. He said that the Iranians would suggest the addition of a provision relating to the obligation of citizens of one country in the territory of the other to perform compulsory military service. The draft treaty submitted to the Government of Iran by the Embassy in 1948 contained such a provision. He proposed that the provision in the earlier draft be included in the present draft.

The Embassy agreed to submit this matter to the Department for its consideration. It is noted that a similar provision is included in other treaties negotiated by the United States, notably Article III of the treaty with Ireland. We preceive no objection to accepting the Iranian suggestion.

(b) Dr. Abdoh referred to the Provisional Agreement Between the United States and Iran, of July 11, 1928, concerning personal status and family law jurisdiction of American nationals in Iran and of Iranian nationals in the United States. He said that the Iranian Government would like to include in the new draft treaty provisions incorporating on a reciprocal basis some of the terms of the 1928 Agreement. Dr. Abdoh's specific suggestion was that an article be added which, essentially, would provide that citizens of either party in the territory of the other would be covered by their national law in regard to "marriage, divorce, legal separation, dowry, affiance, capacity, succession and testamentary power." He said that, in line with his suggestions regarding Article II of the draft treaty, an escape clause might be included so that either party might be relieved of its obligation to carry out its treaty responsibilities regarding the personal status of citizens of the other party resident in its territory, whenever this should be required for reasons relating to public order or morals.

In line with pertinent instructions from the Department, the Embassy representatives explained that this matter had been given serious consideration by the United States Government on previous occasions, and set forth in some detail the reasons why a reciprocal agreement of this kind would not be possible in view of the nature of the judicial system in the United States.

This subject was subsequently raised during the course of a brief conversation on October 17 between Ambassador Henderson, Dr. Abdoh, and Mr. Rountree. Ambassador Henderson again pointed out that the United States court system was such that we could not undertake an agreement on reciprocal terms along the lines

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suggested by Dr. Abdoh. He said that we recognized the difficulties arising from the fact that the agreement of 1928 was on a non-reciprocal basis and indicated the possibility that the 1928 agreement might be considered as replaced by the new proposed treaty when it is concluded. (For tactical reasons the proposed new Article XIV set forth inthe Department's telegram 667, October 5, has not yet been presented to the Iranian representatives.)

Existing Departmental instruction on this subject, notably the Department's telegram No. 667 and Instruction No. A-26, of August 4, 1954, are believed to be adequate for the Embassy's purposes in discussing this matter with the Iranian representatives.

* * * *

The proposed consular provisions of the draft treaty were not included in the discussions reported herein, and Dr. Abdoh suggested that a separate meeting be arranged to take up this subject since most of the Iranian representatives present were not directly concerned with this aspect of the treaty.

It would be appreciated if the Department would consider the matters set forth above at its earliest convenience and provide the Embassy with additional information and instructions. In this connection, it is suggested that telegrams be despatched as rapidly as decisions are made upon the several items. The Iranian Government at the present time appears to be greatly interested in the conclusion of the treaty, and the officials of various ministries dealing with the matter on behalf of the Government have apparently undertaken their responsibilities with unusual enthusiasm. We hope during the course of the next several days to be in a position to resume discussions with the Iranian representatives on at least some of the issues involved, and to be prepared to provide answers to all of their points as soon as possible.

William M. Rountree,
Charge d'Affaires ad interim.

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Copy from the National Archives
Record Group 59: General Records of the Department of State
1950-54 Central Decimal File
File: 611.884/10-1654

ANNEX 227

DEPARTMENT OF STATE INSTRUCTION

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NO.: A-18, July 23, 1954

SUBJECT: Draft Treaty of Amity and Economic Relations

888.753/7-1554
XR611.884
711.368
888.753/7-1654
XR611.884

TO: The American Embassy, TEHRAN

Pursuant to Embtel 105, July 15 and Embtel 119, July 16, Dept transmits herewith five copies of a draft treaty of amity and economic relations and five copies of a separate draft of articles dealing with consular affairs. Copies of these two documents may, at your discretion, be given to Iranian officials as a basis for treaty negotiations. There is also attached a memorandum showing the principal differences between the present drafts and the U. S. - Ethiopia treaty of 1951.

The Department considers it desirable, as in the case of Ethiopia, to have conventional arrangements with Iran governing the status, rights, and powers of consuls, and also dealing specifically with customs privileges and taxation of diplomatic and consular officers and employees. Because of the desirability of avoiding complexity in any treaty proposals to Iran, as indicated in Embtel 105, the consular provisions have not been combined with the provisions on establishment, commerce and navigation. It is thought that the Embassy may find it more convenient in dealing with the Iranians to handle the two groups of articles separately as proposals dealing with different fields, and then incorporate them in the same instrument after agreement shall have been reached. The consular articles may appropriately be inserted following Article XI of the Amity and Economic Relations treaty.

The draft on establishment, commerce and navigation is thought to be about as brief as it can be made and still deal meaningfully with essential matters. At any rate, any further revision should await the reactions of the Iranian officials to specific provisions. The following explanatory statements on certain provisions are submitted as of possible aid to Embassy officials in preparing for the initial stage of negotiations.

The normal privilege of treaty-trader status is set forth in Article II, paragraph 1(a). At the instance of the Dept., Congress, in the Immigration and Nationality Act of 1952, provided for a

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for a new category of non-immigrants -- treaty investors. This may be of significance to many alien businessmen desiring to enter the U. S. because it permits entry and indefinite sojourn for business purposes without the requirement that such business purposes be limited to international trade, as the case with treaty trader status. The treaty-investor provision, included here in paragraph 1(b) appears in only one treaty presently in force, the U.S.-Japan treaty of 1953.

The provision in Article II, paragraph 3(c), is derived from the U. S. policy of promoting freedom of information, and is of interest to the news associations and related groups. The concluding clause of the provision was added to provide a basic assurance of freedom of communication for citizens of one country in another's territories.

Article III, paragraph 3, is a simplified version of the longer commercial arbitration provision that has been included in U. S. proposals to other Governments for a number of years. It is of particular interest to officers of the American Arbitration Association. An important public interest could be served by encouraging private commercial arbitration in countries where administration of justice has not reached a high stage of development. The provision has the limited object of preventing discrimination in the enforcement of private arbitration agreements or awards because of the alienage of the arbitrators or the foreign situs of the arbitration proceedings. Considerations of Federal-State relations in this country make it inadvisable to attempt a more far-reaching provision.

The essential nucleus of the proposed treaty may be considered as resting in Article IV, particularly paragraphs 2 and 4 thereof. The provision on compensation in case of expropriation in paragraph 2 is basic in all U. S. treaty proposals of this type. This provision, together with the provision in Article XIII(2) regarding adjudication of disputes by the International Court of Justice, if accepted by Iran, should afford valuable assurances to the American oil companies and other American investors.

Paragraph 4

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Paragraph 4 of Article IV establishes the general standard of treatment applicable to American business enterprises in Iran. It is to be noted that it does not obligate Iran to admit any foreign enterprises. The draft formerly under consideration would have assured the right of Americans freely to establish enterprises within certain broad fields, and it is understood that this was one important reason for the unfavorable reaction of the Iranian Government to the Department's proposals. No valid agreement can now be made that the proposed treaty would subject Iran to demands from third countries that would threaten undesirable economic penetration. Paragraph 4 is, however, intended to assure non-discriminatory treatment of American enterprises already in Iran and any that may be admitted in the future. This constitutes a minimum standard which the Department would find it very difficult to modify in any significant way.

Article VII, relating to exchange restrictions, is considered by the Department to be of importance in relation to the general treaty objective of improving conditions for foreign investment. It provides rules of conduct which would not impose undue hardship on parties to the treaty, assuming a country accepts the principle that exchange controls should not be unnecessarily discriminatory or applied for protectionist reasons. A country would have latitude under the Article to do whatever may reasonably be required to meet balance-of-payments difficulties. Thus the article requires only that a party make "reasonable provision" for certain transfers related to investments. Opposition to this requirement might imply that a country expected to be "unreasonable" with respect to such transfers.

Foreign officials sometimes argue that it is undesirable to include provisions on exchange restrictions in a bilateral treaty, since to do so might appear to derogate from the Articles of Agreement of the IMF. However, the IMF was not intended to deal with the specific questions covered by the type of treaty here considered, and exchange control provisions adapted to the specific purposes of the bilateral treaty are in no sense a reflection on the IMF. A member of the Fund might be authorized by the IMF, for example, under the Fund's Article VIII, to impose exchange restrictions,

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and under this general authorization might allocate exchange generously for luxury imports but deny exchange for the service of capital. The treaty seeks to establish agreed principles with respect to the application of restrictions, both those authorized by the IMF, and those not coming under the jurisdiction of the IMF as in the case of restrictions on capital transfers. The proposed Article VII in no sense overrides or is in conflict with the IMF.

Article IX, paragraph 3, has been included in recent treaty proposals because of the strong interest expressed with regard to its subject matter by spokesmen for marine insurance interests in the United States. The general problem is dealt with fully in the Department's CA-6292, May 3, 1954. Since it appears from Embdes 486, December 20, 1952, that Iranian law does prevent importers and exporters in Iran from placing marine insurance with underwriters in the U. S. difficulties will doubtless be encountered in persuading the Government of Iran to agree to this provision. The Embassy should, however, make an appropriate effort to obtain its acceptance.

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Enclosures:

1. Memorandum.
2. 5 copies of draft treaty of amity and economic relations.
3. 5 copies of proposed consular provisions.

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Enclosure No: 1 Instruction No: A-16, Teh. 1

XXXXXXXX

MEMORANDUM

TO:

Brief Comparison of Draft Treaty
for Iran with Treaty of 1951 with Ethiopia

The draft treaty prepared as a basis for initial discussion with Iran is substantially the same as the Treaty of Amity and Economic Relations of 1951 with Ethiopia. The principal points of difference are: (1) the omission, on a tentative basis, of the provisions on consular rights; (2) the elimination of various minor provisions included in the latter Treaty at the instance of the Ethiopian negotiators, and (3) the addition of certain provisions from the standard draft treaty of friendship, commerce and navigation in order to afford more effective adjustment to economic and juridical conditions in Iran.

There follows a checklist of the difference between the draft for Iran and the Treaty with Ethiopia. (Underscored references are to the former.)

Article II, paragraph 1: This provision, an adaptation of the corresponding provisions of the standard FCN treaty, is substituted for Article VI(1) of the Ethiopia treaty in order to provide a more specific rule with reference to the entry of businessmen in carrying out the treaty objective of increased trade and investment.

Article II, paragraph 3: A number of minor changes have been made in light of conditions in Iran. The principal is the elimination of the provision appearing in Article VI(3) of the Ethiopian treaty, for most-favored-nation treatment with respect to engaging in religious activities.

Article III, paragraph 2: The provision relating to cautio judicatum solvi, appearing in Article VII(2) of the Ethiopian treaty, has been omitted. This was included in the latter as a concession to the Ethiopian point of view, as it is the Department's aim to obtain, if possible, assurances of national treatment as to

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as to security for costs and judgment.

Article III, paragraph 3: A provision on commercial arbitration has been added. This is an abridged version of the provision on this subject in the standard FCN treaty (see, for example, Article X of the Treaty with Ireland, Article IV(2) of the Treaty with Japan).

(Article VII(3) of Ethiopia treaty): This paragraph, which in the normal order would appear as Article III(3) of the draft for Iran has been dropped as no longer necessary in a treaty of this kind. Subparagraph (a) originally was included in such treaties for rather specialized reasons having to do with wartime security controls, while subparagraph (b) is regarded as in the nature of a clarification of intent.

Article IV, paragraph 2: This provision has been rounded out by the addition of a sentence, taken from the standard FCN treaty, which states in some detail the standards to be observed in making compensation in expropriation cases.

(Article VIII(4) of Ethiopia treaty): This provision has been subjected to some criticism in business circles on grounds that its broad terminology might leave the capital-exporting country subject to very burdensome commitments. As the treaty objectives appear adequately covered by the other provisions on the rights of business enterprises, it has been omitted from the draft for Iran.

Article IV, paragraph 4: This is a revised and somewhat compressed version of Article VIII(5) of the Ethiopia treaty. The final sentence of the latter, which reflects certain special problems raised in the Ethiopian negotiations, has been omitted.

Article V, paragraph 1: This is the same as Article IX(1) of the Ethiopia treaty except for the elimination of the last sentence of the latter, which merely makes explicit what is strongly implicit in this paragraph, and for the deletion of the words "that may be generally acquired", which represents a special qualification requested by the Ethiopian negotiators.

Article VI,

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Article VI, paragraph 1: The last sentence of the comparable provision of the Ethiopian treaty (Article X(1)), which represents a minor accommodation to the Ethiopians, has been omitted.

Article VII, paragraph 3: The addition to this paragraph of reference to transport (which does not appear in Article XI(3) of the Ethiopia treaty) is in line with the coverage provided in the comparable provision of the standard FCN treaty.

Article VIII, paragraph 2: The addition to this paragraph of the provision relating to the international transfer of payments follows the standard draft in this respect and is designed to round out the basic treaty rule of unconditional most-favored-nation treatment in matters affecting the goods trade.

Article VIII, paragraph 2: The exception clause appearing in Article XII(2), the comparable provision of the Ethiopia treaty, is in the nature of a clarification and has been omitted from this paragraph as superfluous.

Article VIII, paragraph 6: Subparagraph (c) relating to customs unions and free trade areas, which was not included in the corresponding provision (Article XII(6)) of the Ethiopia treaty, is taken over from the standard FCN treaty. This provision is a customary exception to the most-favored-nation rule in modern commercial treaties and trade agreements, and may be found in greater or less detail in the General Agreement on Tariffs and Trade and in most recent bilateral instruments.

Article IX, paragraph 2: As the opening clause of the corresponding provision (Article XIII(2)) of the Ethiopia treaty is in the nature of a general clarification, it has not been thought necessary to retain it in this paragraph.

Article X: In view of the present, and the presumably greater, future interests of Iran as a maritime state, it has been thought appropriate to propose the navigation provisions of the standard FCN treaty in place of Article XIV of the Ethiopia treaty. The latter is a version, expanded during negotiations, of a very limited provision originally proposed to Ethiopia at a time

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a time when that country was a landlocked state.

Article XI, paragraph 2: The final sentence of the comparable provision (Article XV(2)) of the Ethiopia treaty has not been included in this paragraph. It was incorporated in the Ethiopia treaty in recognition of a special situation in that country.

Article XI, paragraphs 3 and 4: These paragraphs are taken over without change from the standard draft. They were not included in the draft first used in connection with Ethiopia, as that basic abridged draft was designed generally to meet the needs of countries in less advanced stages of economic development, and it was not possible to introduce them later.

Article XIII, paragraph 1: This provision is taken over from the standard FCN treaty.

(Article XVIII of Ethiopia treaty): A comparable provision has not been included in the draft for Iran as it is thought that decisions as to the content of such a provision could best be developed during the course of the negotiations. It may be that Iranian dissatisfaction with the Agreement of 1928 on personal status, and a consequent desire to be rid of it, may have some useful effect in this regard. The Department of course will be prepared to suggest specific language for this provision at the appropriate time.

- - - - - - - - - - - - - - -

(Consular provisions): The provisions on consular privileges and immunities, prepared as a separate document, have been framed with special reference to countries in which the United States does not maintain large consular establishments. They are intended to provide in brief compass what are regarded as the minimum requirements for satisfactory consular relations with such countries.

