INTERNATIONAL COURT OF JUSTICE

CERTAIN IRANIAN ASSETS

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

REJOINDER

SUBMITTED BY

THE UNITED STATES OF AMERICA

May 17, 2021

ANNEXES

VOLUME VI

Annexes 370 through 385

ANNEX 370

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001

CIVIL ACTION NO. 03 MDL 1570 (GBD)

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FIONA HAVLISH, in her own right and as Executrix of the ESTATE OF DONALD G. HAVLISH, JR., Deceased,

RUSSA STEINER, in her own right and as Executrix of the ESTATE OF WILLIAM R. STEINER, Deceased,

CLARA CHIRCHIRILLO, in her own right and as Executrix of the ESTATE OF PETER CHIRCHIRILLO, Deceased,

TARA BANE, in her own right, and as Executrix of the ESTATE OF MICHAEL A. BANE, Deceased,

GRACE M. PARKINSON-GODSHALK, in her own right and as Executrix of the ESTATE OF WILLIAM R. GODSHALK, Deceased,

ELLEN L. SARACINI, in her own right and as Executrix of the ESTATE OF VICTOR J. SARACINI, Deceased,

THERESANN LOSTRANGIO, in her own right and as Executrix of the ESTATE OF JOSEPH LOSTRANGIO, Deceased, *et al.*,

Plaintiffs,

v.

SHEIKH USAMAH BIN-MUHAMMAD BIN-LADEN, a.k.a. OSAMA BIN-LADEN,

AL-QAEDA/ISLAMIC ARMY, an unincorporated association, *et al.*,

CIVIL ACTION NO. 03-CV-9848 – GBD

Case Transferred from the United States District Court for the District of Columbia Case Number 1:02CV00305

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO DAMAGES

FOREIGN STATE DEFENDANTS:

THE ISLAMIC REPUBLIC OF IRAN,

AYATOLLAH ALI-HOSEINI KHAMENEI,

ALI AKBAR HASHEMI RAFSANJANI,

IRANIAN MINISTRY OF INFORMATION AND SECURITY,

THE ISLAMIC REVOLUTIONARY GUARD CORPS,

HEZBOLLAH, an unincorporated association,

THE IRANIAN MINISTRY OF PETROLEUM,

THE NATIONAL IRANIAN TANKER CORPORATION,

THE NATIONAL IRANIAN OIL CORPORATION,

THE NATIONAL IRANIAN GAS COMPANY,

IRAN AIRLINES,

THE NATIONAL IRANIAN PETROCHEMICAL COMPANY,

IRANIAN MINISTRY OF ECONOMIC AFFAIRS AND FINANCE,

IRANIAN MINISTRY OF COMMERCE,

IRANIAN MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS,

THE CENTRAL BANK OF THE ISLAMIC REPUBLIC OF IRAN, *et al.*,	:
	:
Defendants.	:

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PLAINTIFFS' PROPOSED FINDINGS OF FACT AND

CONCLUSIONS OF LAW WITH RESPECT TO DAMAGES

AND NOW, with liability against all Defendants having been established by the entry of Plaintiffs' Findings of Fact and Conclusions of Law on December 22, 2011, Plaintiffs now come to hereby respectfully submit Plaintiffs' Proposed Findings of Fact and Conclusions of Law with Respect to Damages.

A. PROPOSED FINDINGS OF FACT

The Claimants

a) Claims Involving Decedents' Estates and Their Families

1. Plaintiff **Fiona Havlish** is a resident of the Commonwealth of Pennsylvania and is the surviving spouse of **Donald G. Havlish, Jr.**, a decedent who was killed as a result of a terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001.[1] **Donald G. Havlish, Jr.** was employed by AON, Inc. and worked on the 101st floor of the South Tower of the World Trade Center, Two World Trade Center, New York, New York. Plaintiff **Fiona Havlish** has been appointed the Executrix of the **Estate of Donald G. Havlish, Jr**. **Fiona Havlish**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action in her capacity as the Executrix of the Estate. See Folder 1, provided via CD, for photos of the Decedent. See also Third Amended Complaint, ¶¶ 4-6

2. Plaintiff **Fiona Havlish** also makes a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Donald G. Havlish** on September 11, 2001. It was not until April 4, 2002, that Plaintiff **Fiona**

[1] With the exception of Ms. Havlish, who is listed as the lead Plaintiff in this case, the remaining Plaintiffs who represent the Estates of a Decedent have been listed in alphabetical order for organizational purposes.

Havlish received definitive confirmation that her husband was killed as a result of the terrorist attacks perpetrated by Defendants on September 11, 2001. On that day, the Federal Bureau of Investigation, the local police chief, and the family's minister arrived at the home of Plaintiff **Fiona Havlish** to inform her that a small part of Decedent **Donald G. Havlish, Jr.'s** body had been found and identified via DNA testing. In the context of the horrific suffering experienced by thousands of families as a result of the 9/11 attacks, Plaintiff **Fiona Havlish** grimly refers to herself as one of the "lucky ones" because at least some small portion of Decedent **Donald G. Havlish, Jr.** was found and identified. "On September 12, 2001," **Fiona Havlish** writes, "[our 3 year old daughter] Michaela woke up and looked at me with a smile and said "Where is Daddy?" I took a deep breath and the tears began. I held her and told her that daddy was in heaven and was one of her guardian angels now." See Folder 2, provided via CD. See also Third Amended Complaint, ¶¶ 4-6; 375-421; Declaration of Fiona Havlish ¶ 6, 9.

3. Decedent **Donald G. Havlish, Jr.** is also survived by his father, **Donald Havlish, Sr.**, who is a resident of the State of South Carolina. Plaintiff **Donald Havlish, Sr.** makes a claim for wrongful death and other causes of action against all Defendants as a result of the murder of **Donald G. Havlish, Jr.** on September 11, 2001. "I miss my son very much," **Donald Havlish, Sr.** writes in his Declaration. "I am sorry that I do not have the fellowship with him that I looked forward to, particularly in my later years. Each Sunday, at Church, I visit the columbarium where Don's ashes, those from the World Trade Center, are buried. I say a prayer for both Don and his mother. To this day I still mourn his absence." See Folder 3, provided via CD. See also Third Amended Complaint, ¶ 69; ¶¶ 375-421; Declaration of Donald Havlish, Sr. ¶ 11.

4. Decedent **Donald G. Havlish, Jr.** is also survived by his brother, **William Havlish**, who is a resident of the State of Georgia. Plaintiff **William Havlish** makes a claim for wrongful death and other causes of action against all Defendants as a result of the murder of **Donald G. Havlish** on September 11, 2001. "All of the media frenzy did not allow me to go through the normal process of grieving," **William Havlish** writes in his Declaration. "When my mother had died of cancer, for instance, I had dealt with it much better and was able to put it behind me. Don's death is different because it is brought up year after year, again and again. It does not help the grieving process." See Folder 4, provided via CD. See also Third Amended Complaint, ¶ 69; ¶¶ 375-421; Declaration of William Havlish ¶ 7.

5. Decedent **Donald G. Havlish, Jr.** is also survived by his sister, **Susan Conklin**, who is a resident of the State of Georgia. Plaintiff **Susan Conklin** makes a claim for wrongful death and other causes of action against all Defendants as a result of the murder of **Donald G. Havlish** on September 11, 2001. "I gained at least 100 pounds [following the death of **Donald G. Havlish**]," **Susan Conklin** writes in her Declaration. "Don's death was a horrible experience for me and my family. Our family gatherings and holidays have all changed. When you lose people, those family ties are never the same afterward. Don's death has been a devastating thing for his daughter and the rest of the family." See Folder 5, provided via CD. See also Third Amended Complaint, ¶ 69; ¶¶ 375-421. See also Declaration of **Susan Conklin** ¶ 10, 11.

6. Plaintiff **Tara Bane** is a resident of the Commonwealth of Pennsylvania and is the surviving spouse of **Michael A. Bane**, a decedent who was killed as a result of a terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001.

Michael A. Bane was employed by Marsh & McLennan Company on the 100th floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Tara Bane** has been appointed the **Executrix of the Estate of Michael A. Bane. Tara Bane**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity of the Executrix of the Estate. See Folder 6, provided via CD, for materials from **Michael A. Bane's** Memorial Service and photographs. See also Third Amended Complaint, ¶¶ 13-14; 375-421.

7. Plaintiff **Tara Bane** also makes a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Michael A. Bane** on September 11, 2001. The body of Decedent **Michael A. Bane,** a former high school drop-out who eventually earned a college degree before being named an Assistant Vice President at Marsh & McLennan Company, has never been recovered. "I never did get a call from Michael that day," writes **Tara Bane** in her Declaration. "I later spoke with his co-worker's wife who received a call from her husband, but all she could hear were screams. He called her several times but did not speak. All she heard were the screams of others. What is clear to me is that Michael most definitely suffered greatly. I don't know for how long, but I do know that no human being should have had to endure what my husband had to endure. I believe that the intense fear and panic I felt was nothing compared to what he experienced in his last minutes, or his last hours, of his life." See Folder 7, provided via CD. See also Third Amended Complaint, ¶¶ 13-14; 375-421; Declaration of Tara Bane (now Tara Bane DellaCorte), ¶ 10; Declaration of Christina Bane-Hayes ¶ 23. See also proprietary materials of Marsh & McLennan Company filed under seal via CD.

8. Decedent **Michael A. Bane** is also survived by his father, **Donald Bane**, who is a resident of the State of New York. Plaintiff **Donald Bane** makes a claim for wrongful death and other causes of action against all Defendants as a result of the murder of **Michael A. Bane** on September 11, 2001. Of his son, **Donald Bane** writes, "Michael and I had established a very good and loving adult relationship, communicating on a mature level. He would have been a dependable and trustworthy son throughout our lives. His loss is also great to his siblings. He made a remarkable adaptation to life in spite of his early handicaps, completing his education, finding good employment, and succeeding in his field to the position of Assistant Vice-President at Marsh & McLennan. His violent departure from this life had has a terrible and profound effect on this family. We are still devastated." See Folder 8, provided via CD. See also Third Amended Complaint, ¶ 67; ¶¶ 375-421; Declaration of Jack Donald Bane ¶ 18.

9. Decedent **Michael A. Bane** is also survived by his sister, **Christina Bane-Hayes**, who is a resident of the Commonwealth of Virginia. Plaintiff **Christina Bane-Hayes**, under §1605(a) of the Foreign Sovereign Immunities Act, makes a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Michael A. Bane** on September 11, 2001. **Christina Bane-Hayes** writes of her brother, "I have Michael's Stony Brook sweatshirt. When I wear it I feel safe, as though he has his arms wrapped around me, holding on to me for dear life. To take it off is a sorrowful feeling, letting go of him again. And yet feeling him near me is worth the angst." See Folder 9, provided via CD. See also Third Amended Complaint, ¶¶ 66; 375-421; Declaration of Christina Bane-Hayes ¶ 36.

10. Plaintiff **Krystyna Boryczewski** is a resident of the State of New Jersey and is the

surviving natural mother of **Martin Boryczewski**, a decedent who was killed as a result of the terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Martin Boryczewski** worked on the 104th Floor of the North Tower of the World Trade Center, One World Trade Center. Plaintiff **Krystyna Boryczewski** has been appointed as the Executrix of the **Estate of Martin Boryczewski**. **Krystyna Boryczewski**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the Estate. See Folder 10, provided via CD, for a photo of the Decedent in his minor league baseball uniform. See also Third Amended Complaint, ¶¶ 103-105; 375-421.

11. Plaintiff **Krystyna Boryczewski** also makes a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Martin Boryczewski** on September 11, 2001. Neither the body nor any personal effects of Decedent **Martin Boryczewski** were ever recovered from Ground Zero. A Certificate of Death was issued by The City of New York on October 20, 2001. The cause of death is listed as homicide. "Holidays have not been the same for me and my family," **Krystyna Boryczewski** writes in her Declaration. "[The holidays] are extremely trying and difficult. I don't like them, but when the family gets together I try to make the best of it. I haven't had a Christmas tree since 2001 and I don't know if I will ever have a tree again. The pain I feel over the loss of my son Marty has not lessened in the years since 9/11. The hole that has been left in my heart as a result of my son Marty has not shrunk one iota." See Folder 11, provided via CD. See also Third Amended Complaint, ¶¶ 103-105; 375-421; Declaration of Krystyna Boryczewski ¶ 13, 14.

12. Decedent **Martin Boryczewski** was also survived by his father, **Michael Boryczewski,**

who was a resident of the State of New Jersey. Plaintiff **Michael Boryczewski** made a claim for wrongful death and asserted other causes of action against all Defendants as a result of the murder of **Martin Boryczewski** on September 11, 2001. **Michael Boryczewski** has since expired and an award will be made to the Estate of **Michael Boryczewski**. While alive, Plaintiff **Michael Boryczewski** composed a statement regarding the loss of his son on September 11, 2001. It reads, in part, "I came to America for a better life for my Family and myself. In my wildest nightmare, I never would have imagined the fate of my only Son in the land of liberty and justice. After what I have endured in my life,[2] the fate of my only Son is physically, mentally, emotionally devastating and horrific. If I could give my life for my Son, I would, so that He may have the opportunity to live a beautiful, full life. I love Him, I miss Him, and I will forever." See Folder 12, provided via CD. See also Third Amended Complaint, ¶¶ 103-105; 375-421; My Son, Martin Boryczewski by His Father, Michael Boryczewski.[3]

13. Decedent **Martin Boryczewski** is also survived by his sister, **Julia Boryczewski**, a resident of the State of New Jersey. Plaintiff **Julia Boryczewski** makes a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Martin Boryczewski** on September 11, 2001. **Julia Boryczewski** writes of her experience, "Marty never came home. And, we never got anything of him back. Nothing. Not any personal effects. Not a piece of him. How sick is it that you now talk about pieces of human being identified as a good thing? Family members were

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2 Mr. Boryczewski was interred in German labor camps during World War II and was hospitalized for 8 months for malnutrition after being liberated by American forces.

3 Plaintiff Michael Boryczewski expired during the pendency of this lawsuit. Any award will be made to the Estate of Michael Boryczewski. A Suggestion of Death will be filed contemporaneously with this document.

encouraged when any remains of their loved one were found. It's so sick and twisted. But that's what a post-September 11th world looks like." See Folder 13, provided via CD. See also Third Amended Complaint, ¶¶ 106; 375-421; Declaration of Julia Boryczewski, ¶ 4.

14. Decedent **Martin Boryczewski** is also survived by his sister, **Michele Boryczewski**, a resident of the State of New Jersey. Plaintiff **Michele Boryczewski** makes a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Martin Boryczewski** on September 11, 2001. Of the horror of the attacks of September 11, 2001, **Michele Boryczewski** writes, "Although no one had spoken directly to Marty after the attacks, I did speak to a gentleman at one of Cantor Fitzgerald's offices that was located in another state. I don't remember his name or where his office was located. I do know that I spoke to him prior to the North Tower collapse. He was hysterical. He had been on a conference call with the NYC Cantor office at the time it was hit by the plane. I asked him if he knew anything about how the people in the NYC office were or what was happening there. He was crying hysterically and said that the man he had been on the phone with at the time of and immediately after the attack was screaming in agony, screaming that his skin was melting off his body. After hearing this, I dropped the phone. I don't know who was on the phone from my brother's office, but I do know it was someone on my brother's floor and someone on my brother's team. Perhaps it was my brother, for his team was small, comprised of only 6 people. I will never know. I do know that my brother and the rest of his team endured horrible pain and suffering." See Folder 14, provided via CD. See also Third Amended Complaint, ¶¶ 106; 375-421; Declaration of Michele Boryczewski, ¶ 6.

15. Plaintiff **Richard A. Caproni** and is a resident of the State of Maryland and is the surviving father of **Richard M. Caproni**, a decedent who was killed as a result of the terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Richard M. Caproni** was employed by Marsh & McLennan Company and worked on the 98th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Richard A. Caproni** has been appointed as the Administrator of the **Estate of Richard M. Caproni**. **Richard A. Caproni, Sr.**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Administrator of the Estate. See Folder 15, provided via CD, for family photos and a Newsday article. See also Third Amended Complaint, ¶¶ 147-149; 375-421.

16. **Richard A. Caproni** also brings a claim in his own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Richard M. Caproni** on September 11, 2001. Decedent **Richard M. Caproni** went to work early on the morning of September 11, 2001, with his close friend Mike Harmon in order to catch up on paperwork. Plaintiff **Lisa Caproni-Brown** was informed eight days following the attacks perpetrated by Defendants that Decedent **Richard M. Caproni** was engaged in a telephone conversation with a colleague in Chicago, IL at the time American Airlines Flight 11 struck the North Tower. A Certificate of Death was issued by The City of New York for Decedent **Richard M. Caproni** on October 11, 2001. The cause of death was listed as homicide. An intact body was never recovered and the decedent was eventually identified only through DNA testing a year following the attacks. The remains of Decedent **Richard M. Caproni** were finally laid to rest in April 2005. **Richard A.**

Caproni writes in his Declaration that, "My beautiful son was exploded all over lower Manhattan. How could somebody do this to an innocent human being? I pray that no other family will endure what we have had to endure since 9/11. We lost something precious, a life that can never be replaced." See Folder 16, provided via CD. See also Third Amended Complaint, ¶¶ 147-149; 375-421; Declaration of Richard Caproni ¶¶ 7, 10; Declaration of Dolores Caproni ¶¶ 7-8; Declaration of Lisa Caproni-Brown, ¶ 8.

17. Decedent **Richard M. Caproni** is also survived by his natural mother, **Dolores Caproni**, who is a resident of the State of Maryland. Plaintiff **Dolores Caproni** brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Richard M. Caproni** on September 11, 2001. Plaintiff **Dolores Caproni** writes in her Declaration that, "[Richard] was only 34 years old. He had dreams and ambitions. He will never have the wonderful feeling of getting married, becoming a father, and being an uncle to his sisters' and brothers' children. This has affected my whole life. I'm not the person I was." See Folder 17, provided via CD. See also Third Amended Complaint, ¶¶ 147-149; 375-421; Declaration of Dolores Caproni, ¶ 8.

18. Decedent **Richard M. Caproni** is also survived by his brother, **Christopher Caproni**, who is a resident of the State of Maryland. Plaintiff **Christopher Caproni**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Richard M. Caproni** on September 11, 2001. **Christopher Caproni** had a clear view of the Twin Towers through a window in his office building on that day. He personally saw the North Tower, the building where Decedent **Richard M. Caproni** was employed, burning after being deliberately struck by American Airlines Flight 11 following the hijacking

effectuated by, or enabled by, Defendants. **Christopher Caproni** also personally witnessed United Flight Airlines 175 slam into the South Tower following the hijacking effectuated by, or enabled by, Defendants. **Christopher Caproni's** apartment was only blocks from Ground Zero. Not only was he without access to his apartment for two weeks, but he was forced to view the site where his brother had died every day after he was permitted back into his apartment. See Folder 18, provided via CD. See also Third Amended Complaint, ¶ 150; ¶¶ 375-421; Declaration of Christopher Caproni ¶¶ 14, 20.

19. Decedent **Richard M. Caproni** is also survived by his brother, **Michael Caproni**, who is a resident of the State of New York. Plaintiff **Michael Caproni**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Richard M. Caproni** on September 11, 2001. **Michael Caproni** writes in his Declaration that, "To assess the actual damage that my brother's loss has taken on our family is impossible. It is many years later and I still have trouble sleeping. During the week of September 11th, I have trouble speaking to people. I am constantly reminded of my brother's death and there are times that I feel he will never rest in peace. I try to remember what a great person Rich was and how influential he was in my life, but it is constantly overshadowed by the way he died." See Folder 19, provided via CD. See also Third Amended Complaint, ¶ 150; ¶¶ 375-421; Declaration of Michael Caproni, ¶ 8.

20. Decedent **Richard M. Caproni** is also survived by his sister, **Lisa Caproni-Brown**, a resident of the State of New York. Plaintiff **Lisa Caproni-Brown**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Richard A. Caproni**

on September 11, 2001. On December 15, 2011, Plaintiff **Lisa Caproni-Brown** wrote, "We went to the World Trade Ceremony for seven years. It is like attending the same funeral every year. No holiday or birthday or day will ever be the same. Words can't really describe the toll this has taken on our family. It is important for people to be held accountable for the enormous amount of pain that they have caused." See Folder 20, provided via CD. See also Third Amended Complaint, ¶ 150; ¶¶ 375-421; Declaration of Lisa Caproni-Brown, ¶¶ 10-11.

21. Plaintiff **Clara Chirchirillo** is a resident of the Commonwealth of Pennsylvania and is the surviving spouse of **Peter Chirchirillo**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Peter Chirchirillo** was employed by Marsh, Inc. on the 98th floor of the North Tower in the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Clara Chirchirillo** has been appointed the Executrix of the **Estate of Peter Chirchirillo**. **Clara Chirchirillo,** under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the Estate. See Folder 21, provided via CD for media and memorabilia related to **Peter Chirchirillo**. See also Third Amended Complaint, ¶¶ 10-12; 375-421.

22. Plaintiff **Clara Chirchirillo** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Peter Chirchirillo** on September 11, 2001. Clara Chirchirillo wrote on January 12, 2012, that, "To date, I have received Peter's remains on two separate occasions. Were it not for the descriptions that accompanied the remains of my deceased husband, no one, not even my family, would be able to recognize them. The two discoveries were years apart, opening

up wounds once again that I thought were healed. With each find, and with each new discovery of his remains, and with each newly revised death certificate, I revisit and relive the most painful time in my life." See Folder 22, provided via CD. See also Third Amended Complaint, ¶¶ 10-12; 375-421; Declaration of Clara Chirchirillo, ¶ 17.

23. Decedent **Peter Chirchirillo** is also survived by his sister, **Livia Chirchirillo.** Plaintiff **Livia Chirchirillo**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Peter Chirchirillo** on September 11, 2001. Plaintiff **Livia Chirchirillo**, who was working eight blocks from the World Trade Center Complex at the time of the terrorist attacks, personally heard and witnessed American Airlines Flight 11 flying low overhead and its crash into the North Tower where her brother, Decedent **Peter Chirchirillo**, was working. She tried reaching him on his office phone upon arriving in her office but was unable. As she was leaving her office to rush to the World Trade Center Complex to find her brother, the elevator in which she was a passenger shook from the impact of United Airlines Flight 175 striking the South Tower. See Folder 23, provided via CD. See also Third Amended Complaint, ¶ 12; ¶¶ 375-421; Declaration of Livia Chirchirillo, ¶ 4.

24. Decedent **Peter Chirchirillo** is also survived by his sister, **Catherine Deblieck**. Plaintiff **Catherine Deblieck**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Peter Chirchirillo** on September 11, 2001. On January 29, 2012, Plaintiff **Catherine Deblieck** wrote of the attacks, "Peter was a victim. We are all victims because his murder has affected my whole family." See Folder 24, provided via

CD. See also Third Amended Complaint, ¶ 12; ¶¶ 375-421; Declaration of Catherine Deblieck, ¶ 19.

25. Plaintiff **William Coale** is a resident of the Commonwealth of Pennsylvania and is the surviving father of **Jeffrey Alan Coale**, a citizen of the Commonwealth of Pennsylvania and a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Jeffrey Alan Coale** was employed as the Assistant Wine Steward at the Windows on the World restaurant, located on the 106th floor of the North Tower, One World Trade Center, New York, New York. Plaintiff **William Coale** has been appointed the Administrator of the **Estate of Jeffrey Alan Coale. William Coale,** under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Administrator of the Estate. See Folder 25, provided via CD, for photos and memorial service materials for **Jeffrey Alan Coale**. See also Third Amended Complaint, ¶¶ 31-33; 375-421.

26. Plaintiff **William Coale** also brings claims in his own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Jeffrey Alan Coale** on September 11, 2001. Decedent **Jeffrey Alan Coale** left the financial world at Cantor Fitzgerald in order to work toward his dream of opening his own restaurant. He was originally scheduled off for September 11, 2001, but came to work because the restaurant was hosting a breakfast. On January 20, 2012, Plaintiff **William Coale** wrote, "Jeffrey was only 31 when he was murdered. He had a full working life ahead of him…[a]t the time of his death he had not only a business plan but investors committed in order to [attain] his goal. I am sure he would have owned a successful restaurant, but that is an unknown, so we all go forward as Jeff would have wanted us to,

thanking God for the special gift he gave us on 7/17/70 and took back on 9/11/01." See Folder 26, provided via CD. See also Third Amended Complaint, ¶¶ 31-33; 375-421; Declaration of William Coale, ¶ 8.

27. Plaintiff **Frances Coffey** is a resident of the State of New York and is the surviving spouse of **Daniel M. Coffey**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Daniel M. Coffey** worked on the 94th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Frances M. Coffey** has been appointed as the Executrix of the **Estate of Daniel M. Coffey**. **Frances M. Coffey**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the Estate. See Third Amended Complaint, ¶¶ 133-135; 375-421.

28. Plaintiff **Frances M. Coffey** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Daniel M. Coffey** on September 11, 2001. Decedent **Daniel M. Coffey** had survived the attack on the World Trade Center in 1993. On September 11, 2001, Plaintiff **Frances M. Coffey** lost both her husband and a son. "The constant media attention is also very painful to bear," **Frances M. Coffey** writes in her Declaration. "We are constantly bombarded by reporters, even now ten years later. Every year, on the anniversary, we hear from them. It makes it very difficult to grieve, to be constantly reminded of what happened. On one hand, I understand them. They are curious, and they want a 'story.' But, they do not understand that we are real people and that our pain and suffering is not a 'story.' No one can understand what we went through. No one should ever have to live

through what I did." See Folder 28, provided via CD. See also Third Amended Complaint, ¶¶ 133-135; 375-421; Declaration of Frances M. Coffey, ¶ 8.

29. Decedent **Daniel M. Coffey** is also survived by an adult child, **Daniel D. Coffey, M.D.**, who is a resident of the State of New York. Plaintiff **Daniel D. Coffey, M.D.**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Daniel M. Coffey** on September 11, 2001. On February 6, 2012, Dr. Coffey wrote, "I did not and do not want to go into the City. I could not handle seeing constant reminders of September 11th. There was no way to escape the media attention, even around our hometown. Many other people lost loved ones on September 11th, but we were one of the few families that lost two loved ones that day. People knew that we had lost two people in the attack, and receiving that kind of attention was horrible. People would say to one another as we walked by, 'You know, they lost two.'" See Folder 29, provided via CD. See also Third Amended Complaint, ¶ 136; ¶¶ 375-421; Declaration of Daniel M. Coffey ¶ 5.

30. Decedent **Daniel M. Coffey** is also survived by an adult child, **Kevin M. Coffey**, who is a resident of the State of New York. Plaintiff **Kevin M. Coffey**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Daniel M. Coffey** on September 11, 2001. "[On September 14, 2001], I felt like I had a definitive answer as to whether or not [**Daniel M. Coffey** and **Jason M. Coffey**] were gone," writes **Kevin M. Coffey** in his Declaration. "But I don't think this is something one comes to terms with. I learned to deal with it. I manage. It is not like they died of cancer or another natural

cause. This is not even like a bus accident. This is…they are bits and pieces. All they did was go to work. They went to work and sat at their desk and a plane hit their building. I can't say that I will ever necessarily deal with that. I just learned to manage it." See Folder 30, provided via CD. See also Third Amended Complaint, ¶ 136; ¶¶ 375-421; Declaration of Kevin M. Coffey, ¶ 7.

31. Plaintiff **Frances M. Coffey** is a resident of the State of New York and is the surviving mother of **Jason M. Coffey**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Jason M. Coffey** worked on the 98th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Frances M. Coffey** has been appointed as Administratrix of the **Estate of Jason M. Coffey**. **Frances M. Coffey**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Administratrix of the Estate. See Third Amended Complaint, ¶¶ 137-139; 375-421.

32. Plaintiff **Frances M. Coffey** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Jason M. Coffey** on September 11, 2001. "September 11, 2001, was supposed to be a happy day," **Frances M. Coffey** writes in her Declaration. "It was a day full of plans and exciting events for [**Daniel M. Coffey** and **Jason M. Coffey**]. The father and son both worked together in the World Trade Center and were planning to meet for lunch and pick up Colleen's [**Jason M. Coffey's** girlfriend] engagement ring. Little did we suspect that this happy, exciting day would turn out to be the most horrible one of our lives!!! It turned out later that Jason was on the phone with Colleen when the plane hit. All she heard was

a loud noise and they were cut off." See Folder 32, provided via CD. See also Third Amended Complaint, ¶¶ 137-139; 375-421; Declaration of Frances M. Coffey, ¶ 7.

33. Decedent **Jason M. Coffey** is survived by his brother, **Daniel D. Coffey, M.D.**, who is a resident of the State of New York. Plaintiff **Daniel D. Coffey, M.D.**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Jason M. Coffey** on September 11, 2001. "Jason and I would talk once a week," writes Dr. Coffey in his Declaration. "The weekend before September 11th, Jason called me. Jason asked if I was getting married any time soon. I responded that I was not and asked why he had asked. He said, 'Good, because I am finally going to beat you at something!' He was dating a beautiful girl named Colleen and was planning on proposing to her. In fact, he had picked out the ring and was going to buy it [on September 11, 2001]." See Folder 33, provided via CD. See also Third Amended Complaint, ¶¶ 140; 375-421; Declaration of Daniel M. Coffey, ¶ 9.

34. Decedent **Jason M. Coffey** is survived by his brother, **Kevin M. Coffey**, who is a resident of the State of New York. Plaintiff **Kevin M. Coffey**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Jason M. Coffey** on September 11, 2001. "I wonder how [**Daniel M. Coffey** and **Jason M. Coffey**] died, but I didn't look into it because I did not really want the answer. As soon as we found out that they found parts just for a lack of a better term, I didn't want to know. I do not want to know if they burned, or if they had died when the building came down. Were these questions going through my head? Yes. That is part of what kept me from being able to

sleep. Not on a normal day, I wouldn't think about it but in the quiet of the night it would sneak out." See Folder 34, provided via CD. See also Third Amended Complaint, ¶ 140; ¶¶ 375-421; Declaration of Kevin M. Coffey, ¶ 13.

35. Plaintiff **Keith A. Bradkowski** is a resident of the State of California and is the appointed Administrator of the Estate of **Jeffrey D. Collman**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Jeffrey D. Collman** was employed by American Airlines as flight attendant on American Airlines Flight 11, which was crashed into the North Tower, One World Trade Center by a hijacker. Plaintiff **Keith A. Bradkowski**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Administrator of the **Estate of Jeffrey D. Collman**. See Folder 35, provided via CD, for photographs and memorabilia of **Jeffrey D. Collman**. See also Third Amended Complaint, ¶¶ 183-184.

36. Decedent **Jeffrey D. Collman** is survived by his natural father, **Dwayne W. Collman**, who is a resident of the State of Illinois. Plaintiff **Dwayne W. Collman**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Jeffrey D. Collman** on September 11, 2001. On December 7, 2011, Mr. Collman wrote, "[Jeffrey] was a great son and I miss him a lot. Not a day goes by that I don't think about him, that I do not visualize his blue eyes and blonde hair. Frequently, I get a glimpse of someone who resembles Jeff and my heart stops for a minute. I hurt every day. On Sunday, September 11, 2011, I read the names of the Flight 11 crew at a memorial in Oswego, IL. They had a pair of empty shoes for each of the 2997 victims of the terrorist attack lined

along the road to allow us to visualize the missing people. This brought tears to everyone's eyes and illustrated yet again the enormity of America's loss and my own." See Folder 36, provided via CD. See also Third Amended Complaint, ¶ 185; ¶¶ 375-421; Declaration of Dwayne W. Collman, ¶¶ 4, 7.

37. Decedent **Jeffrey D. Collman** is survived by his brother, **Brian Collman**, who is a resident of the State of Nevada. Plaintiff **Brian Collman**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Jeffrey D. Collman** on September 11, 2001. On December 16, 2011, **Brian Collman** wrote, "I will always remember 9/11 with intense emotional feelings. It is now part of our American history. I lost a brother and a friend on September 11th. My love for Jeffrey Dwayne Collman has not died." See Folder 37 provided via CD. See also Third Amended Complaint, ¶ 186; ¶¶ 375-421; Declaration of Brian Collman, ¶¶ 7, 10.

38. Decedent **Jeffrey D. Collman** is survived by his brother, **Charles Collman**, who is a resident of the State of North Carolina. Plaintiff **Charles Collman**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Jeffrey D. Collman** on September 11, 2001. On January 24, 2012, **Charles Collman** wrote, "My brother Jeffrey and I were very close. I was his younger brother by one year and eight months. We would speak once per week or once every two weeks, at the latest. I had spoken to him on Sunday, September 9, two days before the attacks. He did not mention about having an upcoming flight to Los Angeles. I was told that he took another flight attendant's place at the last minute. Every September 11th, I sit down and pray for my

brother at the time when the first plane hit the World Trade Center." See Folder 38, provided via CD. See also Third Amended Complaint, ¶ 186; ¶¶ 375-421; Declaration of Charles Collman, ¶¶ 8, 16.

39. Decedent **Jeffrey D. Collman** is survived by his sister, **Brenda Sorenson**, who is a resident of the State of Florida. Plaintiff **Brenda Sorenson**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Jeffrey D. Collman** on September 11, 2001. On December 6, 2011, **Brenda Sorenson** wrote, "When I think of Jeffrey I think about how much he loved traveling. His job as a flight attendant was perfect for him as it allowed him to travel. [One] time when my parents asked Jeffrey to watch me while they were out of town, he took me to the Bahamas! I miss Jeffrey every day. I wish that I could talk to him. I am sad that my four daughters did not and will not get to know their uncle. I think of him often. He was just over forty when he died. So young, so very young, and so much life ahead of him." See Folder 39, provided via CD. See also Third Amended Complaint, ¶ 186; ¶¶ 375-421; Declaration of Brenda Sorenson, ¶¶ 7-9.

40. Plaintiff **Loisanne Diehl** is a resident of the State of New Jersey and is the surviving spouse of **Michael Diehl**, a decedent who was killed as a result of a terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Michael Diehl** was employed by Fiduciary Trust Company and worked on the 90th Floor of the South Tower of the World Trade Center, Two World Trade Center, New York, New York. Plaintiff **Loisanne Diehl** has been appointed the Executrix of the **Estate of Michael Diehl**. Plaintiff **Loisanne Diehl**, under §1605(a) of the Foreign Sovereign

Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of Michael Diehl**. See Folder 40, provided via CD, for article from the *Newark Star-Ledger*. See also Third Amended Complaint, ¶¶ 43-45; 375-421.

41. Plaintiff **Loisanne Diehl** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Michael Diehl** on September 11, 2001. Plaintiff **Loisanne Diehl** writes in her Declaration, "We had a funeral service in a small chapel where Michael's right hand, the only part of him that had been found, was to be entombed during the service. His hand was placed into a rectangular urn next to the altar. Then, it was carried by the funeral director to the wall and placed in a space that was intended for a normal-sized casket. It was a very surreal experience. By this time I had been to three memorial services, visited 'Ground Zero,' and been told that Michael was probably vaporized when the plane exploded near his office. Now, with the presence of physical evidence, I did not know hot Michael had died, or how much he had suffered. Thoughts of Michael suffering haunt me to this day." See Folder 41, provided via CD; See also Third Amended Complaint, ¶¶ 43-45; 375-421; Declaration of Loisanne Diehl ¶ 17.

42. Plaintiff **Morris Dorf** is a resident of the State of New Jersey and the surviving father of **Stephen Scott Dorf**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Stephen Scott Dorf** was employed by Euro Brothers, Inc. and worked on the 84th Floor of the South Tower of the World Trade Center, Two World Trade Center, New York, New York. Plaintiff **Morris Dorf** has been appointed as the Executor of the **Estate of Stephen Scott Dorf**. Plaintiff **Morris Dorf,** under §1605(a) of the Foreign Sovereign Immunities Act,

brings a survival action against all Defendants in his capacity as the Executor of the **Estate of Stephen Scott Dorf**. See Third Amended Complaint, ¶¶ 96-98; 375-421.

43. Plaintiff **Morris Dorf** also brings claims in his own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Stephen Scott Dorf** on September 11, 2001. On February 19, 2010, Plaintiff **Morris Dorf** wrote, "My son always stood by the family and was constantly doing things for others. I could always depend on him to take me to the doctors or the store. He was a wonderful, responsible son." See Folder 43, provided via CD. See also Third Amended Complaint, ¶¶ 96-98; 375-421; Declaration of Morris Dorf ¶¶ 5,7.

44. Decedent **Stephen Scott Dorf** is also survived by his sister, **Ann Marie Dorf**, who is a resident of the State of New Jersey. Plaintiff **Ann Marie Dorf**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Stephen Scott Dorf** on September 11, 2001. On December 15, 2011, Plaintiff **Ann Marie Dorf** wrote, "Stephen was the fire warden[4] for his company [located in the South Tower]. After the first plane hit the North Tower, he called my sister to let her know what was happening. She called me and I turned on the radio, I then turned on the TV and saw everything. Knowing my baby brother, the one who was always there for the family, was in a burning building and there was nothing I could do was unbearable. My sister told him to just get out. But knowing Stephen, he embraced his responsibilities as a fire warden. Stephen's

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4 To address the problems encountered during the response to the 1993 bombing of the World Trade Center, the Port Authority created "fire safety teams" from the civilian employees on each floor of the building, which consisted of a fire warden, deputy fire warden, and searchers. Fire wardens would lead co-workers during fire safety drills. Some civilians told the 9/11 Commission that their evacuation on September 11th was greatly aided by changes and training implemented by the Port Authority after the 1993 bombing. See *The 9/11 Commission Report*, pp. 280-81.

co-worker told me that when the second plane hit, he was on the stairwell. He said it shook and people started running down the stairs. The man suffered a broken leg, but he got out alive. He told me Stephen saved his life. *Many people are still alive today talking about what my baby brother did for them on Sept 11.*" (italics in original). See Folder 44, provided via CD. See also Third Amended Complaint, ¶ 99; ¶¶ 375-421; Declaration of Ann Marie Dorf, ¶ 5.

45. Decedent **Stephen Scott Dorf** is also survived by his brother, **Joseph Dorf**, who is a resident of the State of New York. Plaintiff **Joseph Dorf**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Stephen Scott Dorf** on September 11, 2001. "I have hesitated to write this since the terrorist attacks first ensued," states Plaintiff **Joseph Dorf** in his Declaration. "There are no words profound enough to express my feelings. Stephen will be missed dearly by everyone who knew him." See Folder 45, provided via CD. See also Third Amended Complaint, ¶ 99; ¶¶ 375-421; Declaration of Joseph Dorf, ¶ 8.

46. Decedent **Stephen Scott Dorf** is also survived by his sister, **Michelle Dorf**, who is a resident of the State of New Jersey. Plaintiff **Michelle Dorf**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Stephen Scott Dorf** on September 11, 2001. Plaintiff **Michelle Dorf** was the last member of her family to speak to Decedent **Stephen Scott Dorf** while he was alive, immediately after the North Tower was struck by American Airlines Flight 11. "He was so upset when we were talking that his voice was cracking every which way, he seemed scared to death," she

writes in her Declaration. "Stephen said that bodies were being thrown from the windows because people were killing themselves. I could not imagine what he was saying. I told my brother to go downstairs and get out, but I did not really think his building would get hit. If I had, I would have urged him more strongly, but I wasn't thinking at the time. I wish I had told him, 'I love you, I do.' I got a phone call from one of my brother's friends telling me that Stephen helped everyone get out. Stephen was a fire warden and his friend saw him on the way back up to get others. That was so like Stephen, even in this situation, he helped people with no fear for his own life." See Folder 46, provided via CD. See also Third Amended Complaint, ¶ 99; ¶¶ 375-421; Declaration of Michelle Dorf, ¶¶ 10, 13.

47. Decedent **Stephen Scott Dorf** is also survived by his brother, **Robert Dorf**, who is a resident of the State of New Jersey. Plaintiff **Robert Dorf**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Stephen Scott Dorf** on September 11, 2001. Plaintiff **Robert Dorf** is an elementary school teacher in Manhattan. He writes in his Declaration, "Every time they show those planes crashing into the towers they crash into my heart. I had to go to work each day afterwards knowing that those planes flew over my school on the way to the World Trade Center." Folder 47, provided via CD. See also Third Amended Complaint, ¶ 99; ¶¶ 375-421; Declaration of Robert Dorf, ¶ 8.

48. Decedent **Stephen Scott Dorf** is also survived by his sister, **Linda Sammut**, who is a resident of the State of New Jersey. Plaintiff **Linda Sammut**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other

causes of action against all Defendants as a result of the murder of **Stephen Scott Dorf** on September 11, 2001. See Third Amended Complaint, ¶ 99; ¶¶ 375-421.

49. Plaintiff **Corazon Fernandez** is a resident of the State of New Jersey and is the surviving mother of **Judy Fernandez**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Judy Fernandez** was 27 years of age and employed by Cantor Fitzgerald in the North Tower, One World Trade Center. Plaintiff **Corazon Fernandez** is the Personal Representative of the **Estate of Judy Fernandez.** Plaintiff **Corazon Fernandez**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Personal Representative of the **Estate of Judy Fernandez**. See Folder 49, provided via CD, for family photographs of Judy Fernandez. See also Third Amended Complaint, ¶¶ 180-181.

50. **Corazon Fernandez** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Judy Fernandez** on September 11, 2001. "We planned a joint Memorial Service with my brother's family, the Santillans, for Judy and their daughter, Maria Theresa," writes **Corazon Fernandez** in her Declaration. "They were so close we had just one service. Since we had no remains, it was a Memorial service. We really wanted to do something special for Judy, to have a place where we could go visit every morning, but we will never be able to do that because her body was never found. That hurts us very much, and there is no closure. The pain will never go away no matter what." See Folder 50, provided via CD. See also Third Amended Complaint, ¶¶ 180-181; 375-421; Declaration of Corazon Fernandez ¶ 12.

51. Plaintiff **Grace M. Parkinson-Godshalk** is a resident of the Commonwealth of Pennsylvania and is the surviving natural mother of **William R. Godshalk**, a resident of the State of New York and a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **William R. Godshalk** was employed by Keefe, Bruyette & Woods located on the 89th floor of the South Tower, Two World Trade Center, New York, New York. Plaintiff **Grace M. Parkinson-Godshalk** has been appointed the Administratrix of the **Estate of William R. Godshalk**. Plaintiff **Grace M. Parkinson-Godshalk**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Administratrix of the **Estate of William R. Godshalk**. See Third Amended Complaint, ¶¶ 16-18; 375-421.

52. Plaintiff **Grace M. Parkinson-Godshalk** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **William R. Godshalk** on September 11, 2001. **Grace M. Parkinson-Godshalk,** along with Plaintiffs **Fiona Havlish, Ellen Saracini,** and **Tara Bane** were the driving force behind creating a Memorial for not only the 18 victims of 9/11 in their community, but for all of the all of the victims of the 9/11 terrorist attacks. It is located at a former farm called North Park in Pennsylvania. "Bill's remains were never identified," **Grace M. Parkinson-Godshalk** writes in her Declaration. "I'm deeply hurt by not having a grave for my son. Bill is the first thing I think about in the morning and the last thing I think about at night." See Folder 52, provided via CD. See also Third Amended Complaint, ¶¶ 16-18; 375-421; Declaration of Grace M. Parkinson-Godshalk ¶ 10, 15, 16.

53. Plaintiff **Tina Grazioso** is a resident of the State of New Jersey and is the surviving

spouse of **John Grazioso**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **John Grazioso** was employed by eSpeed (Cantor Fitzgerald) on the 105th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Tina Grazioso** has been appointed the Executrix of the **Estate of John Grazioso**. Plaintiff **Tina Grazioso**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of John Grazioso**. See Third Amended Complaint, ¶¶ 46-48; 375-421.

54. **Tina Grazioso** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **John Grazioso** on September 11, 2001. After being informed by the authorities that the first remains of Decedent **John Grazioso** had been recovered, Plaintiff **Tina Grazioso** requested that she be able to hold her husband's body one last time. She was told that this was not possible due to fragmentation. See Folder 54, provided via CD. See also Third Amended Complaint, ¶¶ 46-48; 375-421; Declaration of Tina Grazioso, ¶ 14.

55. Plaintiff **Maureen R. Halvorson** is a resident of the State of Connecticut and is the surviving spouse of **James D. Halvorson**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **James D. Halvorson** worked on the 99th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Maureen R. Halvorson** has been appointed Executrix of the **Estate of James D. Halvorson**. Plaintiff **Maureen R. Halvorson**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the

Estate of James D. Halvorson. See Third Amended Complaint, ¶¶ 123-125.

56. Plaintiff **Maureen R. Halvorson** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **James D. Halvorson** on September 11, 2001. In addition to losing her husband, Plaintiff **Maureen R. Halvorson** also lost her brother, **William Wilson**. Ms. Halvorson called her son Doug, who was working in Manhattan, after hearing a radio report that a small plane had hit the World Trade Center. Describing her son Doug's reaction, **Maureen R. Halvorson** writes, "With a sound in his voice that I have never heard before and with the background of hysteria, my son said, 'It was a huge plane and it went into the building and it didn't come out.' He described a huge fire plume burning on top of the North Tower. Then he said, 'Dad is gone.'" **James D. Halvorson** "traveled the world for his job, especially in the Muslim world: Iraq, Pakistan, Saudi Arabia, Lebanon and Indonesia. He never had a complaint about his dealings there. Doug and I struggle not to hate in memory of Jim and Bill." See Folder 56, provided via CD. See also Third Amended Complaint, ¶¶ 123-125; 375-421; Declaration of Maureen R. Halvorson ¶¶ 19, 39.

57. Plaintiff **Jin Liu** is a resident of the State of New Jersey and is the surviving spouse of **Liming Gu**, a decedent who was killed as a result of the terrorist attack on the World Trade Center on September 11, 2001. **Liming Gu** was 34 years of age and worked on the 95th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Jin Lu** has been appointed as the Executor of the **Estate of Liming Gu**. Plaintiff **Jin Lu**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the

Estate of Liming Gu. See Third Amended Complaint, ¶¶ 171-173; 375-421.

58. Plaintiff **Jin Lu** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Liming Gu** on September 11, 2001. "One of my co-workers had a TV in their office, and we all went to watch **Jin Liu** writes in her Declaration. "That's where I watched the events that took place on the morning of 9/11. I knew [**Liming Gu**] worked on one of the top floors. I started to call him. And I think what happened is, when I was calling him he was calling me, so I did not get a chance to speak with him. But he left me a message. I could not really hear the message clearly; there was too much going on in the background. I can hear people screaming. There was a lot of noise and yelling. I am guessing he was probably hurt as well since the floor that he worked was where the plane went in." See Folder 58, provided via CD. See also Third Amended Complaint, ¶¶ 171-173; 375-421; Declaration of Jin Liu ¶ 6.

59. Plaintiff **Jin Lu** also brings a claim for wrongful death and asserts other causes of action against all Defendants on behalf of **Alan Gu**, a minor, as beneficiary of such claims as a result of the murder of **Liming Gu** on September 11, 2001. "My son, **Alan Gu**, was one year and nine months old on September 11, 2001. Every year, he understands more and more about what happened to his father. At first, he used to ask, 'Where is my Daddy?' He went to therapy for a while, and I hope now he accepts what has happened. The truth is, I do not really know what Alan thinks. He is very quiet on the subject and does not say much." See Folder 59, provided via CD. See Third Amended Complaint, ¶¶ 171-173; 375-421; Declaration of Jin Liu on behalf of Alan Gu, ¶¶ 6, 7.

60. Plaintiff **Grace Kneski** is a resident of the State of South Carolina and is a surviving

relative (natural mother) of **Steven Cafiero**, a decedent who was killed as a result of a terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Steven Cafiero** was employed by AON, Inc. and worked on the 92nd floor of the South Tower of the World Trade Center, Two World Trade Center, New York, New York. Plaintiff **Grace Kneski** has been appointed the Executrix of the **Estate of Steven Cafiero**. Plaintiff **Grace Kneski**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of Steven Cafiero**. See Third Amended Complaint, ¶¶ 52-54; 375-421.