These

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These provisions amplify and round out the coverage provided by Articles III-V of the Ethiopia treaty. Although lengthier and more detailed than the latter, they are derived from the Ethiopia provisions or from the provisions of other conventions on consular matters to which the United States is a party or which are now under negotiation with other foreign countries.

The principal differences between these provisions and the consular articles of the Ethiopia treaty are as follows:

(Article II of Ethiopia treaty): This article, which relates to the privileges of diplomatic officers, is not a customary part of United States consular conventions and has been omitted from these provisions for Iran. Presumably there would be no objection to including a similar provision in a treaty with Iran, if the Iranians so desire.

Article I: This article, which has no exact counterpart in the Ethiopia treaty, makes specific provision for the sending of consular representatives.

Article II, paragraph 1: This provision is generally comparable to Article III(1) of the Ethiopia treaty but has been restated and revised to provide coverage for consular employees.

Article IV, paragraph 1: This paragraph, which has no counterpart in the Ethiopia treaty, establishes a specific right of acquisition and ownership by the Government of either country of the real property it may need in the other country for non-military purposes.

Article VI: This article contains the substance of Article V(4) of the Ethiopia treaty and, in addition, a provision relating to the waiver requirements of Section 247 of the Immigration and Nationality Act.

Article VII: This article, which is not contained in the Ethiopia treaty, defines the relationship between consular officers and local governmental authorities with respect to jurisdiction over official consular acts and files.

Article VIII:

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Article VIII: This article, which is not contained in the Ethiopia treaty, specifies certain important rights which shall vest in consular officers in connection with the protection of nationals of their country when within the other country. Similar provisions may be found in recent consular conventions entered into by the United States (e.g., Article 15(1) and (3), consular convention of 1950 with Ireland).

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July 1954

PROPOSED CONSULAR PROVISIONS

Article I

Each High Contracting Party shall have the right to send to the other High Contracting Party consular representatives, who having presented their credentials and having been recognized in a consular capacity, shall be provided, free of charge, with exequaturs or other authorization.

Article II

1. Consular representatives of each High Contracting Party shall be permitted to reside in the territory of the other High Contracting Party at the places where consular officers of any third country are permitted to reside and at other places by consent of the other High Contracting Party. Consular officers and employees shall enjoy the privileges and immunities accorded to officers and employees of their rank or status by general international usage and shall be permitted to exercise all functions which are in accordance with such usage; in any event they shall be treated, subject to reciprocity, in a manner no less favorable than similar officers and employees of any third country.

2. The consular offices shall not be entered by the police or other local authorities without the consent of the consular officer, except that in the case of fire or other disaster, or if the local authorities have probable cause to believe that a crime of violence has been or is about to be committed in the consular office, consent to entry shall be presumed. In no case shall they examine or seize the papers there deposited.

D.W. 611.84/7-2354

Article III

1. All furniture, equipment and supplies consigned to or withdrawn from customs custody for a consular or diplomatic office of either High Contracting Party for official use shall be exempt within the territories of the other High Contracting Party from all customs duties and internal revenue or other taxes imposed upon or by reason of importation.

2. The baggage, effects and other articles imported exclusively for the personal use of consular officers and diplomatic and consular employees and members of their families residing with them, who are nationals of the sending state and are not engaged in any private occupation for gain in the territories of the receiving state, shall be exempt from all customs duties and internal revenue or other taxes imposed upon or by reason of importation. Such exemptions shall be granted with respect to the property accompanying the person entitled thereto on first arrival and on subsequent arrivals, and to that consigned to such officers and employees during the period in which they continue in status.

3. It is understood, however, that: (a) paragraph 2 of the present Article shall apply as to consular officers and diplomatic and consular employees only when their names have been communicated to the appropriate authorities of the receiving state and they have been duly recognized in their official capacity; (b) in the case of consignments, either High Contracting Party may, as a condition to the granting of exemption, require that a notification of any such consignment be given, in a prescribed manner; and (c) nothing herein authorizes importations specifically prohibited by law.

Article IV

1. The Government of either High Contracting Party may, in the territory of the other, acquire, own, lease for any period of time, or otherwise hold and occupy, such lands, buildings, and appurtenances as may be necessary and appropriate for governmental, other than military, purposes. If under the local law the permission of the local authorities must be obtained as a prerequisite to any such acquiring or holding, such permission shall be given on request.

2. Lands and buildings situated in the territories of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, national, state, provincial and municipal, other than assessments levied for services or local public improvements by which the premises are benefited.

Article V

1. No tax or other similar charge of any kind shall be levied or collected within the territories of the receiving state in respect of the official emoluments, salaries, wages or allowances received (a) by a consular officer of the sending state as compensation for his consular services, or (b) by a consular employee thereof as compensation for his services at a consulate. Likewise, consular officers and employees, who are permanent employees of the sending state and are not engaged in private occupation for gain within the territories of the receiving state, shall be exempt from all taxes or other similar charges, the legal incidence of which would otherwise fall upon officers or employees.

2. The preceding paragraph shall not apply in respect to taxes and other similar charges upon: (a) the ownership or occupation of immovable property situated within the territories of the receiving state; (b) income derived from sources within such territories (except the compensation mentioned in the preceding paragraph); or (c) the passing of property at death.

3. The provisions of the present Article shall have like application to diplomatic officers and employees, who shall in addition be accorded all exemptions allowed them under general international usage.

Article VI

The exemptions provided for in Articles III and V shall not apply to nationals of the sending state who are also nationals of the receiving state, or to any other person who is a national of the receiving state, nor to persons having immigrant status who have been lawfully admitted for permanent residence in the receiving state.

Article VII

Consular officers and employees are not subject to local jurisdiction for acts done in their official character and within the scope of their authority. No consular officer or employee shall be required to present his official files before the courts or to make declaration with respect to their contents.

Article VIII

A consular officer shall be entitled within his district to: (a) interview, communicate with, assist and advise any national of the sending state; (b) inquire into any incidents which have occurred affecting the interests of any such national; and (c) assist any such

national in proceedings before or in relations with the authorities of the receiving state and, where necessary, arrange for legal assistance for him. A national of the sending state shall have the right at all times to communicate with a consular officer of his country and, unless subject to lawful detention, to visit him at the consular office.

State--FD, Wash., D.C.

-1153.

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UNCLASSIFIED

TREATY OF

AMITY AND ECONOMIC RELATIONS

BETWEEN

THE UNITED STATES OF AMERICA

AND

IRAN

July 1954

UNCLASSIFIED

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TABLE OF CONTENTS*

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* The table of contents is included merely to facilitate study of the draft and not as a part of the proposed treaty.

The United States of America and Iran, desirous of emphasizing the friendly relations which have long prevailed between their peoples, of reaffirming the high principles in the regulation of human affairs to which they are committed, and of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, have resolved to conclude a Treaty of Amity and Economic Relations, and have appointed as their Plenipotentiaries:

The President of the United States of America:

and

His Imperial Majesty, the Shah of Iran:

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following articles:

Article I

There shall be firm and enduring peace and sincere friendship between the United States of America and Iran.

Article II

1. Nationals of either High Contracting Party shall be permitted to enter the territories of the other High Contracting Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two High Contracting Parties and engaging in related commercial activities; and (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital. The provisions of the preceding sentence shall be subject to the right of either High Contracting Party to exclude or expel aliens on grounds relating to public order, morals, health and safety.

2. Nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. When any such national is in custody, he shall in every respect receive reasonable and humane treatment; and, on his demand, the diplomatic or consular representative of his country shall be immediately notified and accorded full opportunity to safeguard his interests. He shall be promptly informed of the accusations against him, allowed ample facilities to defend himself and given a prompt and impartial disposition of his case, in accord with modern standards of justice.

3. Nationals of either High Contracting Party within the territories of the other High Contracting Party shall, either individually or through associations, and so long as their activities are not contrary to public order, safety or morals: (a) enjoy freedom of conscience and the right to hold religious services; (b) be permitted to engage in philanthropic, educational and scientific activities; and (c) have the right to gather and transmit information for dissemination to the public abroad, and otherwise to communicate with other persons inside and outside such territories. They shall also be permitted to engage in the practice of professions for which they have qualified.

Article III

1. Companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party. As used in the present Treaty, "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.

2. Nationals and companies of either High Contracting Party shall have free access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy the right of such access without any requirement of registration or domestication.

3. The private settlement of disputes of a civil nature, involving nationals and companies of either High Contracting Party, shall not be discouraged within the territories of the other High Contracting Party; and, in cases of such settlement by arbitration, neither the alienage of the arbitrators nor the foreign situs of the arbitration proceedings shall of themselves be a bar to the enforceability of awards duly resulting therefrom.

Article IV

1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.

2. Property

2. Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

3. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either High Contracting Party located within the territories of the other High Contracting Party shall not be subject to entry or molestation without just cause. Official searches and examinations of such premises and their contents, shall be made only according to law and with careful regard for the convenience of the occupants and the conduct of business.

4. Enterprises which nationals and companies of either High Contracting Party are permitted to establish or acquire, within the territories of the other High Contracting Party, shall be permitted freely to conduct their activities therein, upon terms no less favorable than other enterprises of whatever nationality engaged in similar activities. Such nationals and companies shall enjoy the right to continued control and management of such enterprises; to engage attorneys, agents, accountants and other technical experts, executive personnel, interpreters and other specialized employees of their choice; and to do all other things necessary or incidental to the effective conduct of their affairs.

Article V

1. Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting Party: (a) to lease, for suitable periods of time, real property needed for their residence or for the conduct of activities pursuant to the present Treaty; (b) to purchase or otherwise acquire personal property of all kinds; and (c) to dispose of property of all kinds by sale, testament or otherwise. The treatment accorded in these respects shall in no event be less favorable than that accorded nationals and companies of any third country.

2. Nationals and companies of either High Contracting Party shall be accorded within the territories of the other High Contracting Party effective protection in the exclusive use of inventions, trade marks and trade names, upon compliance with the applicable laws and regulations, if any, respecting registration and other formalities.

Article VI

1. Nationals and companies of either High Contracting Party shall not be subject to the payment of taxes, fees or charges within the territories of the other High Contracting Party, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country. In the case of nationals of either High Contracting Party residing within the territories of the other High Contracting Party, and of nationals and companies of either High Contracting Party engaged in trade or other gainful pursuit or in non-profit activities therein, such payments and requirements shall not be more burdensome than those borne by nationals and companies of such other High Contracting Party.

2. Each High Contracting Party, however, reserves the right to: (a) extend specific tax advantages only on the basis of reciprocity, or pursuant to agreements for the avoidance of double taxation or the mutual protection of revenue; and (b) apply special requirements as to the exemptions of a personal nature allowed to non-residents in connection with income and inheritance taxes.

3. Companies of either High Contracting Party shall not be subject, within the territories of the other High Contracting Party, to taxes upon any income, transactions or capital not attributable to the operations and investment thereof within such territories.

Article VII

1. Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except (a) to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or (b) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund.

2. If either High Contracting Party applies exchange restrictions, it shall promptly make reasonable provision for the withdrawal, in foreign exchange in the currency of the other High Contracting Party, of: (a) the compensation referred to in Article IV, paragraph 2, of the present Treaty, (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (c) amounts for amortization of loans, depreciation of direct investments and capital transfers, giving consideration to special needs for other transactions. If more than

one rate of exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.

3. Either High Contracting Party applying exchange restrictions shall in general administer them in a manner not to influence disadvantageously the competitive position of the commerce, transport or investment of capital of the other High Contracting Party in comparison with the commerce, transport or investment of capital of any third country; and shall afford such other High Contracting Party adequate opportunity for consultation at any time regarding the application of the present Article.

Article VIII

1. Each High Contracting Party shall accord to products of the other High Contracting Party, from whatever place and by whatever type of carrier arriving, and to products destined for exportation to the territories of such other High Contracting Party, by whatever route and by whatever type of carrier, treatment no less favorable than that accorded like products of or destined for exportation to any third country, in all matters relating to: (a) duties, other charges, regulations and formalities, on or in connection with importation and exportation; and (b) internal taxation, sale, distribution, storage and use. The same rule shall apply with respect to the international transfer of payments for imports and exports.

2. Neither High Contracting Party shall impose restrictions or prohibitions on the importation of any product of the other High Contracting Party or on the exportation of any product to the terri-

the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited.

3. If either High Contracting Party imposes quantitative restrictions on the importation or exportation of any product in which the other High Contracting Party has an important interest:

(a) It shall as a general rule give prior public notice of the total amount of the product, by quantity or value, that may be imported or exported during a specified period, and of any change in such amount or period; and

(b) If it makes allotments to any third country, it shall afford such other High Contracting Party a share proportionate to the amount of the product, by quantity or value, supplied by or to it during a previous representative period, due consideration being given to any special factors affecting the trade in such product.

4. Either High Contracting Party may impose prohibitions or restrictions on sanitary or other customary grounds of a non-commercial nature, or in the interest of preventing deceptive or unfair practices, provided such prohibitions or restrictions do not arbitrarily discriminate against the commerce of the other High Contracting Party.

5. Either High Contracting Party may adopt measures necessary to assure the utilization of accumulated inconvertible currencies or to deal with a stringency of foreign exchange. However, such measures shall deviate no more than necessary from a policy designed to promote the maximum development of non-discriminatory multilateral trade and to expedite the attainment of a balance-of-payments position which will obviate the necessity of such measures.

6. Each High Contracting Party reserves the right to accord special advantages: (a) to products of its national fisheries, (b) to adjacent countries in order to facilitate frontier traffic, or (c) by virtue of a customs union or free trade area of which either High Contracting Party, after consultation with the other High Contracting Party, may become a member. Each High Contracting Party, moreover, reserves rights and obligations it may have under the General Agreement on Tariffs and Trade, and special advantages it may accord pursuant thereto.

Article IX

1. In the administration of its customs regulations and procedures, each High Contracting Party shall: (a) promptly publish all requirements of general application affecting importation and exportation; (b) apply such requirements in a uniform, impartial and reasonable manner; (c) refrain, as a general practice, from enforcing new or more burdensome requirements until after public notice thereof; (d) allow appeals to be taken from rulings of the customs authorities; and (e) not impose greater than nominal penalties for infractions resulting from clerical errors or from mistakes made in good faith.

2. Nationals and companies of either High Contracting Party shall be accorded treatment no less favorable than that accorded nationals and companies of the other High Contracting Party, or of any third country, with respect to all matters relating to importation and exportation.

3. Neither High Contracting Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such

Article X

1. Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.

2. Vessels under the flag of either High Contracting Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that High Contracting Party both on the high seas and within the ports, places and waters of the other High Contracting Party.

3. Vessels of either High Contracting Party shall have liberty, on equal terms with vessels of the other High Contracting Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other High Contracting Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other High Contracting Party; but each High Contracting Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries.

4. Vessels of either High Contracting Party shall be accorded national treatment and most-favored-nation treatment by the other High Contracting Party with respect to the right to carry all products that may be carried by vessel to or from the territories of such other High Contracting Party; and such products shall be accorded treatment no less favorable than that accorded like products carried in vessels of such other High Contracting Party, with respect to: (a) duties and charges of all kinds, (b) the administration of the customs, and (c) bounties, drawbacks and other privileges of this nature.

5. Vessels of either High Contracting Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other High Contracting Party, and shall receive friendly treatment and assistance.

6. The term "vessels", as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this terms does not, except with reference to paragraphs 2 and 5 of the present Article, include fishing vessels or vessels of war.