61. Plaintiff **Grace Kneski** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Steven Cafiero** on September 11, 2001. Decedent **Steven Cafiero**, the only son of Plaintiff **Grace Kneski**, telephoned his mother after American Airlines Flight 11 stuck the North Tower to inform her that he was safe. She urged him to leave the South Tower, but the decedent chose to follow the instructions over the public address system to stay at his work station in light of the fact that he was a new employee on the job for only 22 days. During the conversation between Decedent **Steven Cafiero** and Plaintiff **Grace Kneski**, Plaintiff suddenly heard people screaming in the background. Decedent **Steven Cafiero**, immediately before the line went dead, uttered words to the effect of, "Oh, no. Oh, my God." It was at this time that United Airlines Flight 175 crashed into the South Tower through the 77th to 85th Floors. Decedent **Steven Cafiero** was working only 7 floors above the impact zone. Neither his body nor any remains were ever recovered, leaving Plaintiff **Grace Kneski** with no sense of closure. "Losing a child is not natural," she writes in her Declaration. "We are not supposed to outlive our children." See Folder 61,

provided via CD. See also Third Amended Complaint, ¶¶ 52-54; 375-421. See also *The 9/11 Commission Report*, p. 293; Declaration of Grace Kneski, ¶¶ 6, 9, 19.

62. Plaintiff **Roni Levine** is a resident of the State of New York and the surviving spouse of **Robert Levine**, a decedent who was killed as a result of the terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Robert Levine** worked on the 104th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Roni Levine** has been appointed as the Executrix of the **Estate of Robert Levine**. Plaintiff **Roni Levine**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of Robert Levine**. See Folder 62, provided via CD, for a photograph of the Decedent with family members and a photo of his charred work badge from Cantor Fitzgerald. See Third Amended Complaint, ¶¶ 113-115; 375-421.

63. Plaintiff **Roni Levine** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Robert Levine** on September 11, 2001. Six months to the day of the attacks, the FBI visited the family home to inform **Roni Levine** that a portion of her husband's skull was found with all of his teeth intact. "He had just broken up into little pieces, spread all over the place," **Roni Levine** writes in her Declaration. See Folder 63, provided via CD. See also Third Amended Complaint, ¶¶ 113-115; 375-421; Declaration of Roni Levine ¶ 6.

64. Plaintiff **Theresann Lostrangio** is a resident of the Commonwealth of Pennsylvania and is the surviving spouse of **Joseph Lostrangio**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11,

2001. **Joseph Lostrangio** was employed by Devonshire Group on the 77th Floor of the North Tower in the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Theresann Lostrangio** has been appointed the Executrix of the **Estate of Joseph Lostrangio**. Plaintiff **Theresann Lostrangio**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of Joseph Lostrangio**. See Folder 64, provided via CD; See also Third Amended Complaint, ¶¶ 113-115; 375-421. See Third Amended Complaint, ¶¶ 113-115; 375-421

65. Plaintiff **Theresann Lostrangio** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Joseph Lostrangio** on September 11, 2001. The family's children were 19 and 17 at the time of the attacks. **Theresann Lostrangio** first learned of the attacks when her son left a message on the family answering machine that said, "Mom, I think a plane hit Dad." The line then sounded as if it disconnected. See Folder 65, provided via CD. See also Third Amended Complaint, ¶¶ 113-115; 375-421; Declaration of Theresann Lostrangio ¶ 11.

66. Plaintiff **Joanne Lovett** is a resident of the State of New York and is a surviving relative (natural mother) of **Brian Nunez**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Brian Nunez** was employed by eSpeed (Cantor Fitzgerald) on the 104th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Joanne Lovett** has been appointed the Executrix of the **Estate of Brian Nunez.** Plaintiff **Joanne Lovett**, under §1605(a) of the Foreign Sovereign Immunities

Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of Brian Nunez**. See Folder 66, provided via CD; See also Third Amended Complaint, ¶¶ 113-115; 375-421.

67. Plaintiff **Joanne Lovett** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Brian Nunez** on September 11, 2001. **Joanne Lovett** was able to clearly see the World Trade Center, where her son was working in the North Tower, from her own place of employment. She personally witnessed the North Tower burning and the South Tower collapse. Her son, Decedent **Brian Nunez**, left a message on the family answering machine at 8:51 a.m. **Joanne Lovett** says of the message, "Brian had to have been delirious. Brian's voice continued to say that a plane had hit the World Trade Center and he was still inside. He said there is a lot of smoke, and he said he was having a hard time breathing. All through the short message, I could hear Brian's Heavy, labored breathing and his voice was cracking as he continued to tell everyone he loved them, and if he didn't make it out of here…there was another pause and he finished his call with a 'bye.' I could hear the panic in his voice." See Folder 67, provided via CD; See also Third Amended Complaint, ¶¶ 113-115; 375-421; Declaration of Joanne Lovett ¶¶ 13-14.

68. Plaintiff **Chrislan Fuller Manuel** is a resident of the State of Michigan and is the surviving aunt of **Meta L. Waller**, a decedent who was killed as a result of the terrorist attack on the Pentagon on September 11, 2011.[5] **Meta L. Waller** worked on the 1st Floor, "E" Wing of the Pentagon when American Airlines Flight 77, hijacked through the actions of Defendants, was intentionally crashed crash into the building. Plaintiff

[5] The Third Amended Complaint incorrectly lists the Decedent's surname as "Walker."

Chrislan Fuller Manuel has been appointed as the Executrix of the **Estate of Meta L. Waller**. Plaintiff **Chrislan Fuller Manuel**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of Meta L. Waller**. See Folder 68, provided via CD.

69. Plaintiff **Chrislan Fuller Manuel** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Meta L. Waller** on September 11, 2001. "Talking about my relationship with [Decedent **Meta L. Waller**] is difficult for me and I struggle to describe it fully. I have found that people assume that because it was only my aunt that died that we could not have been close enough for me to need to grieve for her and to move on more quickly from her death. I actually had a boss at my former job that asked me, 'It's only your aunt that died. Why do you need time off for that?' I become irritated with this lack of sympathy quickly. Meta was so many things to me and such a part of my life. She was a mother figure, a friend and a confidant. I will grieve for her the rest of my life." See Folder 69, provided via CD. See also Third Amended Complaint, ¶¶ 110-112; 375-421; Declaration of Chrislan Fuller Manuel. ¶ 9.

70. Plaintiff **Maria Regina Merwin** is a resident of the Commonwealth of Kentucky and is the sister of **Ronald Gamboa**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers on September 11, 2001. **Ronald Gamboa** was a passenger on United Airlines Flight 175 which was crashed into the South Tower of the World Trade Center by a hijacker. Plaintiff **Maria Regina Merwin** has been appointed as the Executrix of the **Estate of Ronald Gamboa**. Plaintiff **Maria Regina Merwin**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against

all Defendants in her capacity as the Executrix of the **Estate of Ronald Gamboa**. See Folder 70, provided via CD.

71. Plaintiff **Maria Regina Merwin** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Ronald Gamboa** on September 11, 2001. On the day of the attacks, **Ronald Gamboa** was on the hijacked UA Flight 175 with his partner and their 3 year-old son. "I can't imagine the terror Ron went through as he tried to save his son," **Maria Regina Merwin** writes in her Declaration. "[H]e was so protective of his son and he would do anything do keep him safe so I can't imagine how awful they felt on that plane." See Folder 71, provided via CD. See also Third Amended Complaint, ¶¶ 116-118; 375-421; Declaration of Maria Regina Merwin.

72. Plaintiff **Margaret Mauro** is a resident of the State of Tennessee and is the surviving twin sister of **Dorothy Mauro**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Dorothy Mauro** worked on the 97th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Margaret Mauro** has been appointed as the Administratrix of the **Estate of Dorothy Mauro**. Plaintiff **Margaret Mauro**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Administratrix of the **Estate of Dorothy Mauro**. See Folder 72, provided via CD. See also Third Amended Complaint, ¶¶ 84-86; 375-421.

73. Plaintiff **Margaret Mauro** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Dorothy**

Mauro on September 11, 2001. "With [Decedent **Dorothy Mauro**] gone, half of me is missing," writes Margaret in her Declaration. "I have grieved a long time over her loss. Dorothy and I looked alike and sounded alike. Sometimes when I hear myself laughing, I hear her. When I look in the mirror, it's her image staring back at me. My sister was more than just my twin; she was my forever friend, my confidant, and my traveling companion. Dorothy was the most important person in my life." See Folder 73, provided via CD. See also Third Amended Complaint, ¶¶ 84-86; 375-421; Declaration of Margaret Mauro ¶ 7

74. Plaintiff **Ramon Melendez** is a resident of the Commonwealth of Pennsylvania and is the surviving spouse of **Mary Melendez**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Mary Melendez** worked on the 90th Floor of the South Tower of the World Trade Center, Two World Trade Center, New York, New York. Plaintiff **Ramon Melendez** has been appointed as the Administrator of the **Estate of Mary Melendez**. Plaintiff **Ramon Melendez**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Administrator of the **Estate of Mary Melendez**. See Folder 74, provided via CD. See alsoThird Amended Complaint, ¶¶ 130-132; 375-421.

75. Plaintiff **Ramon Melendez** also brings claims in his own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Mary Melendez** on September 11, 2001. Plaintiff **Ramon Melendez** was speaking on the phone with Decedent **Mary Melendez** after AA Flight 11 struck the North Tower while he was simultaneously watching the television coverage of the attacks. When Mr.

Melendez saw UA Flight 175 strike the South Tower, his wife's phone line at her office went dead. See Folder 75, provided via CD. See also Third Amended Complaint, ¶¶ 130-132; 375-421; Declaration of Ramon Melendez, ¶ 5.

76. Plaintiff **Patricia Milano** is a resident of the State of New Jersey and is the surviving spouse of **Peter T. Milano**, a decedent who was killed as a result of a terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Peter T. Milano** was employed by Cantor Fitzgerald on the 104th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Patricia Milano** has been appointed the Executrix of the **Estate of Peter T. Milano**. Plaintiff **Patricia Milano**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of Peter T. Milano**. See Folder 76, provided via CD. See also Third Amended Complaint, ¶¶ 84-86; 375-421.

77. Plaintiff **Patricia Milano** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Peter T. Milano** on September 11, 2001. With regard to her experience of losing her husband, Plaintiff **Patricia Milano** writes, "[P]eople want you to move on, meet someone, and find happiness again. I'm tired of trying to explain myself and if they really understood the kind, thoughtful husband I had, they would be more empathetic. I feel each day is another day of moving on without him." At the time of his death, **Peter T. Milano** left behind two minor children. See Folder 77, provided via CD. See also Third Amended Complaint, ¶¶ 84-86; 375-421; Declaration of Patricia Milano ¶ 4, 6.

78. Plaintiff **Ivy Moreno** is a resident of the State of New York and the surviving mother of

Yvette Nichole Moreno, a decedent who was killed as a result of the terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Yvette Nichole Moreno** worked on the 92nd Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Ivy Moreno** has been appointed Administratrix of the **Estate of Yvette Nichole Moreno**. Plaintiff **Ivy Moreno**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Administratrix of the **Estate of Yvette Nichole Moreno**. See Folder 78, provided via CD.

79. Plaintiff **Ivy Moreno** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Yvette Nichole Moreno** on September 11, 2001. The Decedent's place of employment was the North Tower, but she survived the attack by the hijacked American Airlines Flight 11. She perished while walking on an overpass toward her home as a result of falling debris from the attacks. Her body was identified via dental records and a tattoo a few days following what would have been her 25th birthday. Her mother, Plaintiff **Ivy Moreno**, was so distraught that the Decedent's uncle was sent to identify the body. "I will never hug her again, kiss her, talk and laugh with her, see her get married, or know the grandchildren that she could have had," **Ivy Moreno** wrote of **Yvette Nichole Moreno**. "The terrorists also killed me on that day. I only exist, I no longer live!" See Folder 79, provided via CD. See also Third Amended Complaint, ¶¶ 93-95; 375-421; Declaration of Ivy Moreno. ¶ 5-7.

80. Plaintiff **Estate of Vincent A. Ognibene** is the estate of the surviving father of **Philip Paul Ognibene**, a decedent who was killed as a result of the terrorist attacks on the

World Trade Center Towers in New York City on September 11, 2001. Decedent **Philip Paul Ognibene** worked on the 89th Floor of the South Tower of the World Trade Center, Two World Trade Center, New York, New York. Plaintiff **Vincent A. Ognibene** has been appointed as co-Executor of the **Estate of Philip Paul Ognibene**. Plaintiff **Estate of Vincent A. Ognibene**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the co-Executor of the **Estate of Philip Paul Ognibene**. See Folder 80, provided via CD. See also Third Amended Complaint, ¶¶ 88-90; 375-421.

81. Plaintiff **Estate of Vincent A. Ognibene** also brings claims in its own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Philip Paul Ognibene** on September 11, 2001.[6] A Declaration was submitted on behalf of the **Estate of Vincent A. Ognibene** by the Executrix of the Estate, Diane Ognibene. Ms. Ognibene is the Claimant's widow and Decedent **Philip Paul Ognibene's** step-mother. Ms. Ognibene states in her Declaration that, "My husband had a very close relationship with Philip. [W]hen Philip died Vincent's whole life turned upside down. When he found out that he had cancer back in 2005, his first words were, 'Well, I will finally be with Philip soon.'" See Folder 81, provided via CD. See also Third Amended Complaint, ¶¶ 88-90; 375-421; Declaration of Diane Ognibene on Behalf of Vincent Ognibene, Deceased, ¶¶ 5, 8.

82. Plaintiff **Marie Ann Paprocki** is a resident of the State of New York and is the surviving sister of **Denis Lavelle**, a decedent who was killed as a result of the terrorist attack on the

6 Plaintiff Vincent A. Ognibene expired on April 25, 2008, during the pendency of this suit. Any award will be made to the Estate of Vincent A. Ognibene. Diane Ognibene is the Executrix of the Estate. A Suggestion of Death is being filed contemporaneously with this document.

World Trade Center Towers in New York City on September 11, 2011. **Denis Lavelle** worked on the 94th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Marie Ann Paprocki** has been appointed as Executrix of the **Estate of Denis Lavelle**. Plaintiff **Marie Ann Paprocki**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of Denis Lavelle**. See Folder 82, provided via CD. See also Third Amended Complaint, ¶¶ 107-109; 375-421.

83. Plaintiff **Marie Ann Paprocki** also brings claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Denis Lavelle** on September 11, 2001. "[**Denis Lavelle**] was my mother's sole caregiver," writes Plaintiff **Marie Ann Paprocki** in her Declaration. "He lived with her, cared for her, and supported her financially. No remains of Denis were ever recovered Because we have no remains of Denis, we also have no real closure. Days, weeks, months, even years later, I have a vision of my brother running to try to save himself for my mother's sake. I am sure that my mother's face flashed before his eyes as he wondered what would become of her without him to support or care for her." See Folder 83, provided via CD. See also Third Amended Complaint, ¶¶ 107-109; 375-421. See also Declaration of Marie Ann Paprocki, ¶¶ 9-10.

84. Plaintiff **Patricia J. Perry** is a resident of the State of New York and is the surviving spouse of **John William Perry**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **John William Perry,** an officer with the New York City Police Department, was last seen in the mezzanine of the South Tower, Two World Trade Center, New York, New York just

prior to its collapse, which was a result of the attacks perpetrated by Defendants. Plaintiff **Patricia J. Perry** has been appointed the Administratrix of the **Estate of John William Perry**. Plaintiff **Patricia J. Perry**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Administratrix of the **Estate of John William Perry**. See Folder 84, provided via CD. See also Declaration of Patricia J. Perry, ¶ 5-7.

85. Plaintiff **Patricia J. Perry** also brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **John William Perry** on September 11, 2001. The Decedent, who had earned a law degree, was in the process of turning in his badge when the North Tower was struck by American Airlines Flight 11. He requested that his badge be returned to him and rushed to the scene of the terrorist attacks, where he died while giving someone oxygen in the South Tower. See Folder 85, provided via CD. See also Third Amended Complaint, ¶¶ 34-36; 375-421. See also Declaration of Patricia J. Perry ¶ 5.

86. Plaintiff **Christine Papasso** is a resident of the State of New York and is the surviving spouse of **Salvatore T. Papasso**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Salvatore T. Papasso** was 34 years of age and employed by the New York State Department of Tax and Finance on the 86th Floor of the South Tower in the World Trade Center, Two World Trade Center, New York, New York. Plaintiff **Christine Papasso** has been appointed the Executrix of the **Estate of Salvatore T. Papasso**. Plaintiff **Christine Papasso**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of**

Salvatore T. Papasso. See Folder 86, provided via CD. See also Third Amended Complaint, ¶¶ 55-57; 375-421.

87. Plaintiff **Christine Papasso** also brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Salvatore T. Papasso** on September 11, 2001. Plaintiff Christine Papasso worked at an office in Manhattan and personally witnessed the attacks on the Twin Towers. See Folder 87, provided via CD. See also Third Amended Complaint, ¶¶ 55-57; 375-421; Declaration of Christine Papasso.

88. Plaintiff **Rodney Ratchford** is a resident of the State of Alabama and is the surviving husband of **Marsha Dianah Ratchford**, a decedent who was killed as a result of the terrorist attack on the Pentagon on September 11, 2001. Plaintiff **Rodney Ratchford** has been appointed as the Executor of the **Estate of Marsha Dianah Ratchford**. Plaintiff **Rodney Ratchford**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Executor of the **Estate of Marsha Dianah Ratchford**. See Folder 88, provided via CD. See also Third Amended Complaint, ¶¶ 167, 169; 375-421.

89. Plaintiff **Rodney Ratchford** also brings a claim in his own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Marsha Dianah Ratchford** on September 11, 2001. See Folder 89, provided via CD. See also Third Amended Complaint, ¶¶ 167, 169; 375-421; Declaration of Rodney Ratchford.

90. Decedent **Marsha Dianah Ratchford** is also survived by a minor child, **Rodney M. Ratchford**, who is a resident of the State of Alabama. Plaintiff **Rodney Ratchford**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful

death and asserts other causes of action against all Defendants on behalf of **Rodney M. Ratchford** as beneficiary of such claims as a result of the murder of **Marsha Dianah Ratchford** on September 11, 2001. See Folder 90, provided via CD. See also Third Amended Complaint, ¶¶ 168, 170; 375-421; Declaration of Rodney Ratchford.

91. Decedent **Marsha Dianah Ratchford** is also survived by a minor child, **Marshee R. Ratchford**, who is a resident of the State of Alabama. Plaintiff **Rodney Ratchford**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants on behalf of **Marshee R. Ratchford** as beneficiary of such claims as a result of the murder of **Marsha Dianah Ratchford** on September 11, 2001. See Folder 91, provided via CD. See also Third Amended Complaint, ¶¶ 168, 170; 375-421; Declaration of Rodney Ratchford.

92. Decedent **Marsha Dianah Ratchford** is also survived by a minor child, **Miranda C. Ratchford**, who is a resident of the State of Alabama. Plaintiff **Rodney Ratchford**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants on behalf of **Miranda C. Ratchford** as beneficiary of such claims as a result of the murder of **Marsha Dianah Ratchford** on September 11, 2001. See Folder 92, provided via CD. See also Third Amended Complaint, ¶¶ 168, 170; 375-421; Declaration of Rodney Ratchford.

93. Plaintiff **Joyce Ann Rodak** is a resident of the State of New Jersey and is the surviving spouse of **John M. Rodak**, a decedent who was killed as a result of the terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **John M. Rodak** worked on the 104th Floor of the South Tower of the World Trade Center, Two World Trade Center, New York, New York. Plaintiff **Joyce Ann Rodak** has been

appointed as the Executrix of the **Estate of John M. Rodak**. Plaintiff **Joyce Ann Rodak**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of John M. Rodak**. See Folder 93, provided via CD.

94. Plaintiff **Joyce Ann Rodak** also brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **John M. Rodak** on September 11, 2001. See Folder 94, provided via CD. See also Third Amended Complaint, ¶¶ 141, 143; 375-421; Declaration of Joyce Ann Rodak.

95. Decedent **John M. Rodak** is also survived by one adult child, **Chelsea Nicole Rodak**, who is a resident of the State of New Jersey. Plaintiff **Chelsea Nicole Rodak**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **John M. Rodak** on September 11, 2001. See Folder 95, provided via CD. See also Third Amended Complaint, ¶¶ 141, 143; 375-421

96. Decedent **John M. Rodak** is also survived by one minor child, **Devon Marie Rodak,** who is a resident of the state of New Jersey. Plaintiff **Joyce Ann Rodak** brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **John M. Rodak** on September 11, 2001, with **Devon Marie Rodak** being the rightful beneficiary of such claims as a result of the murder of **John M. Rodak** on September 11, 2001. See Folder 96, provided via CD. See also Third Amended Complaint, ¶¶ 142, 144; 375-421; Declaration of Joyce Ann Rodak.

97. Decedent **John M. Rodak** is also survived by his natural father, **John Rodak,** who is a resident of the Commonwealth of Pennsylvania. Plaintiff **John Rodak** brings a claim for

wrongful death and asserts other causes of action against all Defendants as a result of the murder of **John M. Rodak** on September 11, 2001. See Folder 97, provided via CD. See Third Amended Complaint, ¶ 146; ¶¶ 375-421. See also Declaration of John Rodak.

98. Decedent **John M. Rodak** is also survived by his natural mother, **Regina Rodak,** who is a resident of the Commonwealth of Pennsylvania. Plaintiff **Regina Rodak** brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **John M. Rodak** on September 11, 2001. See Folder 98, provided via CD. See also Third Amended Complaint, ¶ 146; ¶¶ 375-421; Declaration of Regina Rodak.

99. Decedent **John M. Rodak** is also survived by his sister, **Joanne Gori**. **Joanne Gori** is a resident of the Commonwealth of Pennsylvania and is a party to this action. **Joanne Gori** brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **John M. Rodak** on September 11, 2001. See Folder 99, provided via CD. See also Third Amended Complaint, ¶ 145; ¶¶ 375-421; Declaration of Joanne Gori.

100. Plaintiff **Diane Romero** is a resident of the State of New Jersey and is the surviving spouse of **Elvin Romero**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Elvin Romero** was employed by Cantor Fitzgerald on the 104th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Diane Romero** has been appointed the Administratrix of the **Estate of Elvin Romero**. Plaintiff **Diane Romero**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of Elvin Romero**. See Folder 100, provided via CD.

101. Plaintiff **Diane Romero** also brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Elvin Romero** on September 11, 2001. See Folder 101, provided via CD. See also Third Amended Complaint, ¶¶ 61-63; 375-421; Declaration of Diane Romero.

102. Plaintiff **Loren Rosenthal** is a resident of the State of New Jersey and is the surviving spouse of **Richard Rosenthal**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Richard Rosenthal** worked on the 101st Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Loren Rosenthal** has been appointed as the Executrix of the **Estate of Richard Rosenthal**. Plaintiff **Loren Rosenthal**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of Richard Rosenthal**. See Folder 102, provided via CD. See also Third Amended Complaint, ¶¶ 78-80; 375-421.

103. Plaintiff **Loren Rosenthal** also brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Richard Rosenthal** on September 11, 2001. Some remains of Decedent **Richard Rosenthal** were located and identified approximately 3-4 weeks following the attacks. His charred identification card issued by Cantor Fitzgerald was also found. Plaintiff **Loren Rosenthal** has this identification card in her possession to this day. See Folder 103, provided via CD. See also Third Amended Complaint, ¶¶ 78-80; 375-421; Declaration of Loren Rosenthal.

104. Plaintiff **Judith Jackson Reiss** is a resident of the Commonwealth of Pennsylvania and is

a surviving natural mother of **Joshua Scott Reiss**, a citizen of the Commonwealth of Pennsylvania and a decedent who was killed as a result of a terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Joshua Scott Reiss** was employed by the Cantor Fitzgerald firm, located on the 105th floor of the North Tower, One World Trade Center, New York, New York. Plaintiff **Judith Reiss** has been appointed the Administratrix of the **Estate of Joshua Scott Reiss.** Plaintiff **Judith Reiss**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Administratrix of the **Estate of Joshua Scott Reiss**. See Folder 104, provided via CD.

105. Plaintiff **Judith Reiss** also brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Joshua Scott Reiss** on September 11, 2001. See Folder 105, provided via CD. See also Third Amended Complaint, ¶¶ 28-30; 375-421; Declaration of Judith Reiss.

106. Plaintiff **Expedito Santillan** is a resident of the State of New Jersey and the surviving natural father of **Maria Theresa Santillan**, a decedent who was killed as a result of a terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Maria Theresa Santillan** worked on the 103rd Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Expedito Santillan** has been appointed the Administrator of the **Estate of Maria Theresa Santillan**. Plaintiff **Expedito Santillan**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Administrator of the **Estate of Maria Theresa Santillan**. See Folder 106, provided via CD.

107. Plaintiff **Expedito Santillan** also brings a claim in his own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Maria Theresa Santillan** on September 11, 2001. See Folder 107, provided via CD. See also Third Amended Complaint, ¶¶ 70-73; 375-421; Declaration of Expedito Santillan.

108. Decedent **Maria Theresa Santillan** is survived by her natural mother, **Ester Santillan**, who is a resident of the State of New Jersey. Plaintiff **Ester Santillan,** under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Maria Theresa Santillan** on September 11, 2001. See Folder 108, provided via CD. See also Third Amended Complaint, ¶¶ 70-73; 375-421; Declaration of Ester Santillan.

109. Plaintiff **Ellen L. Saracini** is a resident of the Commonwealth of the Pennsylvania and is the surviving spouse of **Victor J. Saracini**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Victor J. Saracini** was employed by United Airlines and was the pilot of United Flight 175 which crashed into the South Tower, Two World Trade Center, New York. **Victor J. Saracini** was murdered by the hijackers during the flight. Plaintiff **Ellen L. Saracini** has been appointed the Executrix of the **Estate of Victor J. Saracini**. Plaintiff **Ellen L. Saracini**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of Victor J. Saracini**. See Folder 109, provided via CD.

110. **Ellen L. Saracini** also brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Victor J. Saracini** on September 11, 2001. "Terrorists brutally murdered my husband, and

thousands of others in cold blood," she writes in her Declaration. No remains of **Victor J. Saracini** were ever identified. His daughters were 13 and 10 at the time of his death. See Folder 110, provided via CD. See also Third Amended Complaint, ¶¶ 19-21; 375-421; Declaration of Ellen L. Saracini ¶ 8, 10-11.

111. Decedent **Victor J. Saracini** is also survived by his mother, **Anne C. Saracini,** who is a resident of the State of New Jersey. Plaintiff **Anne C. Saracini** brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Victor J. Saracini** on September 11, 2001. See Folder 111, provided via CD. See also Third Amended Complaint, ¶ 65; ¶¶ 375-421; Declaration of Anne C. Saracini by Joanne Renzi, Her Daughter.

112. Decedent **Victor J. Saracini** is also survived by a sibling, **Joanne Renzi**, who is is a resident of the State of New Jersey. Plaintiff **Joanne Renzi** brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Victor J. Saracini** on September 11, 2001. See Folder 112, provided via CD. See Third Amended Complaint, ¶ 64; ¶¶ 375-421. See also Declaration of Joanne Renzi.

113. Plaintiff **Paul Schertzer** is a resident of the State of New Jersey and is the surviving father of **Scott Schertzer**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Scott Schertzer** worked on the 104th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Paul Schertzer** has been appointed as Executor of the **Estate of Scott Schertzer**. Plaintiff **Paul Schertzer**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Executor of the **Estate of Scott Schertzer**. See Folder 113,

provided via CD.

114. Plaintiff **Paul Schertzer** also brings a claim in his own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Scott Schertzer** on September 11, 2001. See Folder 114, provided via CD. See also Third Amended Complaint, ¶¶ 100-102; 375-421; Declaration of Paul Schertzer.

115. Plaintiff **Ronald S. Sloan** is a resident of the State of California and is the surviving father of **Paul K. Sloan**, a decedent who was killed as a result of the terrorist attack on the World trade Center Towers in New York City on September 11, 2001. **Paul K. Sloan** worked on the 89th Floor of the South Tower of the World Trade Center, Two World Trade Center, New York, New York. Plaintiff **Ronald S. Sloan** has been appointed as the Executor of the **Estate of Paul K. Sloan**. Plaintiff **Ronald S. Sloan**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Executor of the **Estate of Paul K. Sloan**. See Folder 115, provided via CD, for photographs and 'An Important Legacy.'

116. Plaintiff **Ronald S. Sloan** also brings a claim in his own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Paul K. Sloan** on September 11, 2001. See Folder 116, provided via CD. See Third Amended Complaint, ¶¶ 100-102; 375-421. See also Declaration of Ronald S. Sloan.

117. Plaintiff **Raymond Anthony Smith** is a resident of the Commonwealth of Pennsylvania and is the brother of **George Eric Smith**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **George Eric Smith** was employed by SunGard Asset Management Systems on the 97th floor of the South Tower in the World Trade Center, Two World Trade Center,

New York, New York. Plaintiff **Raymond Anthony Smith** has been appointed the Administrator of the **Estate of George Eric Smith**. Plaintiff **Raymond Anthony Smith**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Administrator of the **Estate of George Eric Smith**. See Folder 117, provided via CD.

118. Plaintiff **Raymond Anthony Smith** also brings a claim in his own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **George Eric Smith** on September 11, 2001. See Folder 118, provided via CD. See Third Amended Complaint, ¶¶ 177-179; 375-421. See also Declaration of Raymond Anthony Smith.

119. Plaintiff **Katherine Soulas** is a resident of the State of New Jersey and is the surviving spouse of **Timothy P. Soulas**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Timothy P. Soulas** was employed by Cantor Fitzgerald on the 105th floor of the North Tower in the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Katherine Soulas** has been appointed the Executrix of the **Estate of Timothy P. Soulas.** Plaintiff **Katherine Soulas**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Executrix of the **Estate of Timothy P. Soulas**. See Folder 119, provided via CD.

120. Plaintiff **Katherine Soulas** also brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Timothy P. Soulas** on September 11, 2001. At the time of his death, Plaintiff **Katherine Soulas** was pregnant and had children in kindergarten, second, fourth and sixth grade. See Folder

120, provided via CD. See Third Amended Complaint, ¶¶ 174-176; 375-421. See also Declaration of Katherine Soulas.¶¶ 5, 7.

121. Plaintiff **Russa Steiner** is a resident of the Commonwealth of Pennsylvania and is the surviving spouse of **William R. Steiner**, a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **William R. Steiner** was employed by Marsh, Inc. on the 97th floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Russa Steiner** has been appointed the Executrix of the **Estate of William R. Steiner**. Plaintiff **Russa Steiner**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Executrix of the **Estate of William R. Steiner**. See Folder 121, provided via CD.

122. Plaintiff **Russa Steiner** also brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **William R. Steiner** on September 11, 2001. Plaintiff and Decedent were married for 32 "happy and successful" years and had three children. See Folder 122, provided via CD. See Third Amended Complaint, ¶¶ 7-9; 375-421. See also Declaration of Russa Steiner. ¶ 7.

123. Plaintiffs **George Stergiopoulos, M.D.** and **Angela Stergiopoulos** are residents of the State of New York and are the surviving parents of **Andrew Stergiopoulos**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Andrew Stergiopoulos** worked on the 105th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiffs **George** and **Angela Stergiopoulos** have been appointed as co-Executors of the **Estate of Andrew Stergiopoulos**. Plaintiffs **George Stergiopoulos,**

M.D. and **Angela Stergiopoulos**, under §1605(a) of the Foreign Sovereign Immunities Act, bring a survival action against all Defendants in their capacity as the co-Executors of the **Estate of Andrew Stergiopoulos**. See Folder 123, provided via CD. See Third Amended Complaint, ¶¶ 120-122.

124. Plaintiff **George Stergiopoulos, M.D.,** under §1605(a) of the Foreign Sovereign Immunities Act, also brings a claims in his own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Andrew Stergiopoulos** on September 11, 2001. See Folder 124, provided via CD. See Third Amended Complaint, ¶¶ 120-122; ¶¶ 375-421. See also Declaration of George Stergiopoulos, M.D.

125. Plaintiff **Angela Stergiopoulos**, under §1605(a) of the Foreign Sovereign Immunities Act, also bring a claim in their own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Andrew Stergiopoulos** on September 11, 2001. See Folder 125, provided via CD. See Third Amended Complaint, ¶¶ 120-122; ¶¶ 375-421. See also Declaration of Angela Stergiopoulos.

126. Plaintiff **Sandra Straub** is a resident of the Commonwealth of Massachusetts and is the surviving spouse of **Edward W. Straub**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. At the time of the attack, **Edward W. Straub** was located outside the South Tower of the World Trade Center, Two World Trade Center, New York, New York. Plaintiff **Sandra Straub** has been appointed as the Executrix of the **Estate of Edward W. Straub**. Plaintiff **Sandra Straub**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the

Executrix of the **Estate of Edward W. Straub**. See Folder 126 provided via CD.

127. Plaintiff **Sandra Straub** also brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Edward W. Straub** on September 11, 2001. See Folder 127, provided via CD. See Third Amended Complaint, ¶¶ 81-83; 375-421. See also Declaration of Sandra Straub.

128. Plaintiff **Joan E. Tino** is a resident of the State of New Jersey and is the surviving mother of **Jennifer Tino**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Jennifer Tino** worked on the 96th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Joan E. Tino** has been appointed as the Executrix of the **Estate of Jennifer Tino**. Plaintiff **Joan E. Tino**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Executrix of the **Estate of Jennifer Tino**. See Folder 128, provided via CD.

129. Plaintiff **Joan E. Tino** also brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Jennifer Tino** on September 11, 2001. See Folder 129, provided via CD. See Third Amended Complaint, ¶¶ 151-153; 375-421. See also Declaration of Joan E. Tino.

130. Decedent **Jennifer Tino** was also survived by her sister, Plaintiff **Pamela Schiele**, who is a resident of the State of New Jersey. Plaintiff **Pamela Schiele**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Jennifer Tino** on September 11, 2001. See Folder 130, provided via CD. See Third Amended Complaint,

¶¶ 154; 375-421. See also Declaration of Pamela Schiele.

131. Plaintiff **Christine Barton** (now **Pence**) is a resident of the State of Florida and is the surviving mother of **Jeanmarie Wallendorf**, a decedent who was killed as a result of the terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Jeanmarie Wallendorf** worked for Keefe, Bruyette & Woods, Inc. on the 89th Floor of the South Tower of the World Trade Center, Two World Trade Center, New York, New York. The Decedent was last known to be on the 86th Floor of the South Tower. Plaintiff **Christine Pence** has been appointed as the Administratrix of the **Estate of Jeanmarie Wallendorf**. Plaintiff **Christine Pence**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in her capacity as the Executrix of the **Estate of Jeanmarie Wallendorf**. See Folder 131, provided via CD. See Third Amended Complaint, ¶¶ 155-157; 375-421. See also Declaration of Christine Pence.

132. Plaintiff **Christine Barton (**now **Pence)** also brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Jeanmarie Wallendorf** on September 11, 2001. See Folder 132, provided via CD. See Third Amended Complaint, ¶¶ 155-157; 375-421. See also Declaration of Christine Pence.

133. Plaintiff **Doyle Raymond Ward** is a resident of the State of California and is the surviving father of **Timothy Raymond Ward**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Timothy Raymond Ward** was a passenger on United Airlines Flight 175 which was hijacked by Defendants and which Defendants caused to crash into the South

Tower of the World Trade Center, Two World Trade Center, New York, New York. Plaintiff **Doyle Raymond Ward** has been appointed as the Administrator of the **Estate of Timothy Raymond Ward**. Plaintiff **Doyle Raymond Ward**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a survival action against all Defendants in his capacity as the Administrator of the **Estate of Timothy Raymond Ward**. See Folder 133, provided via CD.

134. Plaintiff **Doyle Raymond Ward** also brings a claim in his own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Timothy Raymond Ward** on September 11, 2001. See Folder 134, provided via CD. See Third Amended Complaint, ¶¶ 177-179; 375-421. See also Declaration of Doyle Raymond Ward.

b) Claims Involving Decedents' Families Only

135. Plaintiff **Gerald Bingham** is a resident of the State of Tennessee and is the surviving father of **Gerald Kendall Bingham a/k/a Mark K. Bingham**, a decedent who was killed as a result of a terrorist hijacking and subsequent crash of United Airlines Flight 93 in a field near the town of Shanksville, Pennsylvania on September 11, 2001. **Gerald Bingham**, under §1605(a) of the Foreign Sovereign Immunities Act, makes a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Gerald Kendall Bingham a/k/a Mark K. Bingham** on September 11, 2001. . Decedent **Gerald Kendall Bingham a/k/a Mark K. Bingham** was a former rugby player for two squads at the University of California that were crowned National Champions. Cell phone conversations revealed that he actively participated in what *The 9/11 Commission Report* referred to as "The Battle for Flight 93." Decedent **Gerald**

Kendall Bingham a/k/a Mark K. Bingham died as a result of fragmentation due to blunt force trauma. He was running late for the flight and was the last to board the plane. See Folder 135, provided via CD. See Third Amended Complaint, ¶ 119; ¶¶ 375-421. See also *The 9/11 Commission Report*, pp. 10-14; See also Declaration of Gerald Bingham.

136. Plaintiff **Alice Carpeneto** is a resident of the State of New York and is the surviving mother of **Joyce Ann Carpeneto**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Joyce Ann Carpeneto** was employed by General Telecom and worked on the 83rd Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. **Alice Carpeneto**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Joyce Ann Carpeneto** on September 11, 2001. Decedent **Joyce Ann Carpeneto** was 40 years of age at the time of her death and was planning to become engaged during Christmas 2001. The Certificate of Death issued by The City of New York on November 9, 2001, states that the decedent's body was never recovered. It lists the cause of death as homicide. It was verified that Decedent **Joyce Ann Carpeneto** reported to work on the 83rd Floor of the North Tower on September 11, 2001, through electronic communications and phone records, including a call that was placed by the decedent to co-workers of located off-site at 60 Hudson Street to inform them that employees of General Telecom were trapped on the 83rd Floor of the North Tower. Alice Carpeneto writes in her Declaration that, "It pains me that my daughter will never know what it is like to have children. Nor will I [ever] be able to hold her

children, my grandchildren, in my arms." See Folder 136 provided via CD. See Third Amended Complaint, ¶ 159; ¶¶ 375-421. See also correspondence by Brian Metherell, President, General Telecom, dated September 20, 2001; Declaration of Alice Carpeneto ¶¶ 7, 8, 13.

137. Plaintiff **Stephen L. Cartledge** is a resident of the Commonwealth of Pennsylvania and is the surviving spouse of **Sandra Wright-Cartledge**, a citizen of the Commonwealth of Pennsylvania and a decedent who was killed as a result of a terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Sandra Wright Cartledge** was a Facilities Manager at Aon Corporation, located on the 102nd floor of the South Tower, Two World Trade Center, New York, New York. **Stephen L. Cartledge**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Sandra Wright-Cartledge** on September 11, 2001. The Declaration of Steve Cartledge states, "My wife's co-workers called me later that day [September 11, 2001] to ask if I had heard from Sandra. A group of them were about to get inside an elevator to leave the South Tower, despite instructions to stay, and Sandra was among them. At the last second, she returned to her desk. I later learned that she had left the group to call her daughter, Michelle Wright, to assure her that she was safe. United Airlines Flight 175 hit the South Tower while the two of them were on the phone." See Folder 137 provided via CD. See Third Amended Complaint, ¶¶ 41-42; ¶¶ 375-421. See also Declaration of Steve Cartledge, ¶ 7.

138. Decedent **Sandra Wright-Cartledge** is also survived by her daughter, **Michelle Wright**. Plaintiff **Michelle Wright**, under §1605(a) of the Foreign Sovereign Immunities Act,

brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Sandra Wright-Cartledge** on September 11, 2001. **Michelle Wright** was on the telephone with her mother, Decedent **Sandra Wright-Cartledge**, when United Airlines Flight 175 hit the South Tower. The decedent was unable to escape the building. See Folder 138, provided via CD. See Third Amended Complaint, ¶ 42; ¶¶ 375-421. See also Declaration of Steve Cartledge. ¶ 7; Declaration of Michelle Wright.

139. Plaintiff **Maureen R. Halvorson** is the surviving sister of **William Wilson**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **William Wilson** worked in the South Tower of World Trade Center Towers, New York, New York. Plaintiff **Maureen R. Halvorson**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **William Wilson** on September 11, 2001. See Folder 139, provided via CD. See Third Amended Complaint, ¶ 124; ¶¶ 375-421. See also Declaration of Maureen R. Halvorson.

140. Plaintiff **Haomin Jian** is a resident of the State of New Jersey and is the surviving son of **Hweidar Jian**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Hweidar Jian** worked on the 103rd Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **Haomin Jian**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Hweidar Jian** on September 11, 2001. See Folder 140, provided via CD. See Third Amended Complaint, ¶ 164; ¶¶ 375-

421. See also Declaration of Haomin Jian.

141. Decedent **Hweidar Jian** is survived by his natural mother, **FuMei Chien Huang,** who is a resident of the State of New Jersey and is the surviving mother of **Hweidar Jian**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Hweidar Jian** worked on the 103rd Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. Plaintiff **FuMei Chien Huang**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Hweidar Jian** on September 11, 2001. See Folder 141, provided via CD. See Third Amended Complaint, ¶ 165; ¶¶ 375-421. See also Declaration of FuMei Chien Huang.

142. Decedent **Hweidar Jian** is also survived by a sibling, **Huichun Jian**, who is a resident of Taiwan, Republic of China. Plaintiff **Huichun Jian** make claims under §1605(a) of the Foreign Sovereign Immunities Act for wrongful death and assert other causes of action against all Defendants as a result of the murder of **Hweidar Jian** on September 11, 2001. See Folder 142, provided via CD. See Third Amended Complaint, ¶ 163; ¶¶ 375-421.

143. Decedent **Hweidar Jian** is also survived by a sibling, **Hui-Chuan Jian**, who is a resident of Taiwan, Republic of China. Plaintiff **Hui-Chuan Jian** makes claims under §1605(a) of the Foreign Sovereign Immunities Act for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Hweidar Jian** on September 11, 2001. See Folder 143, provided via CD. See Third Amended Complaint, ¶ 163; ¶¶ 375-421.

144. Decedent **Hweidar Jian** is also survived by a sibling, **Hui-Chien Chen**, who is a resident

of Taiwan, Republic of China. Plaintiff **Hui-Chien Chen** makes claims under §1605(a) of the Foreign Sovereign Immunities Act for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Hweidar Jian** on September 11, 2001. See Folder 144 provided via CD. See Third Amended Complaint, ¶ 163; ¶¶ 375-421.

145. Decedent **Hweidar Jian** is also survived by a sibling, **Hui-Zon Jian**, who is a resident of Taiwan, Republic of China. Plaintiff **Hui-Zon Jian** makes claims under §1605(a) of the Foreign Sovereign Immunities Act for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Hweidar Jian** on September 11, 2001. See Folder 145, provided via CD. See also Third Amended Complaint, ¶ 163; ¶¶ 375-421.

146. Plaintiff **Michael LoGuidice** is a resident of the State of Florida and is the surviving brother of **Catherine LoGuidice**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Catherine LoGuidice** worked 105th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. **Michael LoGuidice**, under §1605(a) of the Foreign Sovereign Immunities Act, makes a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Catherine LoGuidice** on September 11, 2001. See Folder 146, provided via CD. See also Third Amended Complaint, ¶ 166; ¶¶ 375-421; Declaration of Michael LoGuidice.

147. Plaintiff **Ralph S. Maerz, Jr.** is a resident of the Commonwealth of Pennsylvania and is the surviving relative (natural father) of **Noell Maerz**, a citizen of the State of New York and a decedent who was killed as a result of a terrorist attack on the World Trade Center

Towers in New York City on September 11, 2001. **Noell Maerz** was a bond trader employed at Euro Brokers, located on the 84th floor of the South Tower, Two World Trade Center, New York, New York. **Ralph S. Maerz, Jr.**, under §1605(a) of the Foreign Sovereign Immunities Act, makes a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Noell Maerz** on September 11, 2001. See Folder 147, provided via CD. See also Third Amended Complaint, ¶¶ 37-38; ¶¶ 375-421; Declaration of Ralph S. Maerz, Jr.

148. Plaintiff **Martin Panik** is a resident of the Commonwealth of Pennsylvania and is the surviving natural father of **Lt. Jonas Martin Panik**, a citizen of the State of Maryland and a decedent who was killed as a result of a terrorist attack on the Pentagon on September 11, 2001. Plaintiff **Martin Panik,** under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Lt. Jonas Martin Panik** on September 11, 2001. See Folder 148, provided via CD. See also Third Amended Complaint, ¶ 39; ¶¶ 375-421.

149. Plaintiff **Linda Ellen Panik** was a resident of the Commonwealth of Pennsylvania and was the surviving natural mother of **Lt. Jonas Martin Panik**, a citizen of the State of Maryland and a decedent who was killed as a result of a terrorist attack on the Pentagon on September 11, 2001. **Linda Ellen Panik,** under §1605(a) of the Foreign Sovereign Immunities Act, brings a claims in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Lt. Jonas Martin Panik** on September 11, 2001. **Lt. Panik** was a Navy Intelligence officer working in the "hot wash room" of the Pentagon when American Airlines Flight 77, hijacked through

the actions of Defendants, was intentionally crashed crash into the building. At the time of the attack, **Lt. Panik** was in the process of providing a telephone briefing to other Navy Intelligence officers concerning the terrorist attacks perpetrated by Defendants in New York, New York. The body of Decedent **Lt. Jonas Martin Panik** was not found intact. At the time of the crash of American Airlines Flight 77 into the Pentagon, as perpetrated by Defendants, **Lt. Jonas Martin Panik** was briefing Commander David Radi on the status of the terrorist attacks in New York City. When the line suddenly went dead, Commander Radi looked out the window of his Pentagon office, which was opposite that of the plane strike, and saw chunks of concrete and other debris in the air. Decedent **Lt. Jonas Martin Panik** was identified via a fingerprint. His family was given his charred watch and one of his lieutenant bars, which had been polished but still showed signs of fire damage. The family was also provided his leather flight jacket, which had been cleaned and sealed due to exposure to hazardous materials. See Folder 149, provided via CD. See also Third Amended Complaint, ¶ 39; ¶¶ 375-421; Declaration of Martin Panik; Declaration of Linda Panik.[7]

150. Decedent **Lt. Jonas Martin Panik** is also survived by his sister, **Martina Lyne-Anna Panik-Stanley,** who is a resident of the State of Maryland. **Martina Lyne-Anna Panik-Stanley**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim in her own right for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Lt. Jonas Martin Panik** on September 11, 2001. See Folder 150, provided via CD. See also Third Amended Complaint, ¶ 40; ¶¶ 375-421; See also

[7] Following the submission of her Declaration, Linda Ellen Panik succumbed to cancer. For this reason, her proposed award is listed as to the Estate of Linda Ellen Panik. A Suggestion of Death has been filed contemporaneously with this document.

Declaration of Martina Lyne-Anna Panik-Stanley.

151. Plaintiff **Helen Rosenthal** is a resident of the State of New York and is the surviving sister of **Josh Rosenthal**, a decedent who was killed as a result of the terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Josh Rosenthal** worked at Fiduciary Trust on the 97th Floor of the South Tower of the World Trade Center, Two World Trade Center, New York, New York. **Helen Rosenthal**, under §1605(a) of the Foreign Sovereign Immunities Act, makes a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Josh Rosenthal** on September 11, 2001. See Folder 151, provided via CD. See also Third Amended Complaint, ¶ 158; ¶¶ 375-421; Declaration of Helen Rosenthal.

152. Plaintiff **Alexander Rowe** is a United States citizen residing in Simonstown, Western Cape, South Africa and is the surviving father of **Nicholas Rowe**, a decedent who was killed as a result of the terrorist attack on the World Trade Center Towers in New York City on September 11, 2001. **Nicolas Rowe** was working on the 106th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. **Alexander Rowe** makes a claim under §1605(a) of the Foreign Sovereign Immunities Act for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Nicolas Rowe** on September 11, 2001. The body of Decedent **Nicolas Rowe**, who emigrated to the United States from South Africa while in search of a better life, was found atop the roof of the hotel adjacent to the North Tower approximately two days after the attacks. His body was fully dressed and intact save his left arm, which was missing, and his right hand contained burn marks. Nicolas Rowe was forced to jump to his own death to escape the fire raging on the upper floors of the

North Tower following the crash of American Airlines Flight 11 into the building, as perpetrated by Defendants. The body of Decedent **Nicolas Rowe** was buried in his home country of South Africa, approximately 200 feet from the home of Plaintiff **Alexander Rowe**. See Folder 152, provided via CD. See Third Amended Complaint, ¶ 87; ¶¶ 375-421. See also Declaration of Alexander Rowe.

153. Plaintiffs **Ed Russin** is a resident of the State of New Jersey and the surviving natural father of **Steven Russin**, a decedent who was killed as a result of the terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Steven Russin** worked on the 104th Floor of the North Tower of the World Trade Center, One World Trade Center, New York, New York. **Ed Russin**, under §1605(a) of the Foreign Sovereign Immunities Act, makes a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Steven Russin** on September 11, 2001. See Folder 153, provided via CD. See also Third Amended Complaint, ¶ 76; ¶¶ 375-421; Declaration of Ed Russin.