Article XI

1. Each High Contracting Party undertakes (a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce of the other High Contracting Party solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale; and (b) that the nationals, companies and commerce of such other High Contracting Party shall be afforded adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.

2. Each High Contracting Party shall accord to the nationals, companies and commerce of the other High Contracting Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (a) the governmental purchase of supplies, (b) the awarding of concessions and other government contracts, and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special

3. The High Contracting Parties recognize that conditions of competitive equality should be maintained in situations in which publicly owned or controlled trading or manufacturing enterprises of either High Contracting Party engage in competition, within the territories thereof, with privately owned and controlled enterprises of nationals and companies of the other High Contracting Party. Accordingly, such private enterprises shall, in such situations, be entitled to the benefit of any special advantages of an economic nature accorded such public enterprises, whether in the nature of subsidies, tax exemptions or otherwise. The foregoing rule shall not apply, however, to special advantages given in connection with: (a) manufacturing goods for government use, or supplying goods and services to the Government for government use; or (b) supplying at prices substantially below competitive prices, the needs of particular population groups for essential goods and services not otherwise practically obtainable by such groups.

4. No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Article XII

1. The present Treaty shall not preclude the application of measures:

(a) regulating the importation or exportation of gold or

(b) relating to fissionable materials, the radio-active by-products thereof, or the sources thereof;

(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; and

(d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

2. The present Treaty does not accord any rights to engage in political activities.

3. The stipulations of the present Treaty shall not extend to advantages accorded by the United States of America or its Territories and possessions, irrespective of any future change in their political status, to one another, to the Republic of Cuba, to the Republic of the Philippines, to the Trust Territory of the Pacific Islands or to the Panama Canal Zone.

Article XIII

1. Each High Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other High Contracting Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of

Article XIV

1. The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Tehran as soon as possible.

2. The present Treaty shall enter into force one month after the day of exchange of ratifications. It shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein.

3. Either High Contracting Party may, by giving one year's written notice to the other High Contracting Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Treaty and have affixed hereunto their seals.

DONE in duplicate, in the English and Persian languages, both equally authentic, at Tehran this _____ day of _____ one thousand none hundred fifty _____, corresponding with _____.

State--FD, Wash., D.C.

ANNEX 228

INCOMING TELEGRAM Department of State ACTION COPY

CONFIDENTIAL
MESSAGE CENTER

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NEA

Control: 6167
Rec'd: September 15, 1954
2:22 p.m.

1954 SEP 16 AM 7 47

FROM: Tehran

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TO: Secretary of State

NO: 620, September 15, 6 p.m.

1. We seem to be making good progress matter FCN Treaty. Since my delivery of draft to Foreign Minister August 3, Rountree, Counselor of Embassy, has had several encouraging conversations with Abdoh, Political Director of Foreign Office (EMBTEL 119, July 16).

2. Last evening Shademan, Minister National Economy, told me his Ministry pleased in general with provisions treaty. Only concern was lest certain passages granting most-favored-nation treatment might be embarrassing as far as Soviet Union and other Iron Curtain countries concerned. Representatives Iranian Government may desire discuss some these passages later. He hoped Embassy could make Persian translation English text since Foreign Office translation unsatisfactory. Perhaps doubts re certain clauses would disappear if they were well translated. In any event he convinced treaty would be acceptable Iranian Government with no (repeat no) important changes. In fact he thought full agreement could be reached within several weeks.

3. Rountree had similar conversation this morning with Abdoh who said Interdepartmental Committee had met Monday September 13 to consider draft and planned meet each subsequent Monday. Discussions at this meeting proceeded smoothly and all present agreed it highly desirable conclude treaty this character with US. Principal concern was lest certain rights which would be granted US Government, US nationals, or US products might create difficulties for Iran in connection with most-favored-nation provisions incorporated in Iran's treaties with other countries, particularly Iron Curtain countries. Group would later submit list of suggested amendments which in its opinion would keep these difficulties at minimum. Group might, for instance, suggest amendment to Article 1 listing additional bases upon which nationals of one country might be excluded by government of other. Group also did not (repeat not) like term "modern standard of justice" appearing Article 2. They noted that other recent US treaties did not (repeat not) include this expression. Group inclined prefer paragraph 3 of Article 7 to US Treaty with Denmark to paragraph 3 of Article 2 to our draft.

4. During

-2- 620, September 15, 6 p.m. from Tehran

4. During conversation which I had noon today with Foreign Minister and Finance Minister they told me that matter of treaty had been discussed in general at Cabinet meeting and that there was unanimous agreement in Cabinet that it would be advantageous to Iran for negotiation treaty to be completed as soon as possible. Foreign Minister said he had read treaty carefully and thought that matter its negotiation should not (repeat not) be difficult. Because of peculiar situation in which Iran finds itself Iranian Government might suggest several alterations which he thought in general US Government would find acceptable.

HENDERSON

SW:LQF/8

ANNEX 229

INCOMING TELEGRAM *Department of State* ACTION COPY

O/CR

CONFIDENTIAL

Control: 677
Rec'd: October 2, 1954
6:25 a.m.

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FROM: Tehran

TO: Secretary of State

NO: 787, October 2, 11 a.m.

Abdoh, Ministry Foreign Affairs, informed Embassy that in inter-ministerial committee studying draft treaty amity and economic relations certain objections to Article 7 re exchange restrictions had been raised, particularly by Bank Melli representative. Apparently one objection concerned requirement that proposed exchange restrictions should be specifically approved by IMF. Bank Melli believed this provision could not (repeat not) be met when exchange crises arose, e.g., September 1954, which required bank to impose restrictions on certain currency transactions immediately (EMBTEL 703, September 22).

Another objection mentioned by Abdoh concerned requirement that in event exchange restrictions imposed, reasonable provisions would be made for withdrawal of foreign exchange to cover charges connected with foreign loans and investments. Some Iranian officials expressed view that if in treaty with US such commitment made, it would be extended to other countries with which Iran has treaties with MFN clause. Implication that servicing charges on certain non-American foreign investments might acquire priority on Iran's foreign exchange appeared to be sensitive subject with some Iranian officials with experience on compensation issue in oil negotiations. Abdoh also implied that Bank Meli did not (repeat not) want assume treaty responsibility to furnish foreign exchange to meet Plan Organization and other Government commitments to foreign suppliers. Amount such commitments still not (repeat not) known.

Abdoh stated that he would probably have to await Governor Nasser's return in order formulate Government Iran position on Article 7.

Embassy would appreciate receiving Department's advice on interpretation Article 7 in light Iran's specific problems.

HENDERSON

TLS

PERMANENT

ANNEX 230

DECLASSIFIED
Authority 832931

OUTGOING TELEGRAM

INDICATE: ☐ COLLECT
☐ CHARGE TO Dept

Department of State

CONFIDENTIAL
Classification

09344
1954 OCT 26 PM 12 17
DC/T

SENT TO: Amembassy TEHRAN 814

611.884/10-2554

Origin

Info

Your 787

Paragraph One Article VII draft treaty does not ~~repeat not~~ alter present obligation Iran to IMF re approval exchange restrictions as implied Bank Melli comments. Paragraph One (b) is inserted primarily avoid any implication treaty seeks encroach IMF authority and does not impose any new obligation on Iran. It thus does not require IMF approval that IMF itself does not require.

QUOTE reasonable provision UNQUOTE in paragraph Two merely requires country not (repeat not) be QUOTE unreasonable UNQUOTE. It is general term not ~~repeat not~~ directed to any specific matter such as Plan Organization commitments. U.S. considers it sufficiently broad and flexible to provide needed latitude.

Dist. Desired (Offices Only)

~~Herter~~ Dulles
~~Acting~~

DC/R Mail Rev Cat

Drafted by: OFD:MN:JPYoung:AG

Telegraphic transmission and classification approved by: J. P. Young

Clearances:
CP - Mr. Metzer
GTI - Mr. Lincoln

~~S/S-CR~~
OCT 26 1954 A.M.

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Annex 230

ANNEX 231

Department of State

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Classification

01445

SENT TO: AMEMBASSY, TEHRAN 894

611.884/11-454

Origin

Info.

Treaty Article V. If understood, intent proposal is to subject one-b and c as well as a to condition "for conduct activities pursuant to Treaty". This undesirable. Laws number U.S. States and some foreign countries limit alien ownership realty. Intent one-a is merely provide necessary access to land for purposes for which treaty right is given. Acquisition personal property generally is and should be unrestricted. Since one cannot own property except as permitted by law, disposition of it should likewise be unrestricted.

Proposed change in paragraph 2 unobjectionable.

Article VII and VIII. Instructions in preparation.

Article IX-one-d. Important consideration is impartiality rather than independence of authority receiving appeals. Propose: "(d) provide an appeals procedure by which prompt and impartial review of administrative action in customs matters can be obtained;" .

Article X. Regret Iran opposes provisions nondiscriminatory treatment shipping. Point out national shipping can be promoted other means than discriminatory treatment ships and cargoes. ~~(Two examples: subsidies and restriction portion government cargoes.)~~ Discrimination likely result countermeasures

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Drafted by: EDT:CP:VGSetser:hc 11/3/54

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

Clearances:

L/E

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NOV 4 1954 A.M.

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gram to AMEMBASSY TEHRAN

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countermeasures
/other countries against Iranian vessels. Interests international commerce served best by policy permitting free competition vessels all countries for carriage commercial cargoes. If Iranians maintain position, only alternative is deletion Article X.

Dulles
(WSS)

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Classification

ANNEX 232

Approved: October 28, 2008.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E8–26676 Filed 11–7–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 560

Iranian Transactions Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Foreign Assets Control of the U.S. Department of the Treasury (''OFAC'') is amending the Iranian Transactions Regulations, to narrow the scope of existing section by revoking an authorization previously granted to U.S. depository institutions to process ''U-turn'' transfers, and to make certain other conforming and technical changes.

DATES: *Effective Date:* November 10, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director for Compliance, Outreach & Implementation, tel.: 202/622–2490, Assistant Director for Licensing, tel.: 202/622–2480, Assistant Director for Policy, tel.: 202/622–4855, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202/622–2410, Office of the General Counsel, Department of the Treasury, Washington, DC 20220 (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning the Office of Foreign Assets Control (''OFAC'') are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax on-demand service, tel.: 202/622–0077.

Background

The Iranian Transactions Regulations, 31 CFR part 560 (the ''ITR''), implement a series of Executive Orders that began with Executive Order 12613 of October 30, 1987, issued pursuant to authorities including the International Security and Development Cooperation Act of 1985 (22 U.S.C. 2349aa–9). In that order, after finding, *inter alia,* that the Government of Iran was actively supporting terrorism as an instrument of state policy, the President prohibited the importation of Iranian-origin goods and services. Subsequently, in Executive Order 12957, issued on March 15, 1995, under the authority of, *inter alia,* the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), the President declared a national emergency with respect to the actions and policies of the Government of Iran, including its support for international terrorism, its efforts to undermine the Middle East peace process, and its efforts to acquire weapons of mass destruction and the means to deliver them. To deal with that threat, Executive Order 12957 imposed prohibitions on certain transactions with respect to the development of Iranian petroleum resources. On May 6, 1995, to further respond to this threat, the President issued Executive Order 12959, which imposed comprehensive trade and financial sanctions on Iran. Finally, on August 19, 1997, the President issued Executive Order 13059 consolidating and clarifying the previous orders.

Section § 560.516 of the ITR contains authorizations with respect to certain transactions that are processed by U.S. depository institutions, as well as by U.S. registered brokers or dealers in securities. OFAC now is amending § 560.516 to narrow the scope of authority provided in paragraph (a) of this section. As amended, paragraph (a) of § 560.516 authorizes U.S. depository institutions to process transfers of funds to or from Iran, or for the direct or indirect benefit of persons in Iran or the Government of Iran, only if the transfer meets one of the conditions set forth in the sub-paragraphs to paragraph (a) and does not involve debiting or crediting an Iranian account, as defined in § 560.320 of the ITR. Prior to this amendment, sub-paragraph (a)(1) authorized such transactions when the transfer was by order of a non-Iranian foreign bank from its own account in a domestic bank to an account held by a domestic bank for a non-Iranian foreign bank. This is commonly referred to as the ''U-turn'' authorization. It is so termed because it is initiated offshore as a dollar-denominated transaction by order of a foreign bank's customer; it then becomes a transfer from a correspondent account held by a domestic bank for the foreign bank to a correspondent account held by a domestic bank for another foreign bank; and it ends up offshore as a transfer to a dollar-denominated account of the second foreign bank's customer. OFAC now is narrowing the scope of authority provided by paragraph (a) of § 560.516 by deleting sub-paragraph (a)(1) and, thereby, revoking the authorization for ''U-turn'' transfers.

The reasons OFAC is revoking this authorization include the need to further protect the U.S. financial system from the threat of illicit finance posed by Iran and its banks. This threat was highlighted in March of 2008 when the United Nations Security Council adopted Resolution 1803, which calls upon all states ''to exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran...in order to avoid such activities contributing to the proliferation [of] sensitive nuclear activities, or to the development of nuclear weapon delivery systems * * *.'' Moreover, on October 16, 2008, the Financial Action Task Force (''FATF''), the world's premier standard-setting body for anti-money laundering and counter-terrorist financing (''AML/CFT''), warned for the fourth time about the risks posed to the international financial system by continuing deficiencies in Iran's AML/CFT regime, and in particular emphasized Iran's lack of effort in addressing the risk of terrorist financing. The FATF called on all countries to strengthen preventive measures to protect their financial systems from the risk.

As a result of this amendment, effective November 10, 2008, U.S. depository institutions no longer will be allowed to process ''U-turn'' transfers involving Iran, thereby precluding transfers designed to dollarize transactions through the U.S. financial system for the direct or indirect benefit of Iranian banks or other persons in Iran or the Government of Iran. OFAC is revising and republishing § 560.516 of the ITR in its entirety because, in addition to removing sub-paragraph (a)(1), OFAC also is amending this section to delete references to outdated provisions and make other minor technical changes. OFAC also is revising § 560.405 and § 560.532 of the ITR to make certain conforming changes by deleting references to outdated provisions.

Public Participation

Because the amendment of the ITR involves a foreign affairs function, the provisions of Executive Order 12866 and the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date, are inapplicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory

Flexibility Act (5 U.S.C. 601–612) does not apply.

Paperwork Reduction Act

The collections of information related to the ITR are contained in 31 CFR part 501 (the ''Reporting, Procedures and Penalties Regulations''). Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), those collections of information have been approved by the Office of Management and Budget under control number 1505–0164. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

List of Subjects in 31 CFR Part 560

Administrative practice and procedure, Banks, Banking, Brokers, Foreign Trade, Investments, Loans, Securities, Iran.

■ For the reasons set forth in the preamble, the Office of Foreign Assets Control amends 31 CFR part 560 as follows:

PART 560—IRANIAN TRANSACTIONS REGULATIONS

■ 1. The authority citation of part 560 continues to read as follows:

Authority: 3 U.S.C. 301; 18 U.S.C. 2339B, 2332d; 22 U.S.C. 2349aa–9; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 106–387, 114 Stat. 1549; Pub. L. 110–96, 121 Stat. 1011; E.O. 12613, 52 FR 41940, 3 CFR, 1987 Comp., p. 256; E.O. 12957, 60 FR 14615, 3 CFR, 1995 Comp., p. 332; E.O. 12959, 60 FR 24757, 3 CFR, 1995 Comp., p. 356; E.O. 13059, 62 FR 44531, 3 CFR, 1997 Comp., p. 217.

Subpart D—[Amended]

■ 2. Revise § 560.405 to read as follows:

§ 560.405 Transactions incidental to a licensed transaction authorized.

Any transaction ordinarily incident to a licensed transaction and necessary to give effect thereto is also authorized, except:

(a) A transaction by an unlicensed Iranian governmental entity or involving a debit or credit to an Iranian account not explicitly authorized within the terms of the license;

(b) Provision of any transportation services to or from Iran not explicitly authorized in or pursuant to this part other than loading, transporting, and discharging licensed or exempt cargo there;

(c) Distribution or leasing in Iran of any containers or similar goods owned or controlled by United States persons after the performance of transportation services to Iran;

(d) Financing of licensed sales for exportation or reexportation of agricultural commodities or products, medicine or medical equipment to Iran or the Government of Iran (see § 560.532); and

(e) Letter of credit services relating to transactions authorized in § 560.534. See § 560.535(a).

Subpart E—[Amended]

■ 3. Revise § 560.516 to read as follows:

§ 560.516 Payment and United States dollar clearing transactions involving Iran.

(a) United States depository institutions are authorized to process transfers of funds to or from Iran, or for the direct or indirect benefit of persons in Iran or the Government of Iran, if the transfer is covered in full by any of the following conditions and does not involve debiting or crediting an Iranian account:

(1) The transfer arises from an underlying transaction that has been authorized by a specific or general license issued pursuant to this part;

(2) The transfer arises from an underlying transaction that is not prohibited by this part, such as a non-commercial remittance to or from Iran (e.g., a family remittance not related to a family-owned enterprise); or

(3) The transfer arises from an underlying transaction that is exempted from regulation pursuant to § 203(b) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)), such as an exportation to Iran or importation from Iran of information and informational materials, a travel-related remittance, or payment for the shipment of a donation of articles to relieve human suffering.

(b) United States registered brokers or dealers in securities are authorized to process transfers of funds to or from Iran, or for the direct or indirect benefit of persons in Iran or the Government of Iran, if the transfer is covered in full by any of the conditions set forth in paragraph (a) of this section and does not involve the debiting or crediting of an Iranian account.

(c) Before a United States depository institution or a United States registered broker or dealer in securities initiates a payment on behalf of any customer, or credits a transfer to the account on its books of the ultimate beneficiary, the United States depository institution or United States registered broker or dealer in securities must determine that the underlying transaction is not prohibited by this part.

(d) Pursuant to the prohibitions contained in § 560.208, a United States depository institution or a United States registered broker or dealer in securities may not make transfers to or for the benefit of a foreign-organized entity owned or controlled by it if the underlying transaction would be prohibited if engaged in directly by the U.S. depository institution or U.S. registered broker or dealer in securities.

(e) This section does not authorize transactions with respect to property blocked pursuant to part 535.

■ 4. Revise paragraph (b) of § 560.532 to read as follows:

§ 560.532 Payment for and financing of exports and reexports of commercial commodities, medicine, and medical devices.

* * * * *

(b) *Specific licenses for alternate payment terms.* Specific licenses may be issued on a case-by-case basis for payment terms and trade financing not authorized by the general license in paragraph (a) of this section for sales pursuant to § 560.530. See § 501.801(b) of this chapter for specific licensing procedures.

* * * * *

Dated: November 4, 2008.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E8–26642 Filed 11–6–08; 11:15 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[USCG–2008–1090]

RIN 1625–AA09

Drawbridge Operation Regulations; Atlantic Intracoastal Waterway (AIWW), Elizabeth River, Southern Branch, VA, Maintenance

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District, has approved a temporary deviation from the regulations governing the operation of the Norfolk Southern #7 Railroad Bridge, at AIWW mile 5.8, across the Elizabeth River (Southern Branch) in Chesapeake, VA. Under this temporary deviation, the drawbridge may remain in the closed position on specific dates and times to facilitate structural repairs.

ANNEX 233

758 F.3d 185
United States Court of Appeals,
Second Circuit.

Deborah D. PETERSON, et al., Plaintiffs–Appellees,
v.
ISLAMIC REPUBLIC OF IRAN, et al., Defendants–Appellants. *

No. 13–2952–CV.
|
Argued: May 19, 2014.
|
Decided: July 9, 2014.

Synopsis

Background: Representatives of hundreds of Americans killed in multiple Iran-sponsored terrorist attacks who had billions of dollars in unpaid compensatory damages judgments against Iran stemming from those attacks commenced action against Islamic Republic of Iran under the Terrorism Risk Insurance Act (TRIA) and a statute enacted specifically for satisfying terrorism-related judgments against Iran, seeking award of turnover of $1.75 billion in assets. The United States District Court for the Southern District of New York, Katherine B. Forrest, J., 2013 WL 1155576, granted summary judgment to plaintiffs, and denied reconsideration, 2013 WL 2246790. Defendant appealed.

Holdings: The Court of Appeals, John M. Walker, Jr., Circuit Judge, held that:

inclusion of bank wholly owned Islamic Republic of Iran in definition of "Iran" in statute enacted specifically for satisfying terrorism-related judgments against Iran did not violate Treaty of Amity;

statute enacted specifically for satisfying terrorism-related judgments against Iran did not violate Treaty of Amity;

statute did not violate separation of powers;

seizure of property of bank, as instrumentality of Iran, in satisfaction of liability of Iran to Americans killed in multiple Iran-sponsored terrorist attacks did not constitute a "taking"; and

district court did not abuse its discretion in issuing anti-suit injunction to protect its judgment.

Affirmed.

Attorneys and Law Firms

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& Allison, P.C., Washington, DC; Noel J. Nudelman, Heideman Nudelman & Kalik, P.C., Washington, DC; Robert J. Tolchin, The Berkman Law Office, LLC, Brooklyn, N.Y., on the brief), for Plaintiffs–Appellees and Third Party Defendants–Appellees.

Andreas A. Frischknecht (David M. Lindsey, on the brief), Chaffetz Lindsey LLP, New York, N.Y., for Defendants–Appellants.

Before: WINTER, WALKER, and CABRANES, Circuit Judges.

Opinion

***188** JOHN M. WALKER, JR., Circuit Judge:

To satisfy terrorism-related judgments against Iran, the district court (Forrest, *J.*) awarded turnover of $1.75 billion in assets under both the Terrorism Risk Insurance Act of 2002 ("TRIA") and a statute enacted specifically to address the assets at issue in this case, 22 U.S.C. § 8772. Although Iran argues that the TRIA ownership requirements have not been satisfied, we need not reach this issue in light of Congress's enactment of § 8772. Iran concedes that the statutory elements for turnover of the assets under § 8772 have been satisfied, and we reject Iran's arguments that § 8772 conflicts with the Treaty of Amity between the United States and Iran, violates separation of powers, and effects an unconstitutional taking. We also conclude that the district court did not abuse its discretion in issuing an anti-suit injunction to protect its judgment. We AFFIRM.

BACKGROUND

Plaintiffs-appellees are the representatives of hundreds of Americans killed in multiple Iran-sponsored terrorist attacks, and they have billions of dollars in unpaid compensatory damages judgments against Iran stemming from these attacks. [1] Defendant-appellant Bank Markazi is the Central Bank of Iran, which is wholly owned by the Iranian government. The assets at issue in this appeal are $1.75 billion in cash proceeds of government bonds, currently held in New York by defendant Citibank, N.A., in an omnibus account for defendant Clearstream Banking, S.A., a financial intermediary. One of the customers for whom Clearstream maintains this account is defendant Banca UBAE S.p.A., an Italian bank whose customer, in turn, is Bank Markazi. Bank Markazi concedes that through this chain of parties it has at least a "beneficial interest" in the assets at issue. Plaintiffs seek turnover of these assets to satisfy their judgments.

When plaintiffs first learned of Bank Markazi's interest in the assets in 2008, they obtained restraints against transfer of the assets. In 2010, plaintiffs initiated this action against Bank Markazi, UBAE, Clearstream, and Citibank to obtain turnover of the assets under section 201(a) of the TRIA, which provides that "in every case in which a person has obtained a judgment against a terrorist party ... the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment." Terrorism Risk Insurance Act of 2002, Pub L. No. 107–297, § 201(a), 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 Note "Satisfaction of Judgments from Blocked Assets of Terrorists, Terrorist Organizations, and State Sponsors of Terrorism").

In February 2012, while this action was pending, President Obama issued Executive Order 13,599, which stated:

> [I]n light of the deceptive practices of [Bank Markazi] ... to conceal transactions of sanctioned parties.... [a]ll property and interests in property of the Government of Iran, including [Bank Markazi], that are in the United States ... or that are or hereafter come within the possession or control of any United States person ... are blocked....

Exec. Order No. 13,599, 77 Fed.Reg. 6659, 6659 (Feb. 5, 2012). The assets at issue ***189** (which were still under restraint) were blocked based on this Executive Order. Plaintiffs then filed a motion for partial summary judgment on their TRIA claim.

In August 2012, while that motion was pending, Congress passed the Iran Threat Reduction and Syria Human Rights Act of 2012. That Act included a section, codified at 22 U.S.C. § 8772, which stated that "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al. v. Islamic Republic of Iran et al.,* Case No. 10 Civ. 4518" "shall be subject to execution ... in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of [terrorism]." Pub.L. 112–158, § 502, 126 Stat. 1214, 1258. Plaintiffs then filed a supplemental motion for summary judgment under § 8772.

In March 2013, the district court granted summary judgment to plaintiffs, ordering turnover of the assets on the two independent bases of TRIA section 201(a) and 22 U.S.C. § 8772. *Peterson v. Islamic Republic of Iran,* No. 10 Civ. 4518, 2013 WL 1155576 (S.D.N.Y. Mar. 13, 2013). In July 2013, the district court issued an order directing turnover of the blocked assets and enjoining the parties from initiating a claim to the assets in another jurisdiction. *Peterson v. Islamic Republic of Iran,* No. 10 Civ. 4518 (S.D.N.Y. July 9, 2013), ECF No. 463. Post-judgment, plaintiffs settled with Clearstream and UBAE, and Citibank is a neutral stakeholder, leaving Bank Markazi as the sole appellant.

DISCUSSION

"We review *de novo* a district court's grant of summary judgment, construing the evidence in the light most favorable to the non-movant, asking whether there is a genuine dispute as to any material fact and whether the movant is entitled to judgment as a matter of law." *Padilla v. Maersk Line, Ltd.,* 721 F.3d 77, 81 (2d Cir.2013) (citing Fed.R.Civ.P. 56(a)). "We [also] review *de novo* the district court's legal conclusions, including those interpreting and determining the constitutionality of a statute," *United States v. Stewart,* 590 F.3d 93, 109 (2d Cir.2009), or involving the "interpretation of a treaty," *Swarna v. Al–Awadi,* 622 F.3d 123, 132 (2d Cir.2010).

Bank Markazi argues that the assets at issue are not "assets of" Bank Markazi as required for turnover under TRIA section 201(a), and that even if the assets were held to be "assets of" Bank Markazi, then they would be "the property ... of a foreign central bank ... held for its own account" and thus "immune from attachment and from execution" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1611(b)(1). We need not resolve this dispute under the TRIA, however, as Congress has changed the law governing this case by enacting 22 U.S.C. § 8772. Bank Markazi concedes that plaintiffs have satisfied the statutory elements of their § 8772 claim but argues that turnover under this provision (1) conflicts with the Treaty of Amity between the United States and Iran; (2) violates separation of powers under Article III; and (3) violates the Takings Clause. As we explain below, none of these arguments has merit. We also reject Bank Markazi's challenge to the district court's anti-suit injunction.

I. Treaty of Amity

Bank Markazi argues that turnover of the assets under § 8772 would conflict with obligations of the United States under the Treaty of Amity, which is a self-executing treaty between the United ***190** States and Iran that was signed in 1955. Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899; *see also McKesson Corp. v. Islamic Republic of Iran,* 539 F.3d 485, 488 (D.C.Cir.2008) ("The Treaty of Amity, like other treaties of its kind, is self-executing."). But even if there were a conflict, the later-enacted § 8772 would still apply: "The Supreme Court has held explicitly that legislative acts trump treaty-made international law, stating that 'when a statute which is subsequent in time [to a treaty] is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.' " *United States v. Yousef,* 327 F.3d 56, 110 (2d Cir.2003) (alteration in original) (quoting *Breard v. Greene,* 523 U.S. 371, 376, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998)); *see also Whitney v. Robertson,* 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation.... [and] if the two are inconsistent, the one last in date will control the other."). Indeed, when Iran raised a similar argument against turnover under TRIA section 201(a) in a different case, we concluded that even if this provision conflicted with the Treaty of Amity, "the TRIA would have to be read to abrogate that portion of the Treaty." *Weinstein v. Islamic Republic of Iran,* 609 F.3d 43, 53 (2d Cir.2010). [2]

In any event, we see no conflict between § 8772 and the Treaty of Amity. Bank Markazi first contends that Congress's inclusion of Bank Markazi in its definition of "Iran" in § 8772(d)(3) violates Article III.1 of the Treaty, which states that Iranian companies "shall have their juridical status recognized within" the United States. But as Bank Markazi acknowledges, this argument has been rejected by our Court in the context of a similar provision in the TRIA. *See Weinstein,* 609 F.3d at 53 (concluding that Iran's argument was foreclosed by the Supreme Court's analysis of similar provisions in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982)).

Bank Markazi also argues that § 8772 violates Articles IV.1 and V.1, which require that treatment of Iranian companies and their property interests be "fair and equitable" and no "less favorable than that accorded nationals and companies of any third country." But the provision of § 8772 that Bank Markazi points to contains no country-based discrimination; rather, it simply states that "[n]othing in this section shall be construed ... to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than [these] proceedings." 22 U.S.C. § 8772(c). Contrary to Bank Markazi's argument, this provision is expressly *non*-discriminatory.

Finally, Bank Markazi argues that turnover under § 8772 violates Article III.2, which accords Iranian companies "freedom of access to [U.S.] courts," and Article IV.2, which states that Iranian "property shall not be taken except for a public purpose" and upon "prompt payment of just compensation." As discussed below, however, § 8772 neither usurps the adjudicative role of the courts nor effects ***191** an unconstitutional taking of Bank Markazi's assets.

In sum, turnover of the blocked assets under § 8772 is entirely consistent with the United States' obligations under the Treaty of Amity. And, assuming *arguendo* that it is not, § 8772 would have to be read to abrogate any inconsistent provisions in the Treaty.

II. Separation of Powers

Bank Markazi next challenges § 8772 as violating the separation of powers between the legislative branch and the judiciary under Article III by compelling the courts to reach a predetermined result in this case. We conclude, however, that § 8772 does not usurp the judicial function; rather, it retroactively changes the law applicable in this case, a permissible exercise of legislative authority.

In the leading case to find a separation-of-powers violation, *United States v. Klein,* 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1872), Congress had passed a statute requiring courts to treat pardons of Confederate sympathizers as conclusive evidence of disloyalty, and the Supreme Court found the statute invalid for prescribing a rule of decision to the courts. But while *Klein* illustrates that Congress may not "usurp[ ] the adjudicative function assigned to the federal courts," later cases have explained that Congress may "chang[e] the law applicable to pending cases," even when the result under the revised law is clear. *Axel Johnson Inc. v. Arthur Andersen & Co.,* 6 F.3d 78, 81 (2d Cir.1993).