154. Decedent **Steven Russin** was also survived by his natural mother, **Gloria Russin**, who is a resident of the State of New Jersey. Plaintiff **Gloria Russin**, under §1605(a) of the Foreign Sovereign Immunities Act, make a claim for wrongful death and assert other causes of action against all Defendants as a result of the murder of **Steven Russin** on September 11, 2001. See Folder 154, provided via CD. See also Third Amended Complaint, ¶ 76; ¶¶ 375-421; Declaration of Gloria Russin.

155. Decedent **Steven Russin** is also survived by his brother, **Barry Russin,** who is a resident of the State of New Jersey. Plaintiff **Barry Russin** brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Steven**

Russin on September 11, 2001. See Folder 155, provided via CD. See also Third Amended Complaint, ¶ 77; ¶¶ 375-421; Declaration of Barry Russin.

156. Plaintiff **Leonard Zeplin** is a resident of the State of New York and the surviving natural father of **Marc Scott Zeplin**, a decedent who was killed as a result of the terrorist attacks on the World Trade Center Towers in New York City on September 11, 2001. **Marc Scott Zeplin** worked on the 104th Floor of the South Tower of the World Trade Center, Two World Trade Center, New York, New York. **Leonard Zeplin**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Marc Scott Zeplin** on September 11, 2001. See Folder 156, provided via CD. See also Third Amended Complaint, ¶ 91; ¶¶ 375-421; Declaration of Leonard Zeplin; Declaration of Leona Zeplin.

157. Decedent **Marc Scott Zeplin** was survived by his natural mother, Plaintiff **Leona Zeplin, who** is a resident of the State of New York. Plaintiff **Leona Zeplin**, under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Marc Scott Zeplin** on September 11, 2001. See Folder 157, provided via CD. See also Third Amended Complaint, ¶ 91; ¶¶ 375-421; Declaration of Leonard Zeplin; Declaration of Leona Zeplin.

158. Decedent **Marc Scott Zeplin** is also survived by his sister, Plaintiff **Joslin Zeplin,** who is a resident of the State of New York. **Joslin Zeplin,** under §1605(a) of the Foreign Sovereign Immunities Act, brings a claim for wrongful death and asserts other causes of action against all Defendants as a result of the murder of **Marc Scott Zeplin** on

September 11, 2001. See Folder 158, provided via CD. See also Third Amended Complaint, ¶ 92; ¶¶ 375-421.

The Decedents

159. There are 59 Decedents that are the subject of the instant lawsuit. See Third Amended Complaint.

160. Thirty-two of the Decedents were last known to be working in the area of Floors 77 to 106 of the North Tower, One World Trade Center, New York, NY on September 11, 2001. American Airlines Flight 11 struck the North Tower at 8:46:40 a.m. The impact area was Floors 93 to 99. Evidence placed before the 9/11 Commission suggested that the North Tower's three stairwells became impassible from the 92nd floor up. See Third Amended Complaint, *passim*; See also Declarations of Claimants, *passim*; *The 9/11 Commission Report*, p. 285.

161. American Airlines Flight 11 was a scheduled transcontinental flight from Boston to Los Angeles. The aircraft was a Boeing 767, which carries approximately 10,000 gallons of jet fuel. The aircraft spent approximately 48 minutes in the air. Consequently, a large amount of its jet fuel supply was unexpended. Flight 11 impacted the North Tower at a groundspeed of approximately 494.5 miles per hour. Upon the impact of Flight 11 with the North Tower, as perpetrated or enabled by all Defendants, a fireball of jet fuel "erupted upon impact and shot down at least one bank of elevators. The fireball exploded onto numerous lower floors, including the 77th and 22nd; the West Street lobby level; and the B4 level, four stories below ground. The burning jet fuel immediately created thick, black smoke that enveloped the upper floors and roof of the North Tower." See *The 9/11 Commission Report*, pp. 32, 285. See also National Transportation Safety Board, Radar

Data Impact Study, American Airlines Flight 11, United Airlines Flight 175 by Daniel R. Bower, Ph.D. dated February 7, 2002.

162. One Decedent, **Jeffrey Collman**, was a flight attendant on American Airlines Flight 11. He spent up to 32 minutes traveling in plane that was hijacked, or enabled to be hijacked, by Defendants. See Third Amended Complaint, ¶ 183; See also Declaration of Brian Collman; Declaration of Charles Collman; Declaration of Dwayne Collman; Declaration of Brenda Sorenson; *The 9/11 Commission Report*, pp. 32

163. Sixteen of the Decedents were last known to be working in the area of Floors 84 to 104 of the South Tower, Two World Trade Center, New York, NY on September 11, 2001. United Airlines Flight 175 struck the South Tower at 9:03:11 at a groundspeed of 586.5 miles per hour, crashing through an area from Floor 77 to Floor 85. See *The 9/11 Commission Report*, pp. 32, 293-94. See also National Transportation Safety Board, Radar Data Impact Study, American Airlines Flight 11, United Airlines Flight 175 by Daniel R. Bower, Ph.D. dated February 7, 2002.

164. United Airlines Flight 175 was also a scheduled transcontinental flight from Boston to Los Angeles. The aircraft was a Boeing 767-200, which carries approximately 10,000 gallons of jet fuel. It was in the air for approximately 49 minutes, leaving much of its jet fuel supply unexpended. The heart of the impact zone was the 81st floor, where the wing of the aircraft has sliced through the office of the only known survivor from that area. He described the 81st floor "as a 'demolition' site in which everything was 'broken up' and the smell of jet fuel was so strong that it was almost impossible to breathe." Within 15 minutes of impact, debilitating smoke had reached Floor 100. See *The 9/11 Commission Report*, pp. 32, 293-94.

165. Three of the Decedents were onboard United Airlines Flight 175 including the Captain, **Victor Saracini**, who was murdered during the flight by the hijackers. The Decedents who survived the flight were traveling in a plane that was hijacked, or enabled to be hijacked, by Defendants for 17 to 21 minutes. See Third Amended Complaint, ¶¶ 19, 65, 65, 116; 127; 368; See also Declaration of Maria Regina Merwin; Declaration of Ellen Saracini; Declaration of Raymond Doyle Ward; *The 9/11 Commission Report*, pp. 7, 32.

166. Three Decedents were working in the Pentagon when it was struck by American Airlines Flight 77, which was hijacked, or enabled to be hijacked, by Defendants. Like the other hijacked aircraft, American Airlines Flight 77 was a scheduled transcontinental flight from Washington, D.C. to Los Angeles. It was in the air for approximately one hour, seventeen minutes, leaving much of its jet fuel supply unexpended. See Third Amended Complaint, ¶¶ 39, 110, 167. See also Declaration of Chrislan Fuller Manuel; Declaration of Martin Panik; Declaration of Linda Ellen Panik; Declaration of Rodney Ratchford; *The 9/11 Commission Report*, pp. 33.

167. One Decedent, **Gerald Kendall Bingham a/k/a Mark K. Bingham**, was onboard United Airlines Flight 93 on September 11, 2001, which was a scheduled transcontinental flight from Newark, NJ to San Francisco. The Decedent was in the air on a plane hijacked, or enabled to be hijacked, by Defendants for approximately 35 minutes. Following a battle for control of the airplane between the passengers of Flight 93, including the Decedent, and the hijackers, the plane flipped onto its back and crashed into a field near Shanksville, PA at a groundspeed of 580 miles per hour. See Third Amended Complaint, ¶¶ 119; 370. See also Declaration of Gerald Bingham; *The 9/11 Commission Report*, pp. 13-14, 33.

168. One Decedent, **John William Perry**, was a member of the New York City Police Department who was in the mezzanine of the South Tower when it collapsed on September 11, 2001. See Third Amended Complaint, ¶ 34. See also Declaration of Patricia J. Perry, ¶ 7.

169. One Decedent, **Edward W. Straub**, was killed on a public street near the South Tower on September 11, 2001. See Third Amended Complaint, ¶ 81; See also Declaration of Sandra N. Straub, ¶ 25.

170. One Decedent, **Yvette Nichole Moreno**, worked in the North Tower but called her family from outside after American Airlines Flight 11 struck the building. She died on an overpass while walking home, which was caused to collapse by falling debris. See Declaration of Ivy Moreno, ¶ 5.

171. The passengers of American Airlines Flight 11 knew full well that their plane had been hijacked, was flying too low to the ground, and that death was the likely result for all aboard. See *The 9/11 Commission Report*, pp. 4-7.

172. The passengers of United Airlines Flight 175 knew full well that their plane had been hijacked, was flying too low to the ground, and that death was the likely result for all aboard. See *The 9/11 Commission Report*, pp. 7-8.

173. The passengers of United Airlines Flight 93 were well aware that their plane had been hijacked, that two hijacked planes had been flown into the North Tower and South Tower, and that death was the likely result for all aboard, despite the passengers' heroic attempt to thwart the hijackers. See *The 9/11 Commission Report*, pp. 10-14.

174. Civilians in the South Tower were aware that an incident had occurred in the North Tower, leading to a fire and billowing black smoke surrounding the North Tower. See

Declarations of Plaintiffs, *passim*.

175. Civilians in the South Tower witnessed the approach of United Airlines Flight 175 toward their building. See Declaration of Grace Kneski, ¶ 6.

176. Both civilians and military officials at The Pentagon were well aware that the United States was under attack on September 11, 2001. See Declaration of Linda Ellen Panik; See also *The 9/11 Commission Report*, *passim*.

177. Civilians trapped in the North Tower experienced horrific pain and suffering that is almost beyond human comprehension. See Declarations of Plaintiffs, *passim*; See also *The 9/11 Commission Report*, *passim*; Report of Alberto Diaz, M.D, generally.

178. Civilians trapped in the South Tower experienced horrific pain and suffering that is almost beyond human comprehension. See Declarations of Plaintiffs, *passim*; See also *The 9/11 Commission Report*, *passim*; Report of Alberto Diaz, M.D, generally.

179. Civilians and military personnel trapped in The Pentagon experienced horrific pain and suffering that is almost beyond human comprehension. See Declarations of Plaintiffs, *passim*; See also *The 9/11 Commission Report*, *passim*; Report of Alberto Diaz, M.D, generally.

180. Emergency personnel responding to the terrorist attacks perpetrated by, or enabled by, all Defendants experienced horrific pain and suffering that is almost beyond human comprehension. See Declaration of Patricia Perry; See also *The 9/11 Commission Report*, *passim*; Report of Alberto Diaz, M.D, generally.

181. All Decedents who died as a result of the terrorist attacks as perpetrated by, or enabled by, all Defendants experienced horrific pain and suffering that is almost beyond human comprehension. See Declarations of Plaintiffs, *passim*; See also *The 9/11 Commission*

Report, *passim*; Report of Alberto Diaz, M.D, generally.

182. The pain and suffering experienced by Decedents was broadcast throughout the world in real-time and witnessed by all Plaintiffs either as the events of September 11, 2001, unfolded, or during the countless replays of the attacks that have continuously been aired by various media outlets from the date of the attacks to the present day. See Declarations of Plaintiffs, *passim*; See also *The 9/11 Commission Report*, *passim*; Report of Alberto Diaz, M.D, generally.

Expert Attestation in Support of Non-Economic Damages

183. Rear Admiral Alberto Diaz, Jr., M.D. (Ret.) has submitted an expert report with regard to the pain and suffering experienced by the Decedents and their families as a result of the terrorist attacks perpetrated, or enabled by, all Defendants against the United States on September 11, 2001.

184. Dr. Diaz is a member of the American Medical Association, Association of Military Surgeons of the United States, and Association of Naval Services Officers. See Curriculum Vitae of Alberto Diaz, Jr., RADM MC USN (Ret.).

185. Dr. Diaz received a Certification by the Board of Psychiatry and Neurology in 1985. See Curriculum Vitae of Alberto Diaz, Jr., RADM MC USN (Ret.).

186. From 1995-97, Dr. Diaz served as Commander-in-Chief, Pacific Fleet Surgeon. See Curriculum Vitae of Alberto Diaz, Jr., RADM MC USN (Ret.).

187. Dr. Diaz was the Senior Navy Medical Department Representative in the investigation conducted by the U.S. Navy after the USS *Vincennes* shot down an Iranian Airbus on July 3, 1988. See Report of Alberto Diaz, M.D. § Prior Expert Testimony.

188. Dr. Diaz has served as Executive Officer, Medical Director, or Commander of various

United States Navy Medical Centers throughout the world. See Curriculum Vitae of Alberto Diaz, Jr., RADM MC USN (Ret.).

189. Dr. Diaz completed the Combat Casualty Care Course on November 3, 1984. See Curriculum Vitae of Alberto Diaz, Jr., RADM MC USN (Ret.).

190. Dr. Diaz has provided expert deposition testimony in a number of cases for The Wolk Law Firm in Philadelphia, PA, which practices aviation law exclusively. See Report of Alberto Diaz, M.D. § Prior Expert Testimony.

191. Dr. Diaz is qualified to submit an Expert Report to this Court.

192. With regard to the terrorist attacks of September 11, 2001, Dr. Diaz opines that "[t]he express purpose of this 'operation' was to achieve the highest possible human toll in terms of lives lost, injuries sustained and lasting psychological trauma. It also sought to maximize human suffering through the incredibly cruel and horrific means of death and the prolongation of that suffering." See Report of Alberto Diaz, M.D. § Case History.

193. The suffering of those trapped in the four hijacked aircraft, North Tower, South Tower, and the Pentagon was compounded by the neurophysiology of the human brain. See Report of Alberto Diaz, M.D. § Background.

194. The "fear circuit" in the brain has its origins in the central part of the brain called the amygdala. The specific neural pathways which mediate the feelings of *intense* dread, anxiety, fear and panic emanate downward from the central amygdala. See Report of Alberto Diaz, M.D. § Background. (emphasis in original).

195. These systems and responses are "not speculative or fanciful" and are "experimentally reproducible." See Report of Alberto Diaz, M.D. § Background; See also Panksepp, Jack: *Affective Neuroscience (The Foundations of Human and Animal Emotions)*, Oxford

University Press, New York, 1998.

196. The physiological response to fear, in particular extreme fear, includes: an increased heart rate; elevated blood pressure; drying of the mouth; trembling; sweating; blanching; feelings of faintness; nausea and vomiting; and a general homeostatic disregulation. As the threat continues, there are hormonal changes. Cortisol and adrenalin begin to surge through the system, causing tunnel vision and making the victim feel increasingly confused. This disorganizes though processes further and impairs fine motor control and hearing faculties. See Report of Alberto Diaz, M.D. § Background.

197. If there is no relief from the threat, then loss of control of the sphincters ensues, with urinary incontinence and involuntary defecation. See Report of Alberto Diaz, M.D. § Background.

198. *The 9/11 Commission Report* contains corroboration of the effects of intense fear as described by Dr. Diaz. A passenger of doomed United Airlines Flight 175, Peter Hanson, called his father, Lee Hanson, from the hijacked aircraft at approximately 9:00 a.m. on September 11, 2001. Mr. Hanson was interviewed by the Federal Bureau of Investigation on September 11, 2001, and relayed the contents of the phone call with his deceased son, which included the statements: "It's getting very bad on the plane - Passengers are throwing up and getting sick - The plane is making jerky movements – I don't think the pilot is flying the plane – I think we are going down – I think they intend to go to Chicago or someplace and fly into a building- Don't worry, Dad – If it happens it will be very fast – My God, my God." See Report of Alberto Diaz, M.D. § United Airlines Flight 175 and American Airlines Flight 11; *The 9/11 Commission Report*, p. 7-8.

199. It is clear that both American Airlines Flight 11 and United Airlines Flight 175 descended

extremely rapidly, intentionally picking up speed to maximize destructive energy. They were flying very erratically, particularly AA 11 as it flew among the skyscrapers of New York City. Videos of AA 11 capture the sound of the engines as they roar to full throttle just before impact. UA 175 is seen initiating a hard roll and turn to the left as the pilot tries to ensure that the plane would strike the intended target. It is difficult to estimate the induced "G" forces, but they added significantly to the victims' dread and terror in those last few moments. See Report of Alberto Diaz, M.D. § United Airlines Flight 175 and American Airlines Flight 11.

200. When the passengers of United Airlines Flight 93 revolted, the "pilot" began to roll the aircraft violently right and left to throw them off balance. In addition, he began a series of desperate up and down pitching movements. Recordings from the cockpit documents shouts and screams, crashing sounds from the adjacent galley, and evidence of a tumultuous, desperate, frenzied struggle right up to the moment of impact. In the final seconds the pilot pulled the control yoke all the way to the right, rolling the aircraft onto its back and putting it into a terminal dive, impacting the ground near Shanksville, PA at 580 mph. See Report of Alberto Diaz, M.D. § United Airlines Flight 93.

201. Dr. Diaz equates the last moments aboard United Airlines Flight 93 as to that of a horror movie. The desperation and fear of impending doom was made worse by the realization that the passengers' their efforts would come to naught. The violent maneuvering of the aircraft certainly caused injuries beyond those that may have been inflicted by the terrorists. Alternating cycles of weightlessness and crushing "Gs," being smashed from wall to wall and from floor to ceiling, loss of orientation, and the final roll and dive to the ground must have generated extreme physiological responses. By this point, most of the

passengers would have been beyond rational thought. Some in the back would have been paralyzed by overwhelming and unrelenting fear and stress, while most of those involved in the assault would have added components of unfathomable rage and anger to their terror; a truly horrible way to die. See Report of Alberto Diaz, M.D. § United Airlines Flight 93.

202. The unrelenting, extreme anxiety experienced by those in the four hijacked aircraft, the North Tower, the South Tower, and The Pentagon is the most intense and dreadful feeling a human being can experience and leads to a cognitive "meltdown." Once "flight or fight" becomes clearly impossible the mind becomes, for all intents and purposes, immobilized. This "quiescence" had evolutionary value in order to freeze the individual during an unexpected encounter with a dangerous predator. In the modern world, it compounds the dangers and threats surrounding the individual. Quiescence does not imply merciful "numbness," only a physical impossibility to react to the threat. Some authors often refer to the "parallel mind of fear." See Report of Alberto Diaz, M.D. § Background.

203. The horrific experience of those trapped in the four hijacked aircraft, the North Tower, the South Tower and the Pentagon was compounded by tachypsia, which is a consequence of overwhelming stress. Nature compounds the pain by subjectively slowing time down. What may transpire over the course of a few seconds may be experienced as happening in very slow motion, thus prolonging the agony. See Report of Alberto Diaz, M.D. § Background.

204. The signals from the amygada represent inaccessible learned memories (and possibly inherited instinctual associations). The body and brain's response is immediate and

impossible to resist. It is said that the signals from the amygdala trump all other higher cognitive functions. See Report of Alberto Diaz, M.D. § Background.

205. The only way that serious alarm signals from the "fear network" can be held in some abeyance is through intense and repetitive training, such as the military, law enforcement, and rescue personnel undergo. (For ordinary minor "threats" the frontal lobes "reassure" the amygdala that all is under control and the fear response abates.) This explains why rescue personnel of all types were able to perform heroically despite experiencing (physically and subjectively) exactly the same horrible threats to their life and sanity on September 11, 2001. See Report of Alberto Diaz, M.D. § Background. (emphasis in original). (parenthetical in original).

206. Death by immolation ranks as one of the greatest fears among humans and animals alike. See Report of Alberto Diaz, M.D. § World Trade Center (WTC) and the Pentagon Building.

207. Death by fire itself involves initial symptoms of heatstroke, followed by thermal decomposition of organs, sloughing of the skin, bursting of the eyeballs, and finally massive loss of blood and body fluids. Such a death is neither rapid nor merciful. See Report of Alberto Diaz, M.D. § World Trade Center (WTC) and the Pentagon Building.

208. The need to escape the holocaust must have generated a visceral panic response amongst all concerned. For some, tragically, severe traumatic injuries prevented their immediate escape from the flames and they suffered the intense heat and unbearable agony that accompanies such a fate. The lack of oxygen, which was used up quickly by the flames from the jet fuel explosions, added a measure of additional suffering as burning was accompanied by asphyxiation. Searing hot, noxious chemicals were inhaled by victims

near the fires, producing severe and extremely painful irritation of the lining of the lungs. See Report of Alberto Diaz, M.D. § World Trade Center (WTC) and the Pentagon Building.

209. Those trapped in elevators surrounded by fire, particularly the ones located in shafts through which the jet fuel fireball from American Airlines Flight 11 descended in the North Tower, were even less fortunate. They literally sat in red hot ovens and slowly cooked and asphyxiated to death. See Report of Alberto Diaz, M.D. § World Trade Center (WTC) and the Pentagon Building.

210. The above explains why so many victims facing death by fire chose to leap from the buildings to certain death. Approximately 200 persons are known to have chosen to end their lives in this manner rather than face the extreme torture of death by flames. See Report of Alberto Diaz, M.D. § World Trade Center (WTC) and the Pentagon Building.

211. Those who leapt from the buildings were subjected to another form of torture and agony. The terminal velocity of a 170 lb human being is about 120 mph. This translates into approximately 176 ft per second. Falling over 1000 ft will require between 5 and 6 seconds, an eternity when you are facing certain death. Subjectively, tachypsia will prolong the fall and permits the victim to be fully conscious of the absolute certainty of his or her death, to experience the rushing of air, the sudden feeling of weightlessness followed by rapid acceleration downwards, and perhaps tumbling end over end as they rush towards the ground. Were they to open their eyes they could anticipate the exact moment of the cessation of the self. And yet, cruelly, there is enough time to think of those you left behind, to feel regret and to feel sorrow. See Report of Alberto Diaz, M.D. § World Trade Center (WTC) and the Pentagon Building.

212. After the initial impact, explosion, and fireball, survivors were faced with bleak prospects indeed. In general, those in the floors above were trapped with no place to go. Debris and nonexistent, or non apparent, means of egress meant that their fates were sealed. Instinctually, many headed upwards towards the roof, some thinking that perhaps a helicopter rescue was still possible. In the event, high winds from the blazing inferno below made that operation an aeronautical impossibility. When they reached the top, they found that the doors were, in fact, locked. The situation was desperate; neither flight nor fight was possible. The flames continued to surge from below, consuming some and forcing others into a desperate death leap. Death *was* certain. Only the method was yet to be determined. At this point all hope was lost and the psychological and neurophysiologic "storm" was inevitable for many, if not most. Background sounds and snatches of conversations gleaned from brief cell phone conversations paint a picture of confusion, irrational comments ("call 911 and tell them we are under the desks"), and terror. See Report of Alberto Diaz, M.D. § World Trade Center (WTC) and the Pentagon Building.

213. For the occupants of the South Tower, their torture lasted 56 minutes before the last, dramatic act; the collapse of the building dragging all remaining survivors down to a fiery and crushing death. The North Tower collapsed after 75 minutes, merely prolonging the inevitable. The victims inside the Pentagon were spared the agony of being trapped beyond the reach of rescue services, but in every other way, the manner and extent of their suffering was similar in every way. See Report of Alberto Diaz, M.D. § World Trade Center (WTC) and the Pentagon Building.

214. It appears as if every conceivable horrific and gruesome way to die was present on September 11, 2001. However, the dead will suffer no more. For the survivors and family

members, however, this day was not the end of an incredibly tragic chapter in their lives. Rather, it was the beginning of long lasting, intense feelings of grief, guilt and regret. For extremely large numbers, this is translated into significant and disabling psychopathology. The scientific literature reveals that 67% of victims exposed to mass violence become severely (psychologically) impaired, as opposed to only 39% of those exposed to a technologically based disaster, or 37% of those exposed to a natural disaster. See Report of Alberto Diaz, M.D. § Survivors and Surviving Family Members. See also Holloway, H.C. and Fullerton, C.S., (1994) *The Psychology of Terror and its Aftermath*, (in "Individual and Community Responses to Trauma and Disaster, eds. R.J Ursano, B.G. McCaughey & C.S.Fullerton, pp. 31-45, Cambridge: Cambridge University Press; North, C.S., Tivis, L., McMillen, J.C. et al., (2002). *Psychiatric Disorders in Rescue Workers After the Oklahoma City Bombing,* American Journal of Psychiatry, pp. 159, 857-859.