In *Robertson v. Seattle Audubon Society,* 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992), Congress had passed legislation to resolve two environmental suits challenging logging in the Pacific Northwest. The result of the cases under the new law was clear: the statute stated that "Congress hereby determines and directs" that if the forests at issue were managed under the terms of the new statute, it would "meet[ ] the statutory requirements that are the basis for" the plaintiffs' environmental law challenges in those particular cases. 503 U.S. at 434–35, 112 S.Ct. 1407 (quoting Department of the Interior and Related Agencies Appropriations Act, Pub.L. No. 101–121, § 318(b)(6)(A), 103 Stat. 701, 747 (1989)). The Ninth Circuit held this statute to be unconstitutional under *Klein* as directing a particular decision in the two cases. *Id.* at 436, 112 S.Ct. 1407. But the Supreme Court rejected this position, concluding instead that "[t]o the extent that [the statute] affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases," not by compelling findings or results under those provisions. *Id.* at 440, 112 S.Ct. 1407.

Our court rejected a similar separation-of-powers challenge to section 27A(a) of the Securities Exchange Act of 1934, which was enacted to preserve pending securities law claims that would otherwise have been dismissed as untimely. *Axel Johnson,* 6

F.3d at 80–82. We noted that, like the statute in *Robertson,* section 27A(a) does not compel findings or results under old law, but rather "constitutes a change in law applicable to a limited class of cases" that "leaves to the courts the task of determining whether a claim falls within the ambit of the statute." *Id.* at 82.

Similarly, § 8772 does not compel judicial findings under old law; rather, it changes the law applicable to this case. And like the statutes at issue in *Robertson* and *Axel Johnson,* § 8772 explicitly leaves the determination of certain facts to the courts:

> [T]he court shall determine whether Iran holds equitable title to, or the beneficial interest in, the assets [at issue] and that no other person possesses a constitutionally ***192** protected interest in the assets ... under the Fifth Amendment to the Constitution of the United States. To the extent the court determines that a person other than Iran holds—
>
> (A) equitable title to, or a beneficial interest in, the assets ... (excluding a custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran); or
>
> (B) a constitutionally protected interest in the assets ...,
>
> such assets shall be available only for execution or attachment in aid of execution to the extent of Iran's equitable title or beneficial interest therein and to the extent such execution or attachment does not infringe upon such constitutionally protected interest.

22 U.S.C. § 8772(a)(2).

Bank Markazi argues that while § 8772(a)(2) may formally give discretion to the courts, it effectively compels only one possible outcome, as Iran's beneficial interest in the assets had been established by the time Congress enacted § 8772. But this argument is foreclosed by the Supreme Court's decision in *Robertson,* as the statute there was specifically enacted to resolve two pending cases, and the Supreme Court found no constitutional violation. Indeed, it would be unusual for there to be more than one likely outcome when Congress changes the law for a pending case with a developed factual record.

As we have noted, "[t]he conceptual line between a valid legislative change in law and an invalid legislative act of adjudication is often difficult to draw," *Axel Johnson,* 6 F.3d at 81, and there may be little functional difference between § 8772 and a hypothetical statute directing the courts to find that the assets at issue in this case are subject to attachment under existing law, which might raise more concerns. But we think it is clear that under the Supreme Court's guidance in *Robertson*, § 8772 does not cross the constitutional line.

III. Takings Clause

Bank Markazi's final challenge to § 8772 is that it effects an unconstitutional taking. *See* U.S. Const., amend. V ("[N]or shall private property be taken for public use, without just compensation."). As we have already stated in a similar case against another Iranian bank, however, "where the underlying judgment against Iran has not been challenged, seizure of [the bank's] property, as an instrumentality of Iran, in satisfaction of that liability does not constitute a 'taking' under the Takings Clause." *Weinstein,* 609 F.3d at 54.

Bank Markazi argues that this case raises retroactivity concerns that were not present in *Weinstein* because § 8772 was enacted after the assets were first restrained. But this is not a case in which legislation "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability." *E. Enters. v. Apfel,* 524 U.S. 498, 528–29, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (plurality opinion). Iran—the 100% owner of Bank Markazi—had already been found liable to plaintiffs for billions of dollars in uncontested judgments, and § 8772 simply helps plaintiffs reach Iranian assets in partial satisfaction of these judgments. "Here, where Bank [Markazi's] assets are subject to attachment to satisfy a judgment against its foreign sovereign, the underlying purpose of the Takings Clause is in no way violated by attachment of Bank [Markazi's] assets." *Weinstein,* 609 F.3d at 54.

IV. Anti–Suit Injunction

Bank Markazi's final argument on appeal challenges the district court's order ***193** that it "shall be permanently restrained and enjoined from instituting or prosecuting any claim or pursuing any actions against Clearstream in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the Blocked Assets." *Peterson v. Islamic Republic of Iran,* No. 10 Civ. 4518, slip op. at 12 (S.D.N.Y. July 9, 2013), ECF No. 463. Bank Markazi argues that the district court lacked jurisdiction to issue this impermissible restraint on its property outside the United States.

As this court has explained, however, "federal courts ... have inherent power to protect their own judgments from being undermined or vitiated by vexatious litigation in other jurisdictions." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 500 F.3d 111, 124 (2d Cir.2007) (emphasis omitted). "The standard of review for the grant of a permanent injunction, including an anti-suit injunction, is abuse of discretion." *Id.* at 118–19. We see no abuse of discretion here, especially as Bank Markazi expressly consented to this language in the district court. At the hearing on this order, Bank Markazi's counsel objected to the anti-suit injunction as overly broad, the district court modified the language in response to this objection, and Bank Markazi's counsel then expressly stated, "That's fine with us as well, your Honor." Transcript of Conference at 24, *Peterson v. Islamic Republic of Iran,* No. 10 Civ. 4518 (S.D.N.Y. July 9, 2013), ECF No. 466. Because this issue does not involve jurisdictional concerns, Bank Markazi has no basis to now object to this injunction on appeal. *See Kraebel v. N.Y. City Dep't of Hous. Pres. & Dev.,* 959 F.2d 395, 401 (2d Cir.1992) ("We have repeatedly held that if an argument has not been raised before the district court, we will not consider it.").

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

All Citations

758 F.3d 185

Footnotes

* Consistent with the order entered by this Court on October 18, 2013, ECF No. 118, we use the short-form caption for the purpose of publishing this opinion.

1 The appellees first entered this action in various procedural postures, but they are all judgment creditors of Iran and are referred to collectively as "plaintiffs" for ease of reference.

2 Additionally, § 8772, like TRIA section 201(a), contains a broad provision stating that it applies "notwithstanding any other provision of law," 22 U.S.C. § 8772(a)(1), and "the Courts of Appeals have regularly interpreted such 'notwithstanding' provisions 'to supersede all other laws,' " *Weinstein,* 609 F.3d at 53 (quoting *Cisneros v. Alpine Ridge Grp.,* 508 U.S. 10, 18, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993)).

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Navigation Provisions in United States Commercial Treaties

The opening of American ports along the Great Lakes and the St. Lawrence River to ocean-going vessels following the completion of the St. Lawrence Seaway draws attention anew to the legal basis for entry of foreign merchant vessels into American ports and waters. The present inquiry concerns the bilateral treaty provisions according such rights in the treaties currently in force and looks particularly to the right of entry and treatment in American ports. A number of treaties formerly in force are not considered; the limitations of a brief study justify their exclusion.[1]

For the purpose of the present study, United States commercial treaties may be chronologically arranged into three groups: (1) those perfected during the nineteenth century (a number of which have been terminated or superseded by more recent treaties),[2] (2) those concluded in the period between the two World Wars (a substantial number of which are in force),[3] and (3) those negotiated since 1946 (comprising the greater number of instruments now in force).[4] With few exceptions, these instruments, generally styled treaties of "friendship, commerce, and navigation," contain provisions (of varying length and detail) respecting the right of foreign vessels to enter American ports and waters for commercial purposes and prescribing the standards of treat-

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[1] A number of post-World-War-I treaties contain provisions respecting the jurisdiction of consular officials in disputes involving the internal order and discipline of national merchant vessels. These provisions are not discussed in the present study.

[2] Those in force are: Great Britain (1815), 8 *Stat.* 228; France (1822), 8 *Stat.* 278; Colombia (1846), 9 *Stat.* 881; Brunei (1850), 10 *Stat.* 909; Costa Rica (1851), 10 *Stat.* 916; Argentina (1852), 10 *Stat.* 1005; Bolivia (1858), 12 *Stat.* 1003; Paraguay (1859), 12 *Stat.* 1091; Yugoslavia (Serbia, 1881), 22 *Stat.* 963; and Spain (1902), 33 *Stat.* 2105.

[3] Those in force are: Honduras (1927), 45 *Stat.* 2618; Norway (1928), 47 *Stat.* 2135; Austria (1928), 47 *Stat.* 1876; Turkey (1929), 46 *Stat.* 2743; Saudi Arabia (1933), 48 *Stat.* 1826; Finland (1934), 49 *Stat.* 2659; Thailand (1937), 53 *Stat.* 1731; Liberia (1938), 54 *Stat.* 1739; and Iraq (1938), 54 *Stat.* 1790.

[4] Those in force are: China (1946), 63 *Stat.* 1299; Yemen (1946), 60 *Stat.* 1782; Nepal (1947), 61 *Stat.* 2566; Italy (1948), 63 *Stat.* 2255; Ireland (1950), 1 U.S.T. 785; Denmark (1951), T.I.A.S. 4797; Ethiopia (1951), 4 U.S.T. 2134; Israel (1951), 5 U.S.T. 550; Greece (1951), 5 U.S.T. 1829; Japan (1953), 4 U.S.T. 2063; Federal Republic of Germany (1954), 7 U.S.T. 1839; Iran (1955), 8 U.S.T. 899; Netherlands (1956), 8 U.S.T. 2043; Korea (1956), 8 U.S.T. 2217; Nicaragua (1956), 9 U.S.T. 449; Muscat and Oman (1958), T.I.A.S. 4530; Pakistan (1959), T.I.A.S. 4683; France (1959), T.I.A.S. 4625; and Viet-Nam (1961), U.S. Senate, Executive L, 87th Cong., 1st Sess., 1961. Although the Senate has given its consent, the treaty with Belgium (Feb. 21, 1961) has not entered into force. Navigation provisions are similar to those in the treaties with Germany and the Netherlands. See U.S. Senate, Executive J, 87th Cong., 1st Sess., 1961.

ment. Basically, the stipulations evince the established American policy of mutual nondiscrimination in matters of commerce and navigation. The prescribed standard is customarily couched in terms of equality, national treatment, or most-favored-nation treatment. In the more recent treaties, the standard finds expression in terms of both national and most-favored-nation treatment. Language and phraseology vary from instrument to instrument, but the essential stipulations make it possible to discern a pattern of standard treaty rights. It will be useful to examine initially the navigation provisions characteristic of each of the mentioned periods and then to consider in more detail certain standard clauses, such as those on entry, the coasting trade, and port charges and duties.

Nineteenth-Century Treaties

As a rule, the navigation provisions of the treaties concluded during the nineteenth century are less uniform than those instruments perfected in the present century. These earlier provisions customarily include *inter alia,* the right of entry, flag recognition, reservation of the coasting trade, and national treatment with respect to tonnage duties and port charges.[5] In addition, several treaties contain special navigation

[5] The treaty with Argentina (1852) is an illustration of the treaties of this period. Its pertinent provisions are as follows:

"Art. II. There shall be between all the territories of the United States and all the territories of the Argentine Confederation a reciprocal freedom of commerce. The citizens of the two countries, respectively, shall have liberty, freely and securely, to come with their ships and cargoes to all places, ports, and rivers in the territories of either, to which other foreigners, or the ships or cargoes of any other foreign nation or State, are, or may be, permitted to come; to enter into the same, and to remain and reside in any part thereof, respectively; to hire and occupy houses and warehouses, for the purposes of their residence and commerce; to trade in all kinds of produce, manufactures, and merchandise of lawful commerce; and generally to enjoy, in all their business, the most complete protection and security, subject to the general laws and usages of the two countries respectively. In like manner, the respective ships of war and post office or passenger packets of the two countries, shall have liberty, freely and securely, to come to all harbors, rivers, and places to which other foreign ships of war and packets are, or may be, permitted to come; to enter into the same, to anchor and remain there and refit, subject always to the laws and usages of the two countries respectively.

"Art. III. The two high contracting parties agree that any favor, exemption, privilege, or immunity whatever, in matters of commerce or navigation, which either of them has actually granted, or may hereafter grant, to the citizens or subjects of any other government, nation, or State, shall extend, in identity of cases and circumstances, to the citizens of the other contracting party, gratuitously, if the concession in favor of that other government, nation, or State, shall have been gratuitous, or in return for an equivalent compensation, if the concession shall have been conditional.

"Art. V. No other or higher duties or charges, on account of tonnage, light or harbor dues, pilotage, salvage in case of average or shipwreck, or any other local charges, shall be imposed in the ports of the two contracting parties on the vessels of the other than those payable in the same ports on its own vessels.

"Art. VI. The same duties shall be paid, and the same draw-backs and bounties

provisions. For example, limited discriminatory duties are prescribed in the treaty with France (1822).[6] The treaties with Colombia (1846) and Bolivia (1858) prescribe the rights and duties of neutral vessels in time of war.[7]

As a rule, the instruments of this period promise conditional most-favored-nation treatment in all matters of commerce and navigation, with only an occasional reference to national treatment. Use of the former standard requires that the party according a favor to a third state offer a like favor to the citizens and vessels of the other contracting party, gratuitously if the initial favor were gratuitous, or in return for an equivalent compensation if the original grant were conditional.[8] As an exception to this general rule, the treaty with Yugoslavia (Serbia, 1881) provides that any privilege affecting navigation that is accorded to a third state shall be accorded "unconditionally" to the other contracting party.[9] Although the treaty with Brunei (1850) promises most-favored-nation treatment in matters of trade and commerce, the precise commitment to such treatment (whether conditional or unconditional) is undefined. Consistent with the then general practice, the parties doubtless predicated such treatment on a conditional basis.[10]

Post-World-War-I Treaties

Navigation provisions of the treaties concluded in the 1920's and 1930's, exhibiting general uniformity in language and scope, contain greater detail than like provisions included in the instruments perfected in the previous century. Briefly these articles set forth (1) the right of a foreign vessel to discharge a portion of its cargo at one port and then

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allowed, upon the importation or exportation of any article into or from the territories of the United States or into or from the territories of the Argentine Confederation, whether such importation or exportation be made in vessels of the United States or in vessels of the Argentine Confederation.

"Art. VII. The contracting parties agree to consider and treat as vessels of the United States and of the Argentine Confederation all those which, being furnished by the competent authority with a regular passport or sea letter, shall, under the then existing laws and regulations of either of the two Governments, be recognized fully and bona fide as national vessels, by that country to which they respectively belong."

[6] Art. V. These duties apply to foreign vessels.

[7] See the treaty with Colombia, arts. XV, XVII, XXI, XXII, XXIV, and XXVI; and the treaty with Bolivia, arts. XV, XVI, XVII, XX, XXII, XXIV, and XXV. These articles include such provisions as: free ships make free goods, the enumeration of articles of contraband, rights of visit and search by belligerent vessels, the nature and existence of a blockade, the authority and functions of prize courts, the proof of vessel nationality during war, and the prohibition of letters of marque.