215. Psychopathology runs the gamut from Major Depression, General Anxiety Disorder, Sleep Disorders, Substance Abuse, and Adjustment Disorder, to Post Traumatic Stress Disorder. There is also some evidence that among children (whether primary victims or experiencing traumatic separation and dislocation as a result of the disaster) it may contribute to various forms of ASD (Autism Spectrum Disorder). See Report of Alberto Diaz, M.D. § Survivors and Surviving Family Members. See also Norris, F.H., Friedman, M.J., Watson, P.T. et al. (2002) *60,000 Disaster Victims Speak, Part 1, An Empirical Review of the Empirical Literature;* 1981-2001. *Psychiatry*, pp. 65, 207-239.

216. Dr. Diaz attests to a reasonable degree of medical certainty that the suffering of all the victims on September 11, 2001, was gruesome and painful in the extreme, and that the majority of survivors and surviving family members will continue to relive the events of

that fateful day for a significant portion of their natural lives. See Report of Alberto Diaz, M.D. § Conclusion.

217. For many loved ones, modern communications (cell phones) enabled them to share the experience from a distance; experiencing the horror, but not the physical suffering. Thus, grief becomes compounded by guilt, and enduring – and very real and vivid – memories of the tragedy. Unfortunately they are condemned to keep reliving the experience through the unabated media coverage that continues to this day. *Many, if not most will require ongoing psychological/psychiatric intervention.* See Report of Alberto Diaz, M.D. § Conclusion. (emphasis in original).

218. The effects on children who lost parents on that day are immeasurable. The effects of 9/11 will thus continue across generations and for decades to come. See Report of Alberto Diaz, M.D. § Conclusion.

219. The tragedy has become imprinted on our national psyche, and our lives have all been negatively affected in one way or another. It contributed directly to our involvement in two wars and the consequent additional death and suffering. Long lines at the security checkpoints in airports, ubiquitous government surveillance, and suspiciousness of our own Islamic countrymen are all ways in which we as a nation may have lost our innocence. See Report of Alberto Diaz, M.D. § Conclusion.

220. The Declarations submitted by the Claimants in this matter fully support the opinions of Dr. Diaz. Dozens upon dozens of Declarations submitted in connection with this case document that Decedents were trapped in the World Trade Center alive and conscious and that the surviving Claimants received multiple levels of psychological and psychiatric intervention as a result of losing loved ones on September 11, 2001, ranging

from participation in support groups to inpatient psychiatric care. See Declarations, submitted via CD, *passim*.

221. The opinion of Dr. Diaz is firmly supported by the graphic, real-life attestations composed by the Claimants in the instant suit, which speak to both the horror of the Decedents' deaths and the lasting psychological impact that these deaths have wrought on the Decedents' families. This psychological impact still continues a decade after the terrorist attacks perpetrated by Defendants. See Declarations of Claimants, *passim*.

Expert Attestation in Support of Economic Damages

222. Stan V. Smith, Ph.D. is the president of Smith Economics Group, Ltd. Dr. Smith's specific area of expertise is forensic economics. *See Curriculum Vitae of Stan Smith, Ph.D., attached to the Inquest Memorandum as Exhibit F.*

223. Dr. Smith has provided expert deposition testimony thousands of times and has been deemed qualified to testify approximately 500 times by state trial courts and U.S. District Courts in virtually every State in the Union. *See Correspondence by Stan Smith, President, Smith Economics Group, Ltd. dated February 14, 2012*.

224. Dr. Smith taught the first undergraduate course in the nation on forensic economics. *See Curriculum Vitae of Stan Smith, Ph.D., attached to the Inquest Memorandum as Exhibit F.*

225. Dr. Smith is qualified to provide an expert opinion to this Court concerning the forensic economics arising out of the claims made on behalf of the Decedents and Plaintiffs in this case.

226. The amount of compensatory non-economic damages in this matter, as calculated by Dr. Smith, is $1,728,500,000 exclusive of prejudgment interest. *See Correspondence by Stan*

Smith, President, Smith Economics Group, Ltd. dated February 14, 2012, attached to Plaintiffs' Inquest Memorandum as Exhibit K.

227. The amount of compensatory economic damages in this matter, as calculated by Dr. Smith, is $344,277,160. This amount includes prejudgment interest from September 11, 2001, to January 1, 2013, using the annual average monthly interest rates for 30 day U.S. Treasury Bills. *Id.*

228. The total amount of compensatory damages in this matter, which consists of both an economic loss and non-economic loss component, is $2,122,777,160. This is exclusive of prejudgment interest on compensatory non-economic damages. *Id.*

229. The prejudgment interest calculated on the compensatory non-economic damages of $1,728,500,000 as stated in ¶ 225 was calculated using the monthly average Prime Rate of Interest, published by the Federal Reserve System, of 4.96%. From September 11, 2001, to January 1, 2013, the amount of prejudgment interest on the compensatory non-economic damages is $1,262,999,268. *Id.*

230. The method Dr. Smith used to arrive at this prejudgment interest amount is exactly the same methodology as employed by Judge John M. Facciola in *Baker v. Syria, 775 F.Supp.2d 48 (D.D.C. March 30, 2011). Id.*

231. The total of all economic and non-economic damages in this matter, including the prejudgment interest on both economic and non-economic damages, is $3,385,776,428. *Id.*

B. PROPOSED CONCLUSIONS OF LAW

232. Incorporated herein by reference are Plaintiffs' 276 Findings of Fact and 35 Conclusions of Law entered by The Honorable George B. Daniels, United States District Judge for the

Southern District of New York, on December 22, 2011.

233. The 9/11 terrorist attacks are contrary to the guarantees "recognized as indispensable by civilized peoples." 28 U.S.C. § 1350 note. Accordingly, the 9/11 attacks and the resulting deaths constitute "extrajudicial killings" that give rise to private right of action under 28 U.S.C. § 1605A(c).

Damages under the Foreign Sovereign Immunities Act Generally

234. Thus, this Court finds, based on the Findings of Fact at ¶¶ 1-233 above, that Plaintiffs are entitled to damages, both economic and non-economic, as a result of the extrajudicial killings perpetrated by, or enabled by, Defendants on September 11, 2001.

235. Damages available under the cause of action created under the Foreign Sovereign Immunities Act include economic damages, solatium, pain and suffering, and punitive damages. §1605A(c). *See, e.g., Baker, supra,* 775 F.Supp.2d at 78-86*; Murphy v. Islamic Republic of Iran*, 740 F.Supp.2d 51 (D.D.C. 2010); *Acree v. Republic of Iraq*, 271 F.Supp.2d 179, 219-220 (D.D.C. 2003) (Roberts, J.), *vacated on other grounds*, 370 F.3d 41 (D.C.Cir. 2004); *Cronin v. Islamic Republic of Iran*, 238 F.Supp.2d 222, 235 (D.D.C. 2002)(Lamberth, J.), *abrogated on other grounds by Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C.Cir. 2004); *Mousa v. Islamic Republic of Iran*, 238 F.Supp.2d 1 (D.D.C. 2001)(Bryant, J.).

236. In evaluating the Plaintiffs' proof of economic damages, the Court may "accept as true the plaintiffs' uncontroverted evidence." *Elahi v. Islamic Republic of Iran,* 124 F.Supp.2d 97, 100 (D.D.C. 2000); *Campuzano v. Islamic Republic of Iran*, 281 F.Supp.2d 258, 268 (D.D.C. 2003).

237. Plaintiffs may establish proof of damages by affidavit. *Weinstein v. Islamic Republic of*

Iran, 184 F.Supp.2d 13, 19 (D.D.C. 2002); *Polhill v. Islamic Republic of Iran*, 2001 WL 34157508

238. This Court exercises its discretion to award to award Plaintiffs prejudgment interest from the date of the terrorist attacks of September 11, 2001, until the date of final judgment. *Baker, supra.*

239. Prejudgment interest will be awarded both to compensate the Decedents' Estates and surviving Claimants for delays due to litigation and to prevent the Islamic Republic of Iran and all other Defendants from profiting from their long history of terrorist attacks directed toward the United States proper and the interests, persons and property of the United States abroad. *Pugh, supra,* 530 F.Supp.2d at 263.

Damages Awards to the Forty-Seven (47) Decedents' Estates

240. The Estates of the 47 Decedents that are parties to the instant action shall recover economic losses as a result of the wrongful death of each Decedent on September 11, 2001. See citations at ¶ 233, *supra*.

241. The Estates of the 47 Decedents shall also recover non-economic damages via a survival action due to the intense pain and suffering endured by Decedents during their entrapment in the hijacked commercial jetliners designated as American Airlines Flight 11, United Airlines Flight 175, or United Airlines Flight 93; their entrapment in the North Tower or South Tower of the World Trade Center, both of which were laden with thousands of gallons of burning jet fuel and debilitating smoke before their collapse and total destruction; or, their entrapment in The Pentagon after the crash of American Airlines Flight 77 into the building and the resultant conflagration. *Id.*

242. The Estates of the 47 Decedents shall also recover for the pain and suffering specifically

associated with each of the Decedents' horrific deaths individually. *Id*.

243. Both the Decedents' pain and suffering, and the resulting recovery by each of the 47 Estates, is compounded by the Decedents' mental anguish resulting from the knowledge their deaths were imminent. *Baker, supra,* 775 F.Supp.2d at 81-4.

244. The **Estate of Donald J. Havlish, Jr.** is hereby awarded the amount of $37,864,316.[8]

245. The **Estate of Michael A. Bane** is hereby awarded the amount of $37,113,102.

246. The **Estate of Martin Boryczewski** is hereby awarded the amount of $48,515,853.

247. The **Estate of Richard M. Caproni** is hereby awarded the amount of $34,703,448.

248. The **Estate of Peter Chirchirillo** is hereby awarded the amount of $36,593,024.

249. The **Estate of Jeffrey Coale** is hereby awarded the amount of $36,711,296.

250. The **Estate of Daniel M. Coffey** is hereby awarded the amount of $36,211,514.

251. The **Estate of Jason Coffey** is hereby awarded the amount of $35,158,923.

252. The **Estate of Jeffrey Collman** is hereby awarded the amount of $35,470,609.

253. The **Estate of Michael Diehl** is hereby awarded the amount of $36,736,540.

254. The **Estate of Stephen Dorf** is hereby awarded the amount of $34,395,127.

255. The **Estate of Judy Fernandez** is hereby awarded the amount of $34,004,981.

256. The **Estate of William R. Godshalk** is hereby awarded the amount of $47,824,909.

257. The **Estate of John Grazioso** is hereby awarded the amount of $38,529,190.

258. The **Estate of James D. Halvorson** is hereby awarded the amount of $40,617,182.

259. The **Estate of Liming Gu** is hereby awarded the amount of $43,035,609.

260. The **Estate of Steven Cafiero** is hereby awarded the amount of $32,906,639.

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8 See Summary of Certified Economic Losses of Each Plaintiff-Decedent prepared by Smith Economics Group Ltd attached to the Inquest Memorandum as Exhibit G and List of Plaintiffs' Proposed Compensatory Awards Per Claimant attached as Exhibit I and for specific calculations.

261. The **Estate of Robert Levine** is hereby awarded the amount of $35,673,313.

262. The **Estate of Joseph Lostrangio** is hereby awarded the amount of $36,930,063.

263. The **Estate of Brian Nunez** is hereby awarded the amount of $33,652,359.

264. The **Estate of Meta Waller** is hereby awarded the amount of $32,352,938.

265. The **Estate of Ronald Gamboa** is hereby awarded the amount of $34,043,418.

266. The **Estate of Dorothy Mauro** is hereby awarded the amount of $32,733,016.

267. The **Estate of Mary Melendez** is hereby awarded the amount of $38,683,988.

268. The **Estate of Peter T. Milano** is hereby awarded the amount of $53,305,752.

269. The **Estate of Yvette Nichole Moreno** is hereby awarded the amount of $33,512,676.

270. The **Estate of Philip Paul Ognibene** is hereby awarded the amount of $35,587,524.

271. The **Estate of Denis Lavelle** is hereby awarded the amount of $35,192,429.

272. The **Estate of John William Perry** is hereby awarded the amount of $36,076,677.

273. The **Estate of Salvatore T. Papasso** is hereby awarded the amount of $37,442,117.

274. The **Estate of Marsha Dianah Ratchford** is hereby awarded the amount of $37,386,414.

275. The **Estate of John M. Rodak** is hereby awarded the amount of $55,593,184.

276. The **Estate of Elvin Romero** is hereby awarded the amount of $45,936,408.

277. The **Estate of Richard Rosenthal** is hereby awarded the amount of $38,426,641.

278. The **Estate of Joshua Scott Reiss** is hereby awarded the amount of $38,879,175.

279. The **Estate of Maria Theresa Santillan** is hereby awarded the amount of $34,407,439.

280. The **Estate of Victor Saracini** is hereby awarded the amount of $40,745,899.

281. The **Estate of Scott Schertzer** is hereby awarded the amount of $33,944,544.

282. The **Estate of Paul K. Sloan** is hereby awarded the amount of $37,120,133.

283. The **Estate of George Eric Smith** is hereby awarded the amount of $33,761,652.

284. The **Estate of Timothy P. Soulas** is hereby awarded the amount of $117,948,781.

285. The **Estate of William R. Steiner** is hereby awarded the amount of $37,596,100.

286. The **Estate of Andrew Stergiopoulos** is hereby awarded the amount of $36,868,696.

287. The **Estate of Edward W. Straub** is hereby awarded the amount of $47,705,140.

288. The **Estate of Jennifer Tino** is hereby awarded the amount of $33,778,014.

289. The **Estate of Jeanmarie Wallendorf** is hereby awarded the amount of $32,921,240.

290. The **Estate of Timothy Raymond Ward** is hereby awarded the amount of $33,843,706.

Damages Awards for Individual Claimants

291. Those Plaintiffs who are family members of murder victims on September 11, 2001 are entitled to recover compensatory damages for solatium. See, e.g., *Baker, supra*, 775 F.Supp.2d at 83.

292. Solatium is awarded to compensate the "the mental anguish, bereavement[,] and grief that those with a close personal relationship to a decedent experience as the result of the decedent's death, as well as the harm caused by the loss of the decedent['s] society and comfort." *Belkin v. Islamic Republic of Iran, 667 F.Supp.2d 8, 22 (D.D.C. 2009)(citing Dammarell v. Islamic Republic of Iran, 281 F.Supp.2d 105, 196-7 (D.D.C. 2003); Elahi, supra, 124 F.Supp.2d at 110)*.

293. In evaluating the Plaintiffs' request for pain and suffering, solatium damages, and punitive damages, this Court must consider the particular circumstances of this horrific event, as well as similar and recent cases which awarded compensatory and punitive damages to victims of terrorist attacks. *Baker*, *supra*, 775 F.Supp.2d at 83.

294. The Court recognizes that it is entitled to take judicial notice of related proceedings and records in other cases brought under the FSIA, and does so. *Haim v. Islamic Republic of*

Iran, 784 F.Supp.2d 1, 6, quoting *Valore II, supra*, 700 F.Supp.2d at 59.

295. The accompanying Declarations by the surviving Claimants in this matter detail the traumatic effects that the 9/11 attacks and their loss of loved ones continue to cause Claimants today, especially in light of the constant and repetitive media attention surrounding the attacks. *See Exhibit B attached to Plaintiffs' Damage Inquest Memorandum*.

296. The award amounts proposed for individual Claimants are consistent with amounts previously awarded in terrorist cases and consistent with the outrageousness of the 9/11 attacks.

297. The Claimants in this case will receive awards that are higher than the awards in any previously reported terrorism case based on the unprecedented nature, scope and catastrophic physiological and psychological violence wrought by Defendants on the Decedents, Claimants, and the United States as a whole on September 11, 2001.

298. Each surviving Spouse that is a named Plaintiff in the instant action shall be awarded the sum of $12,500,000 in non-economic losses plus prejudgment interest in the amount of $9,133,637 for a total award of $21,633,637.

299. Each surviving minor or adult Child that is a named Plaintiff in the instant action shall be awarded the sum of $8,500,000 in non-economic losses plus prejudgment interest in the amount of $6,210,873 for a total award of $14,710,783.

300. Each surviving Parent that is a named Plaintiff in the instant action shall be awarded the sum of $8,500,000 in non-economic losses plus prejudgment interest in the amount of $6,210,873 for a total award of $14,710,783.

301. Each surviving Sibling that is a named Plaintiff in the instant action shall be awarded the

sum of $4,250,000 in non-economic losses plus prejudgment interest in the amount of $3,105,436 for a total award of $7,355,436.

302. Plaintiff **Chrislan Fuller Manuel**, the niece of Decedent **Meta Waller**, shall be treated as an adult Child and awarded the sum of $8,500,000 in non-economic losses plus prejudgment interest in the amount of $6,210,873 for a total award of $14,710,783 on the following basis: she is the Personal Representative of the **Estate of Meta Waller**; posted an appropriate bond in the Circuit Court of the City of Alexandria, Commonwealth of Virginia; dutifully performed her responsibilities of the Estate; and, on the basis of the statements in her Declaration. See Folders 68 & 69, provided via CD.

303. Nothing shall preclude Plaintiff **Frances M. Coffey**, as Executrix of both the Estate of her deceased husband, **Daniel M. Coffey**, and the Estate her deceased son, **Jason Coffey**, from recovering on behalf of both Estates.

304. Nothing shall preclude **Frances M. Coffey**, individually, **Daniel D. Coffey, M.D.** and **Kevin M. Coffey** for recovering for the murder of both **Daniel M. Coffey** and **Jason Coffey** on September 11, 2001.

305. Nothing shall preclude **Maureen Halvorson**, Executrix of the **Estate of James D. Halvorson**, from recovering on behalf of her deceased husband's Estate, and as the surviving Spouse of **James D. Halvorson**, and as a surviving Sibling of Decedent **William Wilson**. Both **James D. Halvorson** and **William Wilson** were murdered on September 11, 2001.

306. Plaintiffs are also entitled to reimbursement of the costs of bring this litigation. See, e.g., *Murphy, supra,* 740 F.Supp.2d at 77 (D.D.C. 2010). Plaintiffs' costs incurred for the prosecution of this action thus far total $1,977,846.49. *See Affidavit Regarding Plaintiffs'*

Costs of This Action, attached to the Inquest Memorandum as Exhibit M.

Punitive Damages

307. In the instant case, the two hundred, seventy-six (276) Findings of Fact so ordered on December 22, 2011, by The Honorable George B. Daniels demonstrates by ***clear and convincing evidence*** that Iran/Hezbollah and their agents and instrumentalities supported, protected, harbored, aided, embedded, enabled, sponsored, trained, conspired with and facilitated the travel of al-Qaida for the purpose of murdering American citizens on September 11, 2001.

308. The attacks that occurred on September 11, 2001 on the Plaintiffs individually, and our nation collectively, is like no other in American history. The savagery and suffering caused on September 11, 2001 has no parallel in American jurisprudence. This act of terrorism imposed an extrajudicial sentence of death via horrific physical and psychological injury on all Decedents and intense, repetitive psychological injury on all surviving Claimants. Such injuries involve a lifetime of unimaginable grief and immeasurable sorrow. *See Report of Rear Admiral Alberto Diaz, M.D. (U.S. Navy, Ret.). See also Declarations of Claimants, provided via CD.*

309. Accordingly, the **character, nature and extent** of these acts merit punitive damages. *See, e.g., Cronin, supra,* 238 F.Supp.2d at 235.

310. Iran continues to fund terrorist organizations including al-Qaida as noted by Dr. Patrick Clawson in his Affidavit, Exhibit 8, dated June 25, 2010 submitted May 19, 2011 to Judge Daniels.

311. There a need for **deterrence** in this matter but there is evidence that Defendants possess substantial **wealth**. The Iranian natural gas and oil reserves are the second and third

largest in the world, respectively. The gross national product for the Islamic Republic of Iran alone is estimated to be $928.9 billion by the *CIA World Fact Book* (2011). In short, the requirements for punitive damages contained in the RESTATEMENT (SECOND) OF TORTS § 908 (1) are fully complied with this case. *See Supplemental Report of Stan Smith Regarding Punitive Damages, attached as Exhibit L to Plaintiffs' Inquest Memorandum.*

312. A damages multiplier of 5.35, predicated on the United States Supreme Court's denial for a *writ of certiorari* to review a decision from the Supreme Court of Tennessee that upheld an award which amounted to a 5.35-to-1 ratio of punitive damages to actual damages, is warranted in this case. *See DaimlerChrysler Corp. v. Flax,* 272 S.W.3d 521 (Tenn. 2008), *cert denied, May 26, 2009, 129 S.Ct. 2433, 174 L.Ed. 2d 277*.

313. The use of a damages multiplier of 5.35 in this case brings the total amount of the damages award to **$18,113,903,890**.

314. Such damages are warranted in light of Defendants' outrageous, malicious, premeditated attacks on United States soil.

/s/ Thomas E. Mellon, Jr.

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Attorneys for the Havlish Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE TERRORIST ATTACKS ON

SEPTEMBER 11, 2001

CIVIL ACTION NO.

03 MDL 1570 (GBD)

FIONA HAVLISH, in her own right and as Executrix of the ESTATE OF DONALD G. HAVLISH, JR., Deceased,

RUSSA STEINER, in her own right and as Executrix of the ESTATE OF WILLIAM R. STEINER, Deceased,

CLARA CHIRCHIRILLO, in her own right and as Executrix of the ESTATE OF PETER CHIRCHIRILLO, Deceased,

TARA BANE, in her own right,

and as Executrix of the ESTATE OF MICHAEL A. BANE, Deceased,

GRACE M. PARKINSON-GODSHALK, in her own right and as Executrix of the ESTATE OF WILLIAM R. GODSHALK, Deceased,

ELLEN L. SARACINI, in her own right and as Executrix of the ESTATE OF VICTOR J. SARACINI, Deceased,

THERESANN LOSTRANGIO, in her own right and as Executrix of the ESTATE OF JOSEPH LOSTRANGIO, Deceased, *et al.*,

Plaintiffs,

v.

SHEIKH USAMAH BIN-MUHAMMAD BIN-LADEN, a.k.a. OSAMA BIN-LADEN,

AL-QAEDA/ISLAMIC ARMY, an unincorporated association, *et al.*,

CIVIL ACTION NO.
03-CV-9848 – GBD

Case Transferred from the United States District Court for the District of Columbia Case Number 1:02CV00305

AMENDED[1] PLAINTIFFS' DAMAGES INQUEST MEMORANDUM

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[1] This Amended Plaintiffs' Damages Inquest Memorandum, e-filed and hand-delivered February 15, 2012, supersedes and replaces Plaintiffs' original Damages Inquest Memorandum, ECF No. 2552 (filed February 14, 2012).

FOREIGN STATE DEFENDANTS:

THE ISLAMIC REPUBLIC OF IRAN,

AYATOLLAH ALI-HOSEINI KHAMENEI,

ALI AKBAR HASHEMI RAFSANJANI,

IRANIAN MINISTRY OF
INFORMATION AND SECURITY,

THE ISLAMIC REVOLUTIONARY
GUARD CORPS,

HEZBOLLAH,
an unincorporated association,

THE IRANIAN MINISTRY
OF PETROLEUM,

THE NATIONAL IRANIAN
TANKER CORPORATION,

THE NATIONAL IRANIAN
OIL CORPORATION,

THE NATIONAL IRANIAN
GAS COMPANY,

IRAN AIRLINES,

THE NATIONAL IRANIAN
PETROCHEMICAL COMPANY,

IRANIAN MINISTRY OF
ECONOMIC AFFAIRS AND FINANCE,

IRANIAN MINISTRY OF
COMMERCE,

IRANIAN MINISTRY OF DEFENSE
AND ARMED FORCES LOGISTICS,

THE CENTRAL BANK OF THE ISLAMIC REPUBLIC OF IRAN, *et al.*,

Defendants.

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1 *and* 2 Copies of all materials, including the CDs containing the Declarations and the individual economic reports and backup data, are being delivered to the Clerk of Courts, United States District Court, S.D.N.Y., and to the chambers of United States Magistrate Judge Frank Mass, United States Courthouse, 500 Pearl Street, New York, New York, on February 15, 2012.