[8] See Green H. Hackworth, 5 Digest of International Law (Washington: Government Printing Office, 1943) 269–270, for a discussion of the conditional most-favored-nation clause. See, Argentina, art. III; Paraguay, art. III; Bolivia, art. II; Colombia, art. II; and Costa Rica, art. III.

[9] Art. XIII.

[10] Art. II; see Hackworth, *op. cit.*, 272.

to proceed to another port (this provision being carefully circumscribed to exclude foreign participation in the coasting trade), (2) unconditional most-favored-nation treatment with respect to the collection and amount of duties on imports and exports, (3) flag recognition, (4) reciprocal equality regarding bounties and drawbacks, (5) right of vessels of either party to import or export goods into or from the other party, with national treatment in respect of all charges and duties, (6) national treatment respecting pilotage duties and other port charges, and (7) freedom of transit through the territories and waters of the other, excluding any waterways that are part of an international boundary.[11]

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[11] The treaty with Norway (1928) is representative of the treaties of this period. Its pertinent provisions are as follows:

"Art. VII. Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation. * * *

"All articles which are or may be legally imported from foreign countries into ports of the United States or are or may be legally exported therefrom in vessels of the United States may likewise be imported into those ports or exported therefrom in Norwegian vessels, without being liable to any other or higher duties or charges whatsoever than if such articles were imported or exported in vessels of the United States; and reciprocally, all articles which are or may be legally imported from foreign countries into the ports of Norway or are or may be legally exported therefrom in Norwegian vessels may likewise be imported into these ports or exported therefrom in vessels of the United States without being liable to any other or higher duties or charges whatsoever than if such articles were imported or exported in Norwegian vessels.

"In the same manner there shall be perfect reciprocal equality in relation to the flags of the two countries with regard to bounties, drawbacks, and other privileges of this nature of whatever denomination which may be allowed in the territories of each of the Contracting Parties, on goods imported or exported in national vessels so that such bounties, drawbacks and other privileges shall also and in like manner be allowed on goods imported or exported in vessels of the other country.

"With respect to the amount and collection of duties on imports and exports of every kind, each of the two High Contracting Parties binds itself to give to the nationals, vessels and goods of the other the advantage of every favor, privilege or immunity which it shall have accorded to the nationals, vessels and goods of a third state, whether such favored State shall have been accorded such treatment gratuitously or in return for reciprocal compensatory treatment. Every such favor, privilege or immunity which shall hereafter be granted the nationals, vessels or goods of a third State shall simultaneously and unconditionally, without request and without compensation be extended to the other High Contracting Party, for the benefit of itself, its nationals, vessels, and goods. * * *

"Art. IX. The vessels and cargoes of one of the High Contracting Parties shall, within the territorial waters and harbors of the other Party in all respects and unconditionally be accorded the same treatment as the vessels and cargoes of that Party, irrespective of the port of departure of the vessel, or the port of destination of the cargo. It is especially agreed that no duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges of whatever denomination, levied in the name or for the profit of the Government, public

Treaties of this period include two significant improvements for the protection of American interests abroad: (1) in commercial matters, the most-favored-nation standard is expressed in unconditional (rather than conditional) terms, and (2) although some privileges continue to find expression in terms of the most-favored-nation standard, there is increased application of national treatment or equality as the desirable norm in commercial and navigation matters.[12]

The customary navigation clauses are not, however, incorporated into the treaties with Iraq (1938) and Turkey (1929) and the provisional agreement with Saudi Arabia (1933). These instruments, being shorter than the general commercial treaties, contain only brief references to navigation. The provisional agreement with Saudi Arabia merely prescribes that each shall accord to the other unconditional most-favored-nation treatment with respect to duties and charges affecting commerce and navigation.[13] By the terms of the treaty with Iraq, each party agrees to accord both national and most-favored-nation treatment to the vessels of the other (participation in the coasting trade being specifically excepted).[14] In the treaty with Turkey, the agreed standards are also national and most-favored-nation treatment, participation in the coasting trade and eligibility for domestic subsidies being specifically excepted. In all other respects, where there is variance from

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functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories or territorial waters of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels.

"Art. X. Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

"Art. XI. Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties shall be permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the other High Contracting Party, and to proceed with the remaining portions of such cargoes to any other ports of the same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward, provided, however, that the coasting trade of the High Contracting Parties is exempt from the provisions of this Article and from the other provisions of this Treaty, and is to be regulated according to the laws of each High Contracting Party in relation thereto. It is agreed, however, that nationals of either High Contracting Party shall within the territories of the other enjoy with respect to the coasting trade the most favored nation treatment."

[12] The unconditional most-favored-nation clause generally provides that any advantage that either high contracting party may extend to a third state shall simultaneously and unconditionally, without request and without compensation, be extended (in a like situation) to the other contracting party. See Hackworth, *op. cit.*, V, 270.

[13] Art. III.

[14] Art. III.

national treatment, Turkish vessels are to be treated as favorably as those of the most-favored nation.[15]

Post-World-War-II Treaties

The post-World-War-II commercial treaty program of the United States has emphasized the extension and improvement of provisions respecting the rights of American citizens and enterprises abroad and the creation of an environment conducive to the flow abroad of American investment capital. At the same time, because of the increased utilization of discriminatory shipping practices, the navigation provisions have been strengthened through greater use of the national treatment standard.[16] Navigation provisions in these treaties manifest substantial uniformity in scope and language, with corresponding brevity—the treaties with China (1946), Italy (1948), and, to a lesser extent, the Federal Republic of Germany (1954) excepted.[17] Extensive

[15] Art. III.

[16] See U. S. Department of State, Commercial Treaty Program of the United States (Pub. 6565, 1958) 4; Herman Walker, "Modern Treaties of Friendship, Commerce, and Navigation," 42 Minnesota Law Review, (1958) 816; Robert R. Wilson, "Postwar Commercial Treaties of the United States," 43 American Journal of International Law, (1949) 273; and U.S. Senate, Merchant Marine Study and Investigation, 81st Cong., 2d Sess., 1950, Rept. 2494, pp. 385–387.

[17] Representative of the treaties of this period is the treaty with Eire (1950). Its pertinent provisions are as follows:

"Art. XVIII

"1. Between the territories of the two Parties there shall be freedom of commerce and navigation.

"2. Vessels under the flag of either Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that Party both on the high seas and within the ports, places and waters of the other Party.

"3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national and most-favoured-nation treatment within the ports, places and waters of such other Party; but each Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries.

"4. Vessels of either Party shall be accorded national and most-favoured-nation treatment by the other Party with respect to the right to carry all articles that may be carried by vessel to or from the territories of such other Party; and such Articles shall be accorded treatment no less favourable than that accorded like articles carried in vessels of such other Party, with respect to: (a) duties and charges of all kinds, (b) the administration of the customs, and (c) bounties, drawbacks and other privileges of this nature.

"5. Vessels of either Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other Party, and shall receive friendly treatment and assistance.

"6. The term "vessels," as used herein means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraph 5 of the present Article, include fishing vessels or vessels of war.

privileges, expressed in both national treatment and most-favored-nation terms, fortify the mutual nondiscriminatory objective of the parties. Reflecting the increased utilization of publicly owned vessels, the navigation provisions apply to both privately and publicly owned merchantmen. (Benefits, other than those relating to flag recognition and the right of refuge, do not apply, however, to fishing vessels or vessels of war.)[18] Substantially similar provisions encompass such matters as: (1) national and most-favored-nation treatment in ports, (2) flag recognition, (3) national and most-favored-nation treatment with respect to the carriage of cargo between the parties, (4) reservation of the coasting trade, and (5) right of refuge. In addition, a customary provision permits the parties certain freedom of action to protect their national interests. In this regard, it is agreed that the treaty does not preclude the application by either party of measures necessary to fulfill its obligations for the maintenance or restoration of international peace and security or to protect its interests in a national emergency.[19]

In addition to the standard provisions, some treaties contain supplementary stipulations. Reciprocal recognition of tonnage certificates, so long as both parties follow substantially the same measurement system, is prescribed in the treaties with Greece (1951) and Germany (1954).[20] By the terms of the China treaty (1946), each party promises to make available competent pilots to take the vessels of the other into and out of its ports and waters.[21]

In contrast to the inclusive treaties of friendship, commerce, and navigation, certain treaties of "friendship and commerce" lack detailed navigation provisions. The treaty with Pakistan (1959) prescribes that the nationals and companies of each shall be accorded national and most-favored-nation treatment in all matters affecting importation and exportation.[22] Those with Yemen (1946) and Nepal (1947) stipulate

"Art. XX.

"1. The present treaty shall not preclude the application of measures:

"(d) necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

[18] See the treaties with Ireland, art. XVIII (6); Nicaragua, art. XIX (6); Korea, art. XIX (6); Israel, art. XIX (6); Iran, art. X (6); Muscat and Oman, art. X (6); Japan, art. XIX (7); Germany, art. XIX (3); Netherlands, art. XIX (6); China, art. XXI (2); Italy, art. XIX (2); Denmark, art. XIX (6); and Viet-Nam, art. XI (6).

[19] Nicaragua, art. XXI 1 (d); Korea, art. XXI 1 (d); Israel, art. XXI 1 (d); Germany, art. XXIV 1 (d); Netherlands, art. XXII 1 (d); Ethiopia, art. XVI 1 (d); China, art. XXVI 1 (d); Italy, art. XXIV 1 (e); Muscat and Oman, art. XI 1 (d); Denmark, art. XXI 1 (d); Viet-Nam, art. XIII 1 (d); and Ireland art. XX 1 (d). It is also agreed, in this last-mentioned treaty, that its provisions do not preclude the application of measures necessary to fulfill the obligations of a party as a neutral in time of war. Art. XX 1 (e).

[20] Greece, art. XXI (3); Germany, art. XIX (2).

[21] Art. XXII (4).

[22] Art. XIV (5).

that each party shall grant most-favored-nation treatment with regard to commerce and navigation.[23] In contrast, the 1959 "establishment" treaty with France lacks any reference to navigation. This omission, it has been explained, results from the French desire to preserve unchanged certain discriminatory shipping practices. Although the regulations would not have had an adverse effect upon American shipping interests, it was considered more prudent, from the perspective of American policy, to omit all references to navigation, rather than to accept a provision that might be interpreted as a substantial departure from the established policy of mutual non-discrimination in navigation and shipping.[24]

One innovation of far-reaching significance, contained in a substantial number of the treaties, is the limited compromissory clause. In the event of a dispute regarding the interpretation or application of the treaty, unresolved by diplomacy, the parties are to submit the issue to the International Court of Justice. Although this compromissory clause may prove to be of greatest utility with regard to the establishment provisions, its incorporation in the treaties fortifies the legal basis of the navigation provisions.[25]

Freedom of Commerce and Navigation, the Right of Entry, and Flag Recognition

Three customary navigation stipulations provide for: (1) the freedom of commerce and navigation between the territories of the parties, (2) the privilege of entry into the ports and waters of the other, and (3) the recognition of vessel nationality. In practice, the declaration that there shall be reciprocal freedom of commerce and navigation between the territories of the parties is usually (and logically) the introductory clause of the navigation provisions. Nineteenth-century treaties customarily contain such a provision.[26] In the treaty with Great Britain, signed in 1815, this reciprocal liberty is restricted, as far as the British Empire is concerned, to His Majesty's territories in Europe and the principal British ports in the East Indies.[27] A similar declaration,

[23] Yemen, art. IV; Nepal, art. VII.

[24] U.S. Senate, Executive G, 86th Cong., 2d Sess., 1960, p. 2.

[25] Viet-Nam, art. XIV; China, art. XXVIII; Italy, art. XXVI; Denmark, art. XXIV (2); Ireland, art. XXIII; Japan, art. XXIV (2); Ethiopia, art. XVII; Israel, art. XXIV (2); Greece, art. XXVI (2); Germany, art. XXVII (2); Iran, art. XXI (2); Netherlands, art. XXV (2); Korea, art. XXIV (2); Nicaragua, art. XXIV (2); France, art. XVI (2); Pakistan, art. XXIII (2). See Robert R. Wilson, United States Commercial Treaties and International Law (New Orleans: Hauser Press, 1960) 23–25.

[26] See the treaties with: Bolivia, art. III; Yugoslavia, art. I; Argentina, art. II; Paraguay, art. II (with slight modifications); Costa Rica, art. II; and Spain, art. II.

[27] Arts. I and III. The Eire treaty (1950) supersedes this with regard to Ireland. American vessels' access to British ports in the West Indies and North America was finally permitted in 1830 by statute. See Lloyd W. Maxwell, Discriminating Duties and the American Merchant Marine (New York: Wilson, 1926) 35–38.

promising freedom of commerce and navigation, is contained in the treaties concluded since World War I.[28] Despite its continued use, this broad declaration appears to be hortatory, indicative of the parties' good intentions, and not a commitment to undertake specific action.

Stipulations respecting the right of one party's vessels to enter the other's ports and waters do not evidence the same degree of uniformity as is suggested by the declaration that there shall be freedom of commerce and navigation.[29] Under the terms of the older commercial treaties, the citizens of each party are permitted to bring their vessels and cargoes to the ports and waters of the other that are open to foreign commerce or to which foreign vessels may come.[30] This privilege is customarily fashioned in broad terms without reference to the standard of treatment regulating the privilege of entry. There are, nevertheless, a few exceptions; the treaty with Brunei (1850), for example, establishes the right of entry on a most-favored-nation basis.[31] In the treaty with Colombia (1846), vessels of each party, permitted to frequent all coasts and countries of the other, are promised national treatment with regard to commerce and navigation. (It is specifically provided, however, that such treatment does not authorize participation in the coasting trade.)[32] No specific mention of vessels' entry is made in the treaty with Spain (1902). The citizens and subjects of each party are permitted, however (on a reciprocal basis), to enter, travel, and reside in all parts of the other's territories.[33]

In contrast to the stipulations of the treaties mentioned, the provision regarding vessels' entry contained in the treaties perfected in the 1920's and 1930's is fashioned in most-favored-nation terms. Nationals of each party, equally with those of the most favored nation, have the liberty to come with their vessels and cargoes to the ports, places, and waters of the other that are, or may be, open to foreign commerce and navigation.[34] Since 1946, this provision has been broadened and phrased in both national and most-favored-nation terms. Vessels of one party,

[28] Austria, art. VIII; Norway, art. VII; Liberia, art. VII; Thailand, art. III; Finland, art. VI; Honduras, art. VII; Ireland, art. XVIII (1); Nicaragua, art. XIX (1); Korea, art. XIX (1); Israel, art. XIX (1); Iran, art. X (1); Muscat and Oman, art. X (1); Greece, art. XXI (1); Japan, art. XIX (1); Ethiopia, art. XIV (1); China, art. XXI (1); Italy, art. XIX (1); Denmark, art. XIX (1); and Viet-Nam, art. XI (1).

[29] Entry in the technical sense, as embodied in navigation laws, means a vessel's compliance with the regulations of the port for the purpose of taking on or discharging passengers or cargo and not merely putting in for orders or supplies or repairs. Florence, 26 F.2d 606 (1928).

[30] See the treaties with: Bolivia, art. III; Yugoslavia, art. I; Argentina, art. II; Paraguay, art. II; Costa Rica, art. II; and Spain, art. II. The right of entry to British ports is restricted to those in Europe and the East Indies, arts. I and III.

[31] Art. II.

[32] Art. III.

[33] Art. II.

[34] Austria, art. VII; Norway, art. VII; Liberia, art. VII; Thailand, art. III; Finland, art. VI; and Honduras, art. VII.

on equal terms with the vessels of the other party and on equal terms with the vessels of any third country, have the liberty to come to all ports and places open to foreign commerce and navigation.[35] An exception to this practice is evident in the treaties with China (1946) and Italy (1948), wherein the privilege of entry is established only on a most-favored-nation basis.[36]

The right of entry into American ports, as prescribed in the mentioned treaties, pertains not only to coastal ports and waters but also to those located along the Great Lakes and inland waterways, where navigable by ocean-going vessels. A restrictive application of this general privilege to coastal ports would be inconsistent with the parties' declaration of freedom of commerce and navigation.[37]

Another practice evident in a substantial number of treaties is the incorporation of a provision respecting the mutual recognition of vessel nationality. Although the language of the stipulations varies, with greater uniformity evident in the more recent treaties, it is agreed that vessels properly documented by one party will be recognized by the other party as vessels of the former state, whether within territorial waters or on the high seas. With the increased utilization of flags of convenience, the inclusion of such a provision may be of significance.[38]

Coastal Trade

As a matter of national policy, the United States prohibits foreign participation in the coasting trade (*i.e.*, the carriage of cargo or passengers from one American port to another). With few exceptions, participation in such trade is restricted to vessels (1) built in the United States, (2) documented under the laws of the United States, and (3) owned by citizens of the United States.[39] To qualify as an American citizen, a corporation must (1) be organized under the laws of the

[35] Ireland, art. XVIII (3); Nicaragua, art. XIX (3); Korea, art. XIX (3); Israel, art. XIX (3); Iran, art. X (3); Muscat and Oman, art. X (3); Greece, art. XXI (4); Japan, art. XIX (3); Germany, art. XX (1); Netherlands, art. XIX (2); Ethiopia, art. XIV (2); Denmark, art. XIX (3); and Viet-Nam, art. XI (3).

[36] China, art. XXI; and Italy, art. XIX (3).

[37] See the letter of W. W. Butterworth, Director of Far Eastern Affairs (State Department), to Senator E. D. Thomas, Apr. 27, 1948, in U.S. Senate, Subcommittee of Committee on Foreign Relations, Hearing, Friendship, Commerce, and Navigation with China, 80th Cong., 2d Sess., 1948, p. 25. The author understands that, during negotiations for a commercial treaty, the question of the application of the right-of-entry provision to the Great Lakes and the St. Lawrence Seaway was specifically raised. In response, the State Department declared that the provision was applicable.

[38] Argentina, art. VII; Paraguay, art. VII; Colombia, Additional Article; Spain, art. XI; Norway, art X; Liberia, art. XV; Finland, art. XV; Honduras, art. X; Ireland, art. XVIII (2); Nicaragua, art. XIX (2); Korea, art. XIX (2); Israel, art. XIX (2); Iran. art. X (2); Muscat and Oman, art. X (2); Greece, art. XXI (2); Japan, art. XIX (2); Germany, art. XIX (1); Netherlands, art. XIX (1); China, art. XXI (2); Italy, art. XIX (2); Denmark, art. XIX (2); and Viet-Nam, art. XI (2).

[39] 46 U.S.C. secs. 289, 883.

United States or of a state, (2) retain a president, chairman of the board of directors, and a majority of directors necessary to constitute a quorum who are American citizens, and (3) have seventy-five per cent of its stock owned by American citizens.[40]

In view of these strict statutory requirements, commercial treaties customarily provide that the national-treatment privileges do not authorize foreign participation in the coasting trade. Reservations to this effect are standard in most nineteenth-century treaties.[41] During the period between the World Wars, this customary reservation was supplemented by the declaration that the parties would accord most-favored-nation treatment in this matter.[42] Of the treaties perfected in this period, that with Turkey (1929) lacks a most-favored-nation reference to the coasting trade.[43] In the more recent treaties, the parties reserve the right to grant to national vessels exclusive privileges to engage in the coasting trade, inland navigation, and the national fisheries.[44] Several of these treaties also contain supplementary provisions. In the treaty with Greece (1951), participation in towage, pilotage, salvage, and rescue services is reserved for national vessels.[45] Most-favored-nation treatment with respect to cabotage is promised in the treaties with China (1946) and Germany (1954).[46] In the treaty with Japan (1953), it is agreed that foreign vessels may be admitted to the coasting trade on the basis of reciprocity, but there is no commitment to extend most-favored-nation treatment.[47]

In general, the treaties lack a specific definition of the scope and extent of the coasting trade. In the treaty with Greece (1951), however, the trade is specifically defined to include all types of sea transport to and from ports of the same party in respect of articles that, regardless of their initial origin and ultimate destination, are transshipped directly or indirectly at ports of either party for carriage to another port of the same party on the basis of a through bill of lading; or conversely,

[40] 46 U.S.C. (1958, Supp. II) sec. 802. The seventy-five per cent stock requirement refers to the degree of participation in the earnings and to the right to assets of the corporation and not merely to voting control. U.S. v. The Meacham, 107 F. Supp. 997 (1952).

[41] Bolivia, art. III; Colombia, art. III; Costa Rica, art. II; Spain, art. IX; Great Britain, art. III.

[42] Norway, art. XI; Liberia, art. XVI; Thailand, art. X; Honduras, art. XI; Iraq, art. III.

[43] Omission of the most-favored-nation provision regarding the coasting trade was demanded by Turkey. It was understood, however, that rights respecting cabotage would be applied to American vessels without distinction in favor of a third country. See For. Rel. (1929), III, 832, 842.

[44] Ireland, art. XVIII (3); Nicaragua, art. XIX (3); Korea, art. XIX (3); Israel, art. XIX (3); Iran, art. X (3); Muscat and Oman, art. X (3); Denmark, art. XIX (3); Ethiopia, art. XIV (2); and Viet-Nam, art. XI (3).

[45] Art. XXI (6).

[46] Germany, art. XX (4); and China, art. XXIV (2).

[47] Art. XIX (6).

articles loaded at ports of either party for carriage to another port of the same party for the purpose of being transshipped directly or indirectly to a foreign destination on the basis of a through bill of lading.[48]

In the absence of a treaty definition, municipal statutes define the scope and extent of the coasting trade. By statute, coastwide trade basically comprises all carriage between American ports, either directly or via a foreign port.[49] Despite the distance, carriage between Hawaii and continental United States is encompassed within the coasting trade.[50] Carriage between American Samoa and the United States is not, however, considered as coastwise trade.[51]

Notwithstanding the general policy of exclusion, foreign vessels have, in certain instances, engaged in the American coasting trade. Permission, authorized by Congress, has occasionally been granted to Canadian vessels to transport grain and iron ore between American ports on the Great Lakes, passengers between Alexandria Bay and Rochester, New York, and goods and passengers between certain Alaskan ports. In general, Canadian participation has been necessary to overcome a shortage of American vessels.[52]

Extension of cabotage privileges to Canadian vessels would not appear to warrant extensive protests under the most-favored-nation stipulation regarding the coasting trade, which is common in several treaties. With the opening of the St. Lawrence Seaway, it is possible, however, that foreign vessels, promised most-favored-nation treatment regarding the coasting trade, might find it profitable to carry grain between American lake ports and accordingly seek most-favored-nation treatment with Canadian vessels.

An adjunct to the reservation of the coasting trade is the stipulation permitting vessels of one party to discharge a portion of their cargo at a port of the other party and then to proceed coastwise to another port with the remainder of the cargo. Such a provision, incorporated in the treaty with Bolivia (1858), prescribes that customs duties shall be paid only on the portion of the cargo that is discharged.[53] Vessels engaging in this practice are promised national treatment with respect to tonnage duties and port charges. In addition, they are permitted to load in a like manner at different ports on the same voyage outward. Similar provisions applicable to merchant vessels and other privately owned vessels are included in the treaties with Norway (1928), Thailand

[48] Art. XXI (6).
[49] 46 U.S.C. sec. 883.
[50] 48 U.S.C. sec. 509. For British protests on this matter, see For. Rel. (1901), pp. 201–204. In the treaty with China (1946), it is specifically declared that carriage between each party and its insular territories and possessions is part of the coastwise trade. Art. XXIV (2).
[51] 48 U.S.C. sec. 1664.
[52] 46 U.S.C. secs. 289a, 883.
[53] Bolivia, art. III; see also, Spain, art. IX.

(1937), Liberia (1938), and Honduras (1927);[54] a similar provision (without the reference to privately owned vessels) is included in the treaty with Germany (1954).[55] Treaties with China (1946) and Italy (1948) contain similar stipulations plus a supplemental declaration that vessels of each party are to receive most-favored-nation treatment in this matter. The last-mentioned treaty is unusual in its provision that this right shall apply to the discharge or unloading of cargoes or passengers.[56]

Under statutory provisions, foreign vessels proceeding coastwise are subject to an initial fee of two dollars and an unloading fee of two dollars. Although the monetary amount is insignificant, the statute discriminates against foreign vessels and appears to be inconsistent with the national treatment promised in the mentioned treaties. Attempts have been made to amend the statute in order to eliminate discrimination, but without success.[57]

Port Charges and Duties

Port charges and duties, comprising pilotage dues, tonnage taxes, and "light money," offer convenient opportunities for discrimination against foreign shipping. By statute, the United States levies taxes on vessels entering American ports from foreign ports in the amounts of: (1) thirty cents per ton for American built but foreign owned vessels, (2) fifty cents per ton for all other foreign vessels, and (3) fifty cents per ton for any vessel any officer of which is not an American citizen. Foreign vessels entering the United States from a port closed to American vessels are assessed a tax of two dollars per ton.[58] In addition, a tax

[54] Norway, art. XI; Liberia, art. XVI; Thailand, art. X; Honduras, art. XI.

[55] Art. XX (4).

[56] China, art. XXIV (1); and Italy, art. XXII (1).

[57] 46 U.S.C. sec. 329. *Cf.* U.S. House of Representatives, Committee on Merchant Marine and Fisheries, "Analysis by the Department of the Treasury of Legislation to Revise, Consolidate, and Codify the Navigation Laws Relating to Admeasurement, Documentation, Entry, Clearance, Coastwise Trade, Foreign Trade, and United States Fisheries, and for Other Purposes," No. 28 (Committee Print), 1950, p. 59.

[58] 46 U.S.C. sec. 121. Certain exceptions to these stipulations are made with respect to vessels that engage in the foreign or coasting trade along the northern, northeastern, or northwestern frontier of the United States. 46 U.S.C. secs. 123, 124, 125. In addition to the mentioned assessments, a tonnage duty of two cents per ton (not to exceed ten cents per ton in any one year) is levied upon all vessels (including American) that enter American ports from any foreign port in North or Central America or South America bordering on the Caribbean Sea. A duty of six cents per ton (not to exceed thirty cents per ton in any one year) is levied on all vessels entering American ports from other foreign ports. This preference for Western hemisphere ports raised the question in 1884 whether European states might obtain such benefits for their vessels under the most-favored-nation provisions of commercial treaties with the United States. In reply, the State Department declared that this discrimination was purely geographical in character, inuring to the advantage of any vessel of any state that might choose to come from these areas to the United States. Consequently, the most-favored-nation provisions were inapplicable. For the correspondence with Belgium and Denmark on this matter, see For. Rel. (1888), II, 1866–1871.

of fifty cents per ton for "light money" is levied on all foreign vessels entering American ports.[59] Despite their mandatory appearance, these statutory provisions do not impair the national-treatment privileges acquired by foreign states in treaties with the United States.[60]

Notwithstanding these statutory requirements, which may be traced back to the birth of the United States, the established American policy, since the second decade of the nineteenth century, has been the reciprocal abolition of discriminatory duties.[61] This policy finds initial treaty expression in the agreement with Great Britain (1815), wherein national treatment respecting vessel charges and duties is promised.[62] A similar national-treatment provision is customary in subsequent nineteenth-century commercial treaties negotiated by the United States.[63] Apparently the only variance from this established policy is found in the treaty with France (1822). In this instance, the parties continued limited discrimination against the other's vessels; discriminatory dutes were reciprocally abolished, however, in 1866 by an exchange of notes.[64]

A national-treatment provision of broad scope is contained in the treaties concluded in the 1920's and 1930's. Vessels are accorded national treatment not only in respect of pilotage and tonnage duties, but in all respects when within the ports and territorial waters of the other party.[65] The treaty with Thailand (1937) goes further and prescribes that in no case shall treatment with regard to tonnage and other duties be less favorable than that accorded to the most favored nation. Furthermore, vessels of each party are to receive most-favored-nation treatment in all matters relating to entrance, and loading and unloading.[66]

In the more recent treaties, the practice is to omit specific references to pilotage or tonnage duties. Instead, a comprehensive provision,

[59] 46 U.S.C. sec. 128.

[60] 46 U.S.C. secs. 121, 135.

[61] See John Bassett Moore, The Principles of American Diplomacy (New York: Harper, 1918) 160–161, 172–173; For. Rel. (1937), II, 774, and Maxwell, *op. cit.*, 3–53, 125–152.

[62] Art. II; American vessels in British ports in the East Indies were promised tonnage duties accorded to the most favored European nation, art. III. See American State Papers, Foreign Relations, IV, 7–18.

[63] See treaties with Argentina, art. V; Paraguay, art. V; Costa Rica, art. V; and Spain, art. VII. The treaty with Brunei provides that a duty of one dollar per ton many be levied on all American vessels in lieu of all other charges, art. V.

[64] Art. V; this permitted a duty of five francs per ton on American vessels entering France and a duty of ninety-four cents per ton on French vessels entering the United States. See also, For. Rel. (1867), I, 287–289. Although the United States proposed in 1822 the reciprocal abolition of all discriminatory duties, France insisted on certain discriminatory charges to protect the French merchant marine. See American State Papers, Foreign Relations, V, 163–213. See also, Maxwell, *op. cit.*, pp. 43–49.

[65] Norway, art. IX; Liberia, art. XIV; Finland, art. XIII; and Honduras, art. IX.

[66] Art. VII.

providing that the vessels and cargoes of each party are to receive in all respects national and most-favored-nation treatment in the ports, places, and waters of the other party, is utilized.[67] The treaties with China (1946) and Italy (1948) are unusual; vessels of each party are specifically accorded national treatment with regard to tonnage, pilotage, and lighthouse charges and duties.[68]

Treaty provisions prescribing nondiscriminatory duties and charges were unsuccessfully assailed by Congress in 1920. In this instance, Congress directed the President to terminate all treaty provisions restricting the right of the United States to impose discriminatory tonnage duties on foreign vessels entering American ports. Challenging the constitutional validity of Congress's action, President Wilson refused to give effect to the directive.[69]

Notwithstanding the promise of equal treatment respecting tonnage duties, American regulations concerning tonnage measurement inadvertently result in unequal charges. Under the pertinent regulations, portions of a merchant vessel used for cabins or staterooms (constructed entirely above the first deck, which is not a deck to the hull) are excluded from the tonnage measurement. In contrast, most foreign countries include such areas in the vessel's tonnage. Moreover, to facilitate navigation, foreign measurements are generally accepted by American authorities. Consequently, American vessels of similar size and shape have a lower tonnage rating and accordingly pay less tonnage fees than do foreign vessels. This difference in fees appears to be in conflict with the mentioned national-treatment provisions. To date, proposals to rectify the situation have been unsuccessful.[70]

Whereas tonnage and light money duties are levied by the federal government, pilotage regulations are, in general, a matter of state concern.[71] Congressional interest in the regulations is nevertheless apparent.[72] Although a federal statute prohibits state discrimination in favor of vessels sailing between ports within the state and against those sailing between ports of different states, there is no requirement that

[67] Ireland, art. XVIII (3); Nicaragua, art. XIX (3); Korea, art. XIX (3); Israel, art. XIX (3); Iran, art. X (3); Muscat and Oman, art. X (3); Greece, art. XXI (3); Ethiopia, art. XIV (2); Denmark, art. XIX (3); China, art. XXII (1), (6); Italy, art. XX (1), (5); and Viet-Nam, art. XI (3).