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Valore v. Islamic Republic of Iran, 700 F.Supp.2d 52 (D.D.C. 2010) ("*Valore II*").....4, 5, 13, 15, 20
Wagner v. Islamic Republic of Iran, 172 F.Supp.2d 128 (D.D.C. 2001).....13
Weinstein v. Islamic Republic of Iran, 184 F.Supp.2d 13 (D.D.C. 2002).....5, 8, 9, 16

Other Sources:

§1605A(c).....4, 6
28 U.S.C. §1608(e), *et seq*.....4, 5
28 U.S.C. §1602, *et seq*.....4

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PLAINTIFFS NOW COME and seek an award of compensatory and punitive damages for the most outrageous tortious act ever committed on American soil and the most horrific premeditated crime against American citizens in our country's history. Plaintiffs in this action are family members and legal representatives of the murder victims of the September 11, 2001 attacks. Plaintiffs have proven the liability of defendants to the satisfaction of this Court.

This Court must now award damages commensurate with the singularly heinous and resonating nature of the 9/11 attacks. As demonstrated herein, the actions of the defendants caused the Decedents to suffer horrible deaths and inflicted enduring agony upon Plaintiff family members. In addition to providing reparation for economic loss and the horrific pain and suffering of the victims, damages awarded by the Court must also attempt to compensate family members for individual emotional and mental trauma that will never be fully assuaged.

Based on established precedential case law and this particularly malicious and spectacularly devastating crime against humanity committed by defendants, Plaintiffs deserve the highest possible justifiable compensatory and punitive damage awards.

I. BACKGROUND AND PROCEDURAL HISTORY

On September 11, 2001, nineteen members of the al Qaeda terrorist network hijacked four United States passenger airplanes and flew them into the Twin Towers of the World Trade Center in New York City, the Pentagon in Arlington, Virginia, and, due to passengers' efforts to foil the hijackers, an open field near Shanksville, Pennsylvania. Thousands of people on the planes and in the buildings, including first responders at the New York crash site, were killed in these attacks. Countless others were injured, and property worth many billions of dollars was destroyed. See, e.g., *In Re Terrorist Attacks on September 11, 2001*, 349 F.Supp.2d 765, 779 (S.D.N.Y. 2005, Casey, J.); *In Re Terrorist Attacks on September 11, 2001*, 2001 WL 4903584

(S.D.N.Y. 2011, Maas, J.).

Plaintiffs in this action are one hundred, eleven (111) family members and forty-seven (47) legal representatives of murder victims of the 9/11 attacks. *See List of Plaintiffs attached hereto as* ***Exhibit A***. These Plaintiffs sought entry of judgment under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605A (the "FSIA"), against the Islamic Republic of Iran, two of its top leaders, Ayatollah Ali Hoseini Khamenei and Ali Akbar Hashemi Rafsanjani, as well as the Iranian Ministry of Information and Security ("MOIS"), the Islamic Revolutionary Guard Corps ("IRGC"), the Iranian Ministry of Petroleum, the Iranian Ministry of Economic Affairs and Finance, the Iranian Ministry of Commerce, the Iranian Ministry of Defense and Armed Forces Logistics, the National Iranian Tanker Corporation, the National Iranian Oil Corporation, the National Iranian Gas Company, Iran Airlines, the National Iranian Petrochemical Company, and the Central Bank of the Islamic Republic of Iran. Plaintiffs also asserted claims against non-sovereign defendants Usama (or Osama) bin Laden, the Taliban, Muhammad Omar, the al Qaeda/Islamic Army, and Hizballah for wrongful death, survival, intentional infliction of emotional distress, and conspiracy.

Plaintiffs' liability evidence was submitted to the Court via written filings on May 19, 2011, July 13, 2001, and August 19, 2011. The Court held an evidentiary hearing on December 15, 2011. On December 22, 2011, Judge George B. Daniels granted the Plaintiffs' motion for a default judgment against all defendants. *Havlish, et al. v. bin Laden, et al.*, No. 03 Civ. 9448 (ECF No. 2516). Judge Daniels further ordered that the case be referred to United States Magistrate Judge Frank Maas "to resolve any remaining issues, including but not limited to damages both compensatory and punitive." Judge Daniels also entered Findings of Fact and Conclusions of Law detailing the basis for his liability rulings. *Id.*

On January 13, 2012, Judge Maas issued a Scheduling Order directing Plaintiffs to file this Inquest Memorandum, accompanied by supporting affidavits and exhibits, setting forth Plaintiffs' proof of damages, including the costs of this action and, if applicable, Plaintiffs' reasonable attorney's fees, together with proposed findings of fact and conclusions of law. *In Re Terrorist Attacks on September 11, 2001*, No 03-MDL- 1570 (ECF No. 2534).

II. JURISDICTION

In its Findings of Fact and Conclusions of Law as to liability in this matter, this Court has already determined that it has subject matter and personal jurisdiction over all defendants. See Plaintiffs' CONCLUSIONS OF LAW, **Section A.**, ¶¶ 2-16.[1]

III. STANDARD OF REVIEW

This Court has already determined that Plaintiffs have established their *liability* claims "by evidence satisfactory to the court," pursuant to 28 U.S.C. § 1608(e). Through the supporting Declarations, economic evidence and expert reports attached hereto, Plaintiffs establish the amount of the appropriate compensatory and punitive damage awards under that same evidentiary standard.[2] In evaluating the Plaintiffs' proof of economic damages, the Court may "accept as true the plaintiffs' uncontroverted evidence."[3] Further, Plaintiffs may establish proof of damages by affidavit.[4] Additionally, "FSIA courts may 'take judicial notice of related

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[1] See also, *Baker, supra*, 775 F.Supp.2d at 78-84; *Steen v. Islamic Republic of Iran*, Not Reported in F.Supp.2d, 2003 WL 21672820 (D.D.C. 2003); *Campuzano v. Islamic Republic of Iran*, 281 F.Supp.2d 258 (D.D.C. 2003).

[2] *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C.Cir. 2003).

[3] *Elahi v. Islamic Republic of Iran*, 124 F.Supp.2d 97, 100 (D.D.C. 2000); *Campuzano v. Islamic Republic of Iran*, 281 F.Supp.2d 258, 268 (D.D.C. 2003).

[4] *Weinstein v. Islamic Republic of Iran*, 184 F.Supp.2d 13, 19 (D.D.C. 2002); *Polhill v. Islamic Republic*

proceedings and records'" *Haim v. Islamic Republic of Iran*, 784 F.Supp.2d 1, 6, quoting *Valore II, supra*, 700 F.Supp.2d at 59. Also, in evaluating the Plaintiffs' request for pain and suffering, solatium damages, and punitive damages, this Court must consider the particular circumstances of this horrific event, as well as similar recent cases which awarded compensatory and punitive damages to victims of terrorist attacks.[5]

In support of this request for awards of compensatory and punitive damages, Plaintiffs submit to the Court Declarations which detail the suffering endured by the victims and surviving family members. See ***Exhibit B*** attached hereto.[6] These Plaintiff Declarations detail, *inter alia*, the nature (*i.e.*, closeness) of the relationship between the claimants and the decedents, as well as the extreme mental anguish still experienced by the Declarants which is far in excess of that which would have been experienced following the Decedents' natural deaths.

Plaintiffs also hereby submit the expert report of Rear Admiral Alberto Diaz, M.D. Jr., RADM MC USN (*Ret.*). See ***Exhibit C***, attached hereto. Dr. Diaz's report details the horrific last hours and minutes of the terrorist victims on September 11, 2001 and the excruciating pain and suffering they endured. Dr. Diaz has served as Commander-in-Chief, Pacific Fleet Surgeon and was the Senior Navy Medical Department Representative in the investigation conducted by the U.S. Navy after the *USS Vincennes* shot down an Iranian Airbus on July 3, 1988. See Report of Alberto Diaz, M.D., § *PRIOR EXPERT TESTIMONY*. Additionally, Dr. Diaz has served as Executive Officer, Medical Director, or Commander of various United States Navy Medical Centers throughout the world. See *Curriculum Vitae* of Alberto Diaz, Jr., RADM MC USN (Ret.), attached hereto as ***Exhibit D***.

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of Iran, 2001 WL 34157508 (D.D.C. 2001); *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 530 F.Supp.2d 216 (D.D.C. 2008); *Regier v. Islamic Republic of Iran*, 281 F.Supp.2d 87 (D.D.C. 2003).

[5] *Baker, supra*, 775 F.Supp.2d at 83.

[6] Plaintiffs' declarations of damages are numbered in the same order that Plaintiffs appear in *Exhibit A*.

Plaintiffs also hereby submit an expert report (and *curriculum vitae*) from Stan V. Smith, Ph.D., detailing the economic losses suffered by the Decedent Estates, as well as calculations of prejudgment interest. See ***Exhibits E, F,*** and ***J***, attached hereto, *discussed in* **Section V.**, *infra*. Dr. Smith's expert report states that, as a result of the Plaintiff Decedents' untimely deaths, significant economic losses were incurred by their Estates. See ***Exhibit E***, attached hereto. Additionally, Dr. Smith has calculated the appropriate amount of prejudgment interest to be awarded. See **Section X.**, *infra*, and ***Exhibit J***, attached hereto.

IV. Damages Available

Damages available under the FSIA-created cause of action include "economic damages, solatium, pain and suffering, and punitive damages." Many courts have previously assessed these same types of damages against both sovereign and non-sovereign defendants where liability has been established based on the FSIA or common law tort claims.[7] Accordingly, Decedent Estates can recover economic losses stemming from wrongful death of the Decedent. Estates of Plaintiff Decedents can also recover damages for the intense pain and suffering endured by the Decedents during their survival while trapped in the hijacked airlines or in the burning Twin Towers, as well as for pain and suffering specifically related to the Plaintiff Decedents' horrific deaths.[8]

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[7] §1605A(c). *See, e.g., Baker, supra*, 775 F.Supp.2d at 78-86; *Murphy v. Islamic Republic of Iran*, 740 F.Supp.2d 51 (D.D.C. 2010); *Acree v. Republic of Iraq*, 271 F.Supp.2d 179, 219-220 (D.D.C. 2003) (Roberts, J.), *vacated on other grounds*, 370 F.3d 41 (D.C.Cir. 2004); *Cronin v. Islamic Republic of Iran*, 238 F.Supp.2d 222, 235 (D.D.C. 2002)(Lamberth, J.), *abrogated on other grounds by Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C.Cir. 2004); *Mousa v. Islamic Republic of Iran*, 238 F.Supp.2d 1 (D.D.C. 2001)(Bryant, J.).

[8] See *footnote* 7, *supra*.

Immediate family members of the deceased can recover solatium for their emotional injuries.[9] Plaintiffs are also entitled to punitive damages[10], prejudgment interest[11], and the costs of bringing this litigation.[12] Plaintiffs are not requesting any attorneys fees in this action.

V. Economic Losses

Plaintiffs must be awarded damages for their economic losses stemming from the barbarism of the 9/11 attacks. The beneficiaries of the Estates are entitled to recover the present value of economic damages, including lost wages that the Decedents might reasonably have been expected to earn but for the wrongful death. See, e.g., *Estate of Heiser v. Islamic Republic of Iran,* 466 F.Supp.2d 229 (D.D.C. 2006)("*Heiser I*").

In support of Plaintiffs' request for an award of economic damages, Plaintiffs hereby submit extensive economic analyses by Stan V. Smith, Ph.D. that detail the significant economic losses suffered by the Plaintiff Decedent Estates. See ***Exhibit E***, attached hereto. Dr. Smith is one of the preeminent authorities on the law of damages and, indeed, co-authored the first textbook in forensic economics ("ECONOMIC / HEDONIC DAMAGES"). He also created and taught the first course in the nation in forensic economics. He has appeared in Court to testify approximately five hundred (500) times in almost every state and in the great majority of the federal judicial circuits.

Dr. Smith's has submitted reports for each of the forty-seven (47) Plaintiff Decedents detailing that, as a result of that Decedents' untimely deaths, significant economic losses were

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9 See, e.g., *Baker, supra,* 775 F.Supp.2d at 83.

10 *Baker, supra,* 775 F.Supp.2d at 84-6; *Murphy, supra,* 740 F.Supp.2d at 76-8.

11 *Pugh, supra,* 530 F.Supp.2d at 262-5; *Baker, supra,* 775 F.Supp.2d at 86-7.

12 See, e.g., *Murphy, supra,* 740 F.Supp.2d at 76-8.

incurred.[13] Dr. Smith has calculated, using generally accepted accounting methodology, the appropriate economic damages that should be awarded to the Estate of each Plaintiff Decedent. See a summary of the economic losses of each Plaintiff Decedent at ***Exhibit G.***

VI. Pain and Suffering of Decedents

The Estate of each Decedent must be compensated for the pain and suffering endured by the Decedents during their captivity / entrapment, torture and horrific deaths on September 11, 2001. The Estates of each decedents, through their legally appointed personal representatives, are entitled to compensation for the pain and suffering endured by each named Decedent as they survived in extreme pain and mental anguish during the attack before their eventual horrible deaths, in addition to the senseless deaths themselves.[14]

Despite the overwhelming evidence concerning the extent of the trauma, death and devastation on September 11, 2001 and the amount of pain and suffering that the Plaintiffs endured, the appropriate amount of damages to award as compensation for this pain and suffering can be difficult to determine with precision. Indeed, it goes without saying that no monetary judgment would truly compensate these Plaintiffs for the pain and suffering they endured - and many will continue to endure - as a result of the 9/11 terrorist attacks. Notwithstanding the inherent difficulty and subjectivity involved in awarding damages based on

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13 *Curriculum vitae* and a cover letter to the confidential expert reports of Stan Smith, PH.D., are attached hereto at ***Exhibits E*** and ***F***. The individual financial reports and personal financial records of the Plaintiff decedent estates (which Stan Smith analyzed and from which he reached his economic conclusions) is being provided under seal contemporaneously herewith. *See* ***Exhibit H.***

14 See., e.g., *Cicippio v. Islamic Republic of Iran*, 18 F.Supp.2d 62, 69-70 (D.D.C. 1998); *Sutherland v. Islamic Republic of Iran*, 151 F.Supp.2d 27, 50-3 (D.D.C. 2001); *Polhill, supra*, 2001 WL 34157508 at * 4-6; *Pugh, supra*, 530 F.Supp.2d at 262-74; *Regier, supra*, 281 F.Supp.2d at 100-4; *Steen, supra*, 2003 WL 21672820 at *4-6.

the pain and suffering of a claimant, compensation is required once liability has been determined. *Weinstein, supra*, 184 F.Supp.2d at 22-3; *Gates v. Syrian Arab Republic*, 580 F.Supp.2d 53 (D.D.C. 2008).

Because there is no precise methodology used to calculate damages for pain and suffering, the trier of fact (which in this case is the Court) has a significant amount of discretion in determining the amount of appropriate compensation. See., e.g., *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C.Cir. 1969); *Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 472-73 (8th Cir. 1977); *Gates, supra*, 580 F.Supp.2d at 72.

In making this determination, this Court should not simply award what it abstractly finds to be fair. Rather, in deciding the amount of damages to award in this case, the Court should look at damage awards for pain and suffering in other cases brought under the FSIA and also in personal injury lawsuits arising under a variety of circumstances. *Id.* Prior similar cases in which the court awarded compensatory damages for pain and suffering to the victims of a terrorist act typically fall into two categories: those in which the victim died, and the pain and suffering is awarded for that endured between the attack and the victim's death; and, those in which the victim was held in captivity. The Decedent victims of the September 11, 2001 terrorist attacks should be viewed as fitting into both categories, therefore their pain and suffering and survival damage awards warrant significant upward enhancements.

Several cases have awarded damages for the victim's pain and suffering that occurred between the attack and the victim's death shortly thereafter. In these cases, courts were influenced not only by the length of time that the victim endured physical suffering, but also by

the victims' mental anguish from *the knowledge that death was imminent*. *Baker, supra,* 775 F.Supp.2d at 81-4.

In recent cases involving kidnapping and captivity, courts have awarded pain and suffering damages to victims who were held captive and/or tortured for their pain and suffering during and after captivity. In these cases, courts typically determine the pain and suffering award by multiplying a *per diem* amount by the number of days in captivity.[15] Most commonly, however, in cases involving brutal acts - such as the 9/11 attacks - courts find that the *per diem* amount will not adequately compensate victims for the pain and suffering endured both during and after their captivity. In these cases, courts often supplement the product of the *per diem* formula with a lump sum in order to reach the final damage award.[16] An alternative manner of dealing with the inadequacy of *per diem* awards is to simply grant a lump sum award in lieu of any *per diem* damages.[17]

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[15] See *Daliberti v. Republic of Iraq*, 146 F.Supp.2d 19, 25-26 (D.D.C. 2001)(Oberdorfer, J.)(awarding damages for pain and suffering both during and after captivity at **$10,000 per day** of captivity); *Jenco v. Islamic Republic of Iran*, 154 F.Supp.2d 27, 37 (D.D.C. 2001)(Lamberth, J.)(awarding damages for pain and suffering both during and after captivity at **$10,000 per day** of captivity).

[16] See *Price v. Socialist People's Libyan Arab Jamahiriya*, 384 F.Supp.2d 120, 135-36 (D.D.C. 2005) (Lamberth, J.)(awarding damages to victims of long-term brutal kidnapping and torture for pain and suffering both during and after captivity by adding lump sum of **$7 million** to product of **$10,000** ***per diem*** formula);
Surette v. Islamic Republic of Iran, 231 F.Supp.2d 260, 269 (D.D.C. 2002)(awarding damages to victim of kidnapping for pain and suffering by adding lump sum of **$1 million** for the time that victim faced certain death alone to product of **$10,000** ***per diem*** formula);
Hill v. Republic of Iraq, 175 F.Supp.2d 36, 47-48 (D.D.C. 2001)(Jackson, J.), *rev'd on other grounds*, 328 F.3d 680 (D.C.Cir. 2003), (awarding damages to "constructive hostages" by adding lump sum of between **$100,000** and **$500,000** to product of **$3,000 to $5,000** ***per diem*** formula).

[17] See *Acree, supra*, 271 F.Supp.2d at 219-220 (awarding damages for pain and suffering to victims of torture while POWs by adding lump sum of between **$10-20 million** for period of captivity to lump sum of between **$2-5 million** for the period after captivity, depending on length of confinement, brutality of treatment, and severity of remaining psychological injuries);
Cronin v. Islamic Republic of Iran, 238 F.Supp.2d 222, 235 (D.D.C. 2002)(Lamberth, J.), *abrogated on other grounds by Cicippio-Puleo, supra*, 353 F.3d 1024, (awarding lump sum of **$1.2 million** in damages for pain and suffering to victim of kidnapping and torture);
Cicippio, supra, 18 F.Supp.2d at 69-70 (awarding lump sum of approximately **$3-19 million** in damages for pain and suffering to victims of kidnapping and torture).

When the period of the victim's pain, suffering and trauma was longer, the awards have increased.[18] Courts have been influenced not only by the length of time that the victim endured physical suffering, but by the victim's mental anguish stemming from the knowledge that death was imminent.

For example, in *Pugh v. Socialist People's Libyan Arab Jamahiriya*, *supra*, an action was brought under the FSIA against Libya for wrongful death, intentional infliction of emotional distress, and loss of consortium by estates and survivors of American passengers killed in the bombing of a French airliner in Africa. 530 F.Supp.2d at 219-62. The District Court ruled that the estates of the seven U.S. citizens who died in the bombing were entitled to recover the present value of the economic losses resulting from their wrongful deaths and that prejudgment interest would be awarded. *Id.*, 530 F.Supp.2d at 263-4. Further, the *Pugh* court determined that the appropriate awards to passengers' estates was economic damages plus **$18 million** to each estate for the decedent's pain, suffering and death. *Id.*, 530 F.Supp.2d at 263-4. Applying this established framework, courts have consistently awarded terrorism victims who were killed after a brief captivity in excess of **$18 million**.[19]

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18 See, e.g., *Haim v. Islamic Republic of Iran*, 425 F.Supp.2d 56, 71–72 (D.D.C. 2006)(citing *Stethem v. Islamic Republic of Iran*, 201 F.Supp.2d 78, 91 (D.D.C. 2002) (awarding **$1.5 million** for pain and suffering endured over a 15-hour period in which the victim was repeatedly beaten before being shot).

19 See also:
Cicippio, *supra*, 18 F.Supp.2d at 62 (three kidnap victims were awarded a combined **$45 million** in compensatory damages for their pain and suffering);
Sutherland, *supra*, 151 F.Supp.2d at 27 (hostage awarded compensatory damages of **$23,540,000**);
Polhill, *supra*, Not Reported in F.Supp.2d, 2001 WL 34157508 at *1 (In action against Iran for captivity of Robert Polhill, he was awarded **$15 million**);
Regier, *supra*, 281 F.Supp.2d at 87 (Abductee was awarded compensatory damages of **$24,540,000**);
Steen, *supra*, 2003 WL 21672820 at *1 (D.D.C. 2003)(kidnap victim awarded **$27,750,000**; a rate of **$10 thousand for each day plus an additional $10 million**);
Campuzano, *supra*, 281 F.Supp.2d at 272-8 (Plaintiffs who survived bombing were entitled to damages up to **$15,000,000** *each* for past and future pain and suffering.).

The attached report by Rear Admiral Alberto Diaz, M.D. details the physical and psychological damages suffered by the victims during the final hours and minutes of their lives and is attached hereto as ***Exhibit C***. Dr. Diaz has drawn upon his extensive clinical experience and upon medical literature regarding the physiology of fear, severe pain, trauma and the enduring effects on survivors, families and friends. He also discusses the neurophysiology and psychology of extreme fear and impending doom and their effects on victims' perceptions of time.

Based on the FSIA precedent and the extraordinary nature of the 9/11 Decedents' suffering, as discussed by Dr. Diaz, Plaintiffs propose that the estates of each decedent be awarded **$18 million** for their pain and suffering, in addition to their proven economic losses. This amount is consistent with prior awards to decedents in terror cases, especially in light of the upward enhancements justified by the brutality and scope of the 9/11 attacks.

VII. Solatium of Family Members

Those Plaintiffs who are family members of murder victims on September 11, 2001 are entitled to recover compensatory damages for solatium.[20] Solatium is awarded to compensate the "the mental anguish, bereavement[,] and grief that those with a close personal relationship to a decedent experience as the result of the decedent's death, as well as the harm caused by the loss of the decedent['s] society and comfort." *Belkin v. Islamic Republic of Iran*, 667 F.Supp.2d 8, 22 (D.D.C. 2009)(citing *Dammarell v. Islamic Republic of Iran*, 281 F.Supp.2d 105, 196-7 (D.D.C. 2003); *Elahi, supra*, 124 F.Supp.2d at 110). Damages for solatium belong to the

20 See, e.g., *Baker, supra*, 775 F.Supp.2d at 83.

individual heir personally for injury to the feelings and loss of a decedent's comfort and society. *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 29 (D.D.C. 1998).

In determining the amount of compensatory damages awards to family members of a surviving victim, this Court has held that these awards are determined by the "nature of the relationship" between the family member and victim, and "the severity of the pain suffered by the family member." *Haim, supra*, 425 F.Supp.2d at 75; *Estate of Heiser* ("*Heiser I*"), *supra*, 466 F.Supp.2d at 229. "Furthermore, in determining the appropriate compensatory damages for each plaintiff's pain and suffering, courts are guided not only by prior decisions awarding damages for pain and suffering, but also by those which awarded damages for solatium.[21]

Compensatory damages awards to family members for their pain and suffering must be determined by the nature of the relationship and the severity and duration of the pain suffered by the family member.

Courts have developed a standardized approach for FSIA solatium claims. For instance, the court in *Heiser v. Islamic Republic of Iran* ("*Heiser I*"), surveyed past awards in the context of deceased victims of terrorism to determine that, based on averages, "[s]pouses typically receive greater damage awards than parents [or children], who, in turn, typically receive greater awards than siblings." 466 F.Supp.2d 229, 269 (2006); *Estate of Bland v. Islamic Republic of Iran*, -- F.Supp.2d ---, 2011 WL 6396527 (D.D.C. 2011). Relying upon the average awards, the *Heiser I* Court articulated a framework in which spouses of deceased victims were awarded

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[21] *Cf. Wagner v. Islamic Republic of Iran*, 172 F.Supp.2d 128, 135 n. 11 (D.D.C. 2001)(Jackson, J.) (noting that, in an intentional homicide case, "solatium appears in any event to be indistinguishable from the intentional infliction of emotional distress"); *see also Surette, supra*, 231 F.Supp.2d at 267 n. 5 ("In the context of FSIA cases, this Court has recognized the claim of solatium as... indistinguishable from the claim of intentional infliction of emotional distress."); *Haim, supra*, 425 F.Supp.2d 56.

approximately $8 million, while parents received $5 million and siblings received $2.5 million. *Id.*; See also *Valore II*, *supra*, 700 F.Supp.2d at 85 (observing that courts have "adopted the framework set forth in *Heiser* [*I*] as 'an appropriate measure of damages for the family members of victims'")(quoting *Peterson v. Islamic Republic of Iran*, 515 F.Supp.2d 25, 51 (D.D.C. 2007)); *Stern v. Islamic Republic of Iran*, 271 F.Supp.2d 286, 301 (D.D.C. 2003). In addition to spouses typically receive greater damage awards than parents, who, in turn, receive greater awards than siblings;[22] there are two additional considerations discernable from the case law: a.) families of hostage or captivity victims are also typically awarded greater damages than are the families of victims of a single attack;[23] and b.) families of victims who have died are typically awarded greater damages than families of victims who remain alive.[24]

Courts have consistently held that prior pain and suffering awards should be a guide and not adhered to blindly. "*These numbers, however, are not set in stone.*" *Greenbaum v. Islamic Republic of Iran*, 451 F.Supp.2d 90, 108 (D.D.C. 2006) (Lamberth, J.)(*emphasis added*); *Estate of Bland v. Islamic Republic of Iran*, -- F.Supp.2d ---, 2011 WL 6396527 at *8 (D.D.C., December 21, 2011)(Lamberth, C.J.); *Murphy*, *supra*, 740 F.Supp.2d at 79. Deviations may be warranted when, *inter alia*, "evidence establish[es] an especially close relationship between the plaintiff and decedent, particularly in comparison to the normal interactions to be expected given

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22 *Compare, e.g., Anderson v. Islamic Republic of Iran*, 90 F.Supp.2d 107, 113 (D.D.C. 2000)(Jackson, J.)(awarding **$10 million** to the wife of a hostage and torture victim); *Cicippio*, *supra*, 18 F.Supp.2d at 70 (same), with *Eisenfeld v. Islamic Republic of Iran*, 172 F.Supp.2d 1, 8 (D.D.C. 2000)(Lamberth, J.)(awarding **$5 million** each to the parents and **$2.5 million** each to the siblings of victims of a suicide bombing on a passenger bus); see also *Flatow*, *supra*, 999 F.Supp. at 31 (awarding parents each **$5 million** and siblings each **$2.5 million** of victim who was killed in passenger bus bombing).

23 *Compare, e.g., Anderson*, *supra*, 90 F.Supp.2d at 113 (awarding **$10 million** to the wife of a hostage and torture victim) with *Campuzano*, *supra*, 281 F.Supp.2d at 277 (awarding to the wife of a bombing victim compensatory damages for solatium in the amount of **$6 million**).

24 *See, e.g., Jenco*, *supra*, 154 F.Supp.2d at 38 (relying on this distinction in granting awards of **$1.5 million** to siblings of a kidnapping victim who was eventually safely returned).

the familial relationship; medical proof of severe pain, grief or suffering on behalf of the claimant [is presented]; and circumstances surrounding the terrorist attack [rendered] the suffering particularly more acute or agonizing." *Oveissi v. Islamic Republic of Iran*, 768 F.Supp.2d 16, 26-27 (D.D.C., March 8, 2011). Additionally, as the Court noted in *Greenbaum*, *supra*, "larger awards are typically reserved for cases with aggravating circumstances that appreciably worsen the surviving spouse's pain and suffering, such as cases *involving torture or kidnapping of a spouse*." 451 F.Supp.2d at 108 (citing *Cicippio*, *supra*, 18 F.Supp.2d at 70; *Acree*, *supra*, 271 F.Supp.2d at 222)(*emphasis added*). The Court may award greater amounts in cases "with aggravating circumstances," indicated by such things as "[t]estimony which describes a general feeling of permanent loss or change caused by decedent's absence" or "[m]edical treatment for depression and related affective disorders," *Flatow*, *supra*, 999 F.Supp. at 31; *Greenbaum*, *supra*, 451 F.Supp.2d at 108. Significant upward enhancement departures are also warranted in cases with "circumstances that appreciably worsen" a claimant's "pain and suffering, such as cases involving torture or kidnapping" of the party to whom extreme and outrageous conduct was directed.[25]

The accompanying Declarations by the surviving Claimants in this matter detail the traumatic effects that the 9/11 attacks and their loss of a loved one continue to cause Claimants today. See ***Exhibit B***. Further, Dr. Diaz's accompanying report details the aggravating circumstances - such as the mental effects of knowing death was imminent and the horrible physical effects of the deaths themselves - that continue to appreciably worsen the surviving

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[25] *Greenbaum*, *supra*, 451 F.Supp.2d at 108 (departing upward from **$8 million** to **$9 million** in a widower's award upon consideration of "the severity of his pain and suffering due to the loss of his wife and unborn first child"); *Estate of Bland*, *supra*, 2011 WL 6396527 at * 9 (upward departure to **$8 million** award warranted by severe injuries sustained by a service member in bombing to United States Marine barracks in Beirut, Lebanon on October 23, 1983).

family members' pain and suffering. See ***Exhibit C***. Claimants here suffered great personal loss due to the captivity, suffering *and* death of family members dearly loved and all suffered the particularly devastating and uniquely acute suffering warranting upward enhancement departures. *See, e.g., Valore II, supra*, 700 F.Supp.2d at 86.

In *Flatow, supra*, 999 F.Supp. at 1, the district court held that a claim for solatium includes claims for the mental anguish, bereavement, and grief that those with a close relationship to the decedent experience as a result of the decedent's death. Besides considering the nature of the relationship, the *Flatow* court held that death as a result of terrorism, with its attendant horrific surrounding circumstances, *prevents the anguish from subsiding*. See also, *Higgins v. The Islamic Republic of Iran*, Not Reported in F.Supp.2d, 2000 WL 33674311 (D.D.C. 2000). This is corroborated in this matter by the report of Dr. Diaz, attached as ***Exhibit C***.

In calculating damages for loss of solatium in the case of a deceased family member, courts has considered a variety of factors to include: (1) whether the decedent's death was sudden and unexpected; (2) whether the death was attributable to negligence or malice; (3) whether the claimants have sought medical treatment for depression and related disorders resulting from the decedent's death; (4) the nature (*i.e.*, closeness) of the relationship between the claimant and the decedent; and (5) the duration of the claimants' mental anguish in excess of that which would have been experienced following the decedent's natural death. *Flatow, supra*, 999 F.Supp. at 30–31.

The "sudden and unexpected" quality of a death - as, of course, occurred in this case - may also be taken into consideration in gauging the emotional impact to those left behind. *Eisenfeld, supra*, 172 F.Supp.2d at 8-9; *Weinstein, supra*, 184 F.Supp.2d at 23. The murder of

thousands of Americans was both sudden and unforeseen by their loved ones and the consequences of the terrorists' actions upon them all the more intense.[26] That defendants acted with extreme malice is unquestioned.

Therefore, based on established precedential case law and based on the malicious and spectacularly devastating crime against humanity committed by defendants, Plaintiffs propose the following family members be awarded the following amounts for solatium:

Relationship to Decedent	*Proposed Pain and Suffering / Solatium Award*
Spouse	**$12,500,000**
Parent	**$8,500,000**
Child	**$8,500,000**
Sibling	**$4,250,000**

These amounts proposed by Plaintiffs are consistent with amounts previously awarded in previous terrorist cases and consistent with the outrageousness of the 9/11 attacks. For example, in *Pugh, discussed supra,* the District Court ruled that the appropriate award to deceased terrorism victims' spouses included **$26 million** for pain, suffering and loss of consortium. 530 F.Supp.2d at 266-74. The *Pugh* Court further ruled that the appropriate award to deceased terrorism victims' children included **$10 million** for pain and suffering; the appropriate award to deceased terrorism victims' parents included **$5 million** for pain and suffering; and the appropriate award to deceased terrorism victims' siblings included **$8 million** for pain and suffering. *Id.*

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[26] See also, *Carlson v. Islamic Republic of Iran*, 201 F.Supp.2d 78 (D.D.C. 2002).

VIII. Justifications for Upward Departures

The Plaintiffs in this case should receive awards that are at least as high, or higher, as the awards in any terrorism case. This world-changing incident deserves all possible upward enhancements to the compensatory and punitive precedents already established against Iran and other sponsors of terrorism.

This case involves United States civilians on American soil; not military personnel, members of a peace-keeping force or independent contractors on hostile foreign soil, as many of the previous cases have been.

The most fundamental aim of terrorism is to instill fear and trepidation; in this, the September 11, 2001 terrorist attack was, in significant ways, successful. Not only was 9/11 a horrific crime, indeed the most devastating act of terrorism in world history, but it changed the way of life for every American, and almost every person in the Western world.

Never had any terrorist attack claimed more casualties; never had any terrorist attack targeted more than two locations simultaneously; never had a terrorist attack caused the degree of destruction of property and wealth that 9/11 did. Never had any terrorist attack been so effective in creating havoc within, or causing change to, an entire society.

The Plaintiffs were among those who paid the immediate price for this terrorist effect, and it is the Plaintiffs who are, and forevermore will be reminded constantly that the cruel and terrible deaths of their loved ones affected entire populations, entire generations.

The surviving family members are reminded of this fact not only every September 11th when the event is commemorated annually, but virtually each and every day of the year: hardly a

day goes by without some reminder of the horrible deaths of their loved ones on September 11, 2001. There are so many cultural, media, commercial, and interpersonal references to 9/11 that it has become commonplace, part of the vernacular of our times. It is impossible to travel by airplane without clear reminders of 9/11 (including the "9/11 tax" imposed to assist funding of the Transportation Security Administration), and large office buildings, sports stadiums, transportation hubs, cultural centers - almost any place where people congregate - have enhanced security that derives directly from 9/11. Terrorism awareness campaigns are now ubiquitous, advertised in public places, transportation systems, and highways. The entire federal government was reorganized around "homeland security." Each of these serves as a constant painful reminder to those who lost loved ones on September 11, 2001.

Moreover, although the survivors now have a memorial in New York City, another at the Pentagon in Arlington, Virginia, and others located throughout the country, many of the family members can visit no cemetery as the final resting place of their deceased loved ones. Closure may never occur for many of the survivors of the victims of the attacks of September 11, 2001.

IX. Punitive Damages

According to the Restatement (Second) of Torts, the purpose of punitive damages is "to punish" a defendant for "outrageous conduct," and "to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908 (1) (1977); *see also Acosta v. Islamic Republic of Iran*, 574 F.Supp.2d 15, 30 (D.D.C. 2008). Courts evaluate four factors in determining a proper punitive damages award: "(1) the **character** of the defendant's act, (2) the **nature** and **extent** of harm to the plaintiffs that defendants caused or intended to cause, (3) the

need for **deterrence**, and (4) the **wealth** of the defendants." *Acosta, supra,* 574 F.Supp.2d at 30 (quoting *Flatow, supra*, 999 F.Supp. at 32).

In the instant case, the two hundred, seventy-six (276) Findings of Fact so ordered on December 22, 2011 by the Honorable George B. Daniels demonstrates by clear and convincing evidence that Iran/Hezbollah and their agents and instrumentalities supported, protected, harbored, aided, embedded, enabled, sponsored, trained, conspired with and facilitated the travel of al-Qaida for the purpose of murdering American citizens on September 11, 2001.

Accordingly, the **character, nature and extent** of these acts clearly merit punitive damages. *See, e.g., Cronin, supra,* 238 F.Supp.2d at 235. Iran continues to fund terrorist organizations including al-Qaida as noted by Dr. Patrick Clawson in his Affidavit, Exhibit 8, dated June 25, 2010 submitted May 19, 2011 to Judge Daniels. Clawson states:

> "[I]n my expert opinion a minimum estimate for Iran's spending on terrorism would be the amount used in the United States Department of State Country Reports on Terrorism for Iran's support to Hezbollah; *i.e.*, $200 million a year... a more likely estimate of the financial material support provided by Iran in support of terrorism is $400 million a year though given the imprecise evidence, I would feel more comfortable estimating a range of $300 million to $500 million a year rather than any one figure."

Thus, not only is there a need for **deterrence** but there is evidence that the defendant has substantial **wealth**. In fact, the Iranian natural gas and oil reserves are the second and third largest in the world, respectively. The Iranian gross national product is estimated to be $928.9 billion by the *CIA World Fact Book* (2011). In short, the requirements for punitive damages contained in the RESTATEMENT (SECOND) OF TORTS § 908 (1) are fully complied with this case.

According to the Congressional Research Service (August 2008) there have been over thirty (30) cases that have awarded punitive damages against Iran for acts of terrorism since 1997. The law involving punitive damages is now reasonably well-settled,- as explained in two of the most recent opinions, *Cielito Valencia, et al. v. Islamic Republic of Iran, et al.*, 774 F.Supp.2d 1 and *Estate of Bland, supra*, 2011 WL 6396527 at *6. On March 31, 2010, in *Valencia*, the court noted that the compensatory damage-punitive damage ratio of 3.44 was established in an earlier FSIA case, *Valore II, supra*, 700 F.Supp.2d at 87-90.

On December 21, 2011, Royce C. Lamberth, Chief Judge, ordered punitive damages applying the ratio of 3.44 to the compensatory damages. *See Estate of Bland, supra*. The Court noted the need to deter the actions of the Iranian defendants in planning, supporting and aiding the execution of terroristic attacks. *See also, Rimkus v. Islamic Republic of Iran*, 750 F.Supp.2d at 163, 184 (D.D.C. 2010). Judge Lamberth stated in *Estate of Bland, supra*:

> To accomplish this goal, this court - relying on the Supreme Court's opinion in *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007) - held that the calculation of punitive damages in subsequent related actions should be directly tied to the ratio of punitive to compensatory damages set forth in earlier cases. *Murphy*, 740 F.Supp.2d at 76. Thus, in *Murphy* this Court applied the ratio of $1.00:$3.44 established in *Valore* [*II*] - an earlier FSIA case arising out of the Beirut bombing. *Id.* at 82-83 (citing *Valore* [*II*], 700 F.Supp. 2d at 52). Here, the Court will again apply this same $1.00:$3.44 ratio, which has been established as the standard ratio applicable to cases arising out of the Beirut bombing.

However, the attacks that occurred on September 11, 2001 on the Plaintiffs individually and our nation collectively is like no other in American history. The savagery and suffering caused on September 11, 2001 has no parallel in American jurisprudence. The act of terrorism imposed a sentence of death or horrific physical and psychological injury on victims. Such injuries involve a lifetime of unimaginable grief and immeasurable sorrow. Indeed, the whole of

humanity calls out the full measure of condemnation and punishment by this Court. Therefore, the Plaintiffs respectfully request the Court's consideration for a multiplier of 5.35 predicated on the United States Supreme Court's denial for a *writ of certiorari* to review a decision from the Supreme Court of Tennessee that upheld an award which amounted to a 5.35-to-1 ratio of punitive damages to actual damages. *See DaimlerChrysler Corp. v. Flax*, 272 S.W.3d 521 (Tenn. 2008), *cert denied, May 26, 2009, 129 S.Ct. 2433, 174 L.Ed. 2d 277.*

The *DaimlerChrysler Corp.* case arose out of a motor vehicle accident in June 2001, which resulted in the death of an eight-month-old baby. Plaintiffs, the parents of the decedent, filed suit alleging wrongful death and negligent infliction of emotional distress (NIED) against the other driver involved in the accident and against DaimlerChrysler Corp., who was the manufacture of plaintiffs' 1998 Dodge Caravan. The jury assigned fault evenly against the defendant driver (for speeding) and DaimlerChrysler Corp. (for defective design of the car seats), and awarded plaintiffs $5 million in compensatory damages for their wrongful death claim, and $2.5 million damages for their NIED claim. During the second phase of the trial, evidence was presented that DaimlerChrysler Corp. was aware of the defective design of their car seats, they failed to warn customers, they hid evidence of the defective design, and they continued to market the Caravan as a vehicle that put safety first. The jury awarded punitive damages against DaimlerChrysler Corp. in the amount of $65.5 million for the wrongful death claim and $32.5 million for the NIED claim. The trial judge remitted the punitive damages down to $13,367,345.00 for the wrongful death claim and $6,632,655.00 for NIED.

On appeal, the Tennessee Court of Appeals reversed, holding that there was insufficient evidence to award any damages pertaining to the NIED claim. Further, the court held that there

was not clear and convincing evidence that DaimlerChrysler Corp. acted recklessly or intentionally in order to warrant punitive damages, and struck the entire punitive damages award.

On further appeal, the Supreme Court of Tennessee affirmed the court of appeal's holding pertaining to the NIED. However, they reversed the portion of the decision pertaining to punitive damages. Holding that there was in fact sufficient evidence to support a finding of punitive damages, the court reviewed whether the size of the punitive damages award was excessive in violation of the due process standards set out by United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). Specifically, the court relied on the first two guideposts set out in *Gore* and *Campbell* (the reprehensibility of the defendant's conduct; and the ratio between the punitive damage award and the compensatory damages).

With regard to the first guidepost, the court noted that the evidence in this case "clearly demonstrates that [DaimlerChrysler Corp.'s] conduct was reprehensible." As to the second guidepost, the court noted that the punitive-to-compensatory ratio was 5.35-to-1 and acknowledged the language of the Supreme Court decisions in *Gore* (suggesting that a ratio of greater than 4-to-1 approaches the outer limits of constitutionality) and *Campbell* (suggesting that a ratio of 1-to-1 may be all that is permissible in cases where compensatory damages are "substantial"). However, the court also noted that in *Campbell* the Supreme Court declined to adopt a fixed mathematical formula to determine the appropriateness of punitive damages and stated that "the precise award in any case, of course, must be based upon the facts and circumstances of defendant's conduct and the harm to the plaintiff." The Tennessee court held that in light of the first two guideposts, the ratio of 1 to 5.35 would be warranted in the case, noting that the evidence pertaining to the defendant's conduct demonstrated their conduct was

reprehensible and the harm to the plaintiffs in this case was tragic (the death of an eight-month-old baby). Respectfully, the hideous, monstrous events of September 11, 2001 far exceeds the tragedy contained in the *DaimlerChrysler Corp* case.

The proposed compensatory award in this case is **$3,385,776,428** (including prejudgment interest, see **Section X.**, *infra*).[27] Accordingly, applying a compensatory to punitive damage ratio of **1:3.44** totals **$11,647,070,912.**

The reasonableness of the Plaintiffs' request for a compensatory to punitive damage ratio of **1:5.35** is further demonstrated by the expert report of Stan V. Smith, PhD, attached hereto as ***Exhibit L***. Taking an entirely different economic viewpoint consistent with the American Economic Association, Dr. Smith analyzes the Gross Domestic Product of Iran which is nearly one trillion dollars. Consistent with economist principles involving punitive sanctions against corporations, Dr. Smith suggests a two percent (2%) sanction as applied to the GDP resulting in a punitive damage award of **$17.8 billion**. The application of the compensatory to punitive damages ratio of **1:5.35** presents a punitive damage number of **$18.1 billion**. Dr. Smith's approach thereby demonstrates the reasonableness of the **1:5.35** ratio. Stated otherwise, a multiplier of **5.35** renders an **$18.1 billion** result whereas the two percent of one week's GDP for Iran renders **$17.8 billion**. Relatively speaking, the two different approaches render the same result. Hence, the Plaintiffs pray for a **5.35** multiplier sanction or a two percent of GDP as the appropriate sanction for the atrocities of the events of September 11, 2001.

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[27] Also see "Total Damages Summary" prepared by Dr. Stan Smith at ***Exhibit K***, attached hereto.

However, Plaintiffs pray this court to apply a compensatory to punitive damage ratio of **1:5.35** for the reasons noted above. Therefore, Plaintiffs pray the Court for a total award of **$18,113,903,889.**

X. Prejudgment Interest

In the case of *Baker, supra,* the Court addresses the award of prejudgment interest. The Honorable John M. Facciola, United States Magistrate Judge, notes it is within the Court's discretion to award Plaintiffs prejudgment interest **from the date of the attacks (September 11, 2001) until the date of final judgment. Not only is the decision to award prejudgment interest in the discretion of the Court but how to compute that interest also rests with the Court subject to equitable considerations**. *Baker, supra.* Such prejudgment awards compensate the victims for any delay due to litigation and prevent Iran from profiting from its long history of terrorist attacks. Federal Courts in the District of Columbia have awarded prejudgment interest in cases where the victims "were delayed in recovering compensation for their injuries-including, specifically, where such injuries result in targeted attacks perpetrated by foreign defendants." *Pugh, supra,* 530 F.Supp.2d at 263.

Plaintiffs respectfully submit the expert report from Dr. Stan Smith who analyzed the applicable interest calculations. See Dr. Smith Report on Prejudgment Interest, attached hereto as ***Exhibit J.***

Plaintiffs have sustained injuries involving pain and suffering by victims in the September 11, 2001 attacks as well as the lifelong emotional distress of their immediate families as addressed by solatium claims. Accordingly, Plaintiffs urge this Court to award prejudgment interest on damages for solatium and pain and suffering computed consistent in the expert report of Dr. Stan Smith. *See* ***Exhibit J.,*** attached; *Baker, supra,* 775 F.Supp.2d at 86-7.

The total compensatory damage award (economic plus non-economic) plus interest, is **$3,385,776,428**. See "Total Damages Summary" prepared by Dr. Stan Smith at ***Exhibit K***, attached hereto. Accordingly, applying a compensatory to punitive damage ratio of **1:3.44** totals **$11,647,070,912.**

However, the Plaintiffs pray this Court to award full compensatory damages (economic and non-economic) plus totaling **$3,385,776,428** - plus a **1:5.35** damages ratio for a total award of **$18,113,903,889**.

XI. PLAINTIFFS' COSTS OF THIS ACTION

Plaintiffs are also entitled to reimbursement of the costs of bring this litigation.[28]

Plaintiffs' costs of this action thus far are **$1,977,846.49.** See Affidavit of Thomas E. Mellon, Jr., Esquire regarding Plaintiffs' costs of this action, attached hereto as ***Exhibit M***.

Plaintiffs are not requesting any statutory attorneys fees in this action in as much as Plaintiffs have executed contracts with their counsel.

XII. CONCLUSION

Plaintiffs should be awarded damages for the unspeakable horrors committed on September 11, 2001 attacks. Plaintiffs have proven the liability of defendants to the satisfaction of this Court. This Court must now award damages commensurate with the devastating nature of the 9/11 attacks and the pain and suffering endured by the Plaintiff Decedents that day, as well as

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28 See, e.g., *Murphy, supra,* 740 F.Supp.2d at 77 (D.D.C. 2010).

by their family members on a daily basis to this day and for many years to come.[29]

Respectfully Submitted,

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[29] Please also see Plaintiffs' proposed Findings of Fact and Conclusions of Law and proposed Order, submitted to the Court contemporaneously herewith.

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Attorneys for the Havlish Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE TERRORIST ATTACKS ON

SEPTEMBER 11, 2001

CIVIL ACTION NO.

03 MDL 1570 (GBD)

FIONA HAVLISH, in her own right and as Executrix of the ESTATE OF DONALD G. HAVLISH, JR., Deceased,

RUSSA STEINER, in her own right and as Executrix of the ESTATE OF WILLIAM R. STEINER, Deceased,

CLARA CHIRCHIRILLO, in her own right and as Executrix of the ESTATE OF PETER CHIRCHIRILLO, Deceased,

TARA BANE, in her own right, and as Executrix of the ESTATE OF MICHAEL A. BANE, Deceased,

GRACE M. PARKINSON-GODSHALK, in her own right and as Executrix of the ESTATE OF WILLIAM R. GODSHALK, Deceased,

ELLEN L. SARACINI, in her own right and as Executrix of the ESTATE OF VICTOR J. SARACINI, Deceased,

THERESANN LOSTRANGIO, in her own right and as Executrix of the ESTATE OF JOSEPH LOSTRANGIO, Deceased, *et al.*,

Plaintiffs,

v.

SHEIKH USAMAH BIN-MUHAMMAD BIN-LADEN, a.k.a. OSAMA BIN-LADEN,

AL-QAEDA/ISLAMIC ARMY, an unincorporated association, *et al.*,

CIVIL ACTION NO.
03-CV-9848 – GBD

Case Transferred from the United States District Court for the District of Columbia Case Number 1:02CV00305

ADDENDUM TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO DAMAGES

FOREIGN STATE DEFENDANTS:

THE ISLAMIC REPUBLIC OF IRAN,

AYATOLLAH ALI-HOSEINI KHAMENEI,

ALI AKBAR HASHEMI RAFSANJANI,

IRANIAN MINISTRY OF INFORMATION AND SECURITY,

THE