[68] China, art. XXII (2), (3); and Italy, art. XX (2), (3).

[69] Hackworth, *op. cit.*, V, 322–326.

[70] 46 U.S.C. secs. 75, 81; see also, document cited in note 57 *supra*, pp. 10–11, 134–135.

[71] 46 U.S.C. sec. 211.

[72] In Bloomfield Steamship Co. et al. v. Sabine Pilots Association, 262 F.2d 345 (1959), the court declared: "The fact that Congress has seen fit to allow the several States to regulate pilotage in their ports should not be construed to mean that the national government has no interest in this important area affecting commerce with other nations. Quite the reverse is true. Congress has felt since the founding of this nation that her foreign commerce would be best served by State regulation of pilotage, subject, however, to certain safeguards which Congress itself may from time to time impose."

states accord foreign vessels equitable treatment with national vessels.[73] Consequently, it is possible that state pilotage regulations might discriminate against foreign vessels and thus conflict with national-treatment treaty provisions. The possibility of such a conflict was raised in *Olsen* v. *Smith*. In this instance, Texas pilotage regulations, exempting American coasting vessels from the pilotage regulations, were cited as conflicting with article II of the 1815 treaty with Great Britain, which promises national treatment in all port duties and charges. Pointing out that American vessels engaged in the foreign trade were not exempt from pilotage charges, the court found that there was no conflict with the treaty.[74]

Although treaty provisions, as the supreme law of the land, overrule any inconsistent state statute, the necessity of undertaking legal action to obtain relief would cause inconvenience. Co-operative action by state authorities is essential to prevent any conflict between the treaties and state regulations.[75]

Right to Carry Cargo

It has been noted earlier that commercial treaties customarily contain a declaration promising freedom of commerce and navigation between the territories of the parties. In addition, several treaties include a provision permitting one party's vessels to carry cargo from a third country to the other party without a penalty of higher customs duties. In effect such provisions permit each party to participate fully in the import and export trade of the other. Variously phrased, the stipulation prescribes that all articles that may be legally imported from foreign countries to one party in its vessels may also be imported in the vessels of the other party. Goods, imported in the vessels of the other party, receive national treatment with regard to customs duties. In like manner, there is "perfect equality" in the exportation of goods to foreign countries. The same bounties, drawbacks, and other privileges obtain, whether the goods are exported in national vessels or vessels of the other party.[76]

[73] 46 U.S.C. sec. 213. Recent federal legislation makes mandatory the use of pilots on ocean-going vessels in certain waters of the Great Lakes. Rates for pilotage services are the same for national or foreign vessels. Canadian and American lakers are exempt from the provisions. See 74 *Stat.* 259, and 26 Fed. Reg. 951.

[74] 195 U.S. 332 (1904). This is an unusual case. It did not actually involve a British vessel or a claim by a British national. An association of branch pilots sought to enjoin the defendant from serving as a pilot. He alleged that all the vessels he piloted into the port of Galveston were British and that by virtue of the treaty of 1815 he had a right to do so. He asserted that since coastwise American vessels were exempt from the pilotage regulations all British vessels were also exempt. The court rejected this argument.

[75] U. S. Constitution, art. VI, sec. (2); Ware v. Hylton, 3 Dallas 199 (1796); see also, Hackworth, *op. cit.*, II, 268–269.

[76] Spain, art. VIII; Colombia, art. IV; Bolivia, art. IV.

This national-treatment provision is also contained in several of the treaties concluded during the 1920's and 1930's.[77] In the more recent treaties, the right of treaty vessels to carry goods between a party and third countries is expressed in both national and most-favored-nation terms. Articles carried in the vessels of the other party are accorded national treatment with regard to duties and charges, the administration of the customs, and bounties and drawbacks.[78] Unlike the general pattern of the recent treaties, the one with China (1946) contains a stipulation fashioned after that incorporated in the post-World-War-I treaties.[79] A somewhat similar provision is incorporated in the treaty with Italy (1948); however, unlike the China treaty, it promises both national and most-favored-nation treatment.[80]

Within the past decade, Congress has enacted cargo-preference legislation to assist the American merchant marine. Accordingly, fifty per cent of the gross tonnage of goods or material procured, furnished, or financed by the United States government that is to be transported by ocean vessels must be carried in privately owned American vessels.[81] Although such legislation demands preference in vessel selection, it does not appear to conflict with any national-treatment provisions of commercial treaties. When the legislation was enacted, the State Department indicated its opposition on the ground that such legislation invited discriminatory action against the American merchant fleet. No mention was made, however, of a possible conflict with provisions of commercial treaties. Of the *aides memoires* submitted to the Department protesting the proposed legislation, only that from Italy raised the question whether such action would "possibly" violate the nondiscriminatory provisions of the treaty of 1948.[82] (It has been suggested that such action is covered by the security reservations of the more recent treaties.)[83]

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[77] Austria, art. VII; Norway, art. VII; Liberia, art. XII; Finland, art. XII; Honduras, art. VII. In consenting to the Austrian treaty, the Senate added a reservation to the effect that the mentioned provisions should remain in force for twelve months. If not then terminated on ninety days notice, they should remain in force until either of the parties enacted legislation inconsistent with the provisions. In such an event, they would lapse sixty days after such enactment. From thence the parties would enjoy all the rights that they would have possessed had such a provision not been embraced in the treaty. In negotiating the 1928 treaty with Norway, the State Department desired to incorporate the import of the reservation in the treaty. In the face of Norwegian opposition, it dropped its insistence on this provision. See For. Rel. (1928), III, 539 ff.

[78] Ireland, art. XVIII (4); Nicaragua, art. XIX (4); Korea, art. XIX (4); Israel, art. XIX (4); Iran, art. X (4); Muscat and Oman, art. X (4); Greece, art. XXI (5); Japan, art. XIX (4); Germany, art. XX (2), (3); Netherlands, art. XIX (3), (4); Denmark, art. XIX (4); and Viet-Nam, art. XI (4).

[79] Art. XXIII (1).

[80] Art. XX (1).

[81] 46 U.S.C. sec. 1241 (b).

[82] Thorsten V. Kalijarvi, "The Cargo Preference Principle in Merchant Shipping," Department of State Bulletin, XXXI (1954), 63–69.

[83] Thomas F. Olson, "Cargo Preference and the American Merchant Marine," 25 Law and Contemporary Problems, (1960) 102–103.

Equality of Customs Duties

As an adjunct to discriminatory port charges levied on foreign vessels, discriminatory customs duties are often levied on goods imported in foreign (rather than domestic) vessels. American statutes permit a ten per cent *ad valorem* duty on all goods imported into the United States in foreign vessels.[84] Like the discriminatory port charges, this levy does not apply to goods imported in vessels entitled to equal treatment with American merchantmen.[85] Complementing the reciprocal abolition of discriminatory port charges, certain treaties contain provisions that promise national treatment respecting duties on goods of one party imported into the other in vessels of either party. In like manner, the same bounties, drawbacks, and other privileges are allowed on goods exported in vessels of either party.[86]

This national-treatment provision, finding initial expression in the treaty with Great Britain (1815), is contained in several treaties of the nineteenth century.[87] In contrast to the general practice (but consistent with its other discriminatory provisions), the treaty with France (1822) permitted discriminatory customs duties on American goods imported in American (rather than French) bottoms. In like manner, discriminatory duties were permitted on French goods imported into the United States in French vessels.[88]

Reflecting the new American commercial policy, the treaties concluded in the 1920's and 1930's specifically promise unconditional most-favored-nation treatment to the nationals and vessels of each party respecting the amount and collection of duties on imports and exports.[89] In addition, "perfect reciprocal equality" is promised to vessels of each party with respect to bounties and other privileges allowed on goods imported or exported in national vessels.[90] A similar stipulation is contained in the treaty wth China (1946), although a national-treatment

[84] 46 U.S.C. sec. 146.

[85] 46 U.S.C. sec. 141.

[86] In The Five Per Cent Discount Cases, 243 U.S. 97 (1917), the Supreme Court held that, so long as treaties in force promised equality of treatment regarding customs duties on goods shipped in foreign vessels, a statute permitting a five per cent discount on goods imported in American ships would remain inoperative. In so doing, the Court reversed the decision of the Court of Customs Appeals, which had ordered the discount on goods imported in vessels of Belgium, the Netherlands, Great Britain, Austria-Hungary, Germany, Italy, Spain, and Japan.

[87] Arts. II and III. This provision applies only to goods going to or coming from British ports in Europe or the East Indies. See also, Argentina, art. VI; Paraguay, art. VI; Costa Rica, art. VI.

[88] Arts. I, II. The discriminatory duty was not to exceed twenty francs per ton on American goods imported in American vessels and $3.75 per ton on French goods imported in French bottoms. These discriminatory customs duties were abandoned in 1827. See Maxwell, *op. cit.*, pp. 43–46.

[89] Austria, art. VII; Norway, art. VII; Liberia, art. VIII; Finland, art. XII; Honduras, art. VII.

[90] Norway, art. VII; Liberia, art. XII; Finland, art. XII; Honduras, art. VII.

provision fashioned in this manner is unusual in the more recent treaties.[91] Of this latter group, those with Italy (1948) and Ethiopia (1951) promise that, with respect to bounties, drawbacks, and other privileges, national and most-favored-nation treatment will be accorded to articles imported or exported by the vessels of either party.[92] The standard provision in the more recent treaties prescribes national treatment respecting duties of all kinds, bounties and other privileges, and the administration of the customs for articles carried in the vessels of either party.[93]

Right of Refuge

A customary navigation provision in the post-World-War-II treaties guarantees disabled vessels the right of asylum and refuge in the ports and waters of the other party. Although the language varies considerably, the basic provision promises that each party's disabled vessels shall be permitted to take refuge in the nearest port or haven of the other and receive "friendly treatment and assistance."[94] The unusual standard of "friendly treatment and assistance" is not found in any other navigation provision. It is noteworthy that the right to enter a port when in distress is not limited to ports open to foreign commerce and navigation; vessels in distress may enter the "nearest" port of haven. Moreover, the right of refuge is available to vessels of war and fishing craft. Several treaties contain additional stipulations that supplement this basic provision. The treaties with Israel (1951), China (1946), and Italy (1948) permit disabled vessels to obtain such repairs as are necessary and available.[95] In the treaty with Japan (1953), the parties pledge that vessels seeking refuge shall receive the same assistance and protection as national vessels or those of the most favored nation. With respect to local duties or charges, national and most-favored-nation treatment is to be the norm. Cargoes of disabled vessels and salvaged articles are exempt from customs duties, unless they are entered for local consumption. Local authorities are free, however, to prescribe measures for the protection of revenue, pending the departure of the disabled vessel.[96] The treaty with Greece (1951) also prescribes, in some detail, the right of disabled vessels to take refuge and obtain necessary repairs. In addition, it contains provisions respecting the delivery of salvaged goods to the owners or consular representative, the right of consular officers to render assistance to disabled vessels, and the right of the master to

[91] Art. XXIII (2).
[92] Italy, art. XXI (2) and Ethiopia, art. XIV (2).
[93] See note 78 *supra*.
[94] Iran, art. X (5); Muscat and Oman, art. X (5); Denmark, art. XIX (5); Viet-Nam, art. XI (5); Ireland, art. XVIII (5); Nicaragua, art. XIX (5); and Korea, art. XIX (5).
[95] Israel, art. XIX (5); China, art. XXII (5); Italy, art. XX (4).
[96] Art. XIX (5).

engage crew members necessary for the continuation of the voyage.[97]

Treaties with Germany (1954) and the Netherlands (1956) contain stipulations absent in the other treaties. In the event a vessel of one party is wrecked or takes refuge, national treatment is promised to the vessel, crew, passengers, the personal property of the crew and passengers, and the cargo. After repairs, the vessel may continue its voyage, upon conforming with the laws applicable to national vessels in like situations. Salvaged articles are exempt from customs duties unless they are entered for internal consumption; articles not entered for consumption may be subjected to measures necessary to protect the local revenue.[98]

Apparently such provisions were not incorporated in the treaties concluded after World War I; however, a few of the nineteenth-century treaties contain similar provisions. In the treaty with Colombia (1846), it is agreed that whenever the vessels (private or war) are forced to seek asylum in the ports of the other through the pursuit of pirates or enemies or the want of provisions, they shall be received and treated with "humanity." In addition, disabled vessels shall be accorded national treatment with respect to assistance and protection.[99] A similar provision is contained in the treaty with Bolivia (1858), with the additional declaration that the benefits of the article apply to privateers and private vessels of war until the parties relinquish that mode of warfare in consideration of the general relinquishment of the right of capture of private property upon the high seas.[100] In the treaty with Spain (1902), national treatment is promised with respect to assistance in the event of shipwreck, damages at sea, and forced refuge.[101] The treaty with Brunei (1850) promises all assistance to shipwrecked American vessels regarding the recovery of property. The crew and passengers are to receive "full protection" for their lives and property.[102]

Conclusion

It is unnecessary to attempt a summary of the navigation provisions; however, a brief assessment is warranted. It is difficult to assess with precision the specific contribution of the commercial treaties with navigation provisions to the growth and development of the American merchant marine. At the turn of the century, the then United States Commissioner of Navigation (Eugene T. Chamberlain) declared: "the negotiation of these treaties is doubtless the most splendid achievement of American diplomacy; it is surely one of the greatest boons ever

[97] Art. XXII.
[98] Germany, art. XXI; and Netherlands, art. XXI.
[99] Arts. IX, XI.
[100] Arts. IX, X.
[101] Art. X.
[102] Art. VIII.

conferred upon the mercantile marine of the world."[103] Although the Commissioner may have overly exaggerated the utility of commercial treaties, their contribution to the growth of the American merchant fleet should not be minimized.

In contrast, their contribution to nondiscriminatory treatment of foreign vessels is more readily apparent. Discrimination against foreign vessels either directly in the form of additional duties or indirectly in the form of cargo preference requirements is easily accomplished. Although such discrimination may be temporarily suspended by municipal statute on the basis of reciprocity,[104] the bilateral commercial treaty is a more effective instrument for the establishment of equitable treatment for foreign vessels. In like manner, the bilateral treaty is an effective instrument for the introduction of other navigation rights and privileges, such as the right of entry, the right to carry cargo to and from third states, and the right to proceed coastwise. Bilateral instruments place such rights and privileges on a substantial legal foundation. Established on a long-term basis, they are consequently immune from the possible fluctuations of domestic policy. In the more recent treaties, this legal foundation is strengthened by the limited compromissory clause. Viewed from the broader perspective, the incorporation of navigation provisions in bilateral treaties contributes to the orderly development of international legal rules respecting commerce and navigation.

[103] Eugene T. Chamberlain, "Our Merchant Marine," in Chauncey M. Depew, One Hundred Years of American Commerce (New York: Haynes, 1895), I, 39.

[104] 46 U.S.C. sec. 141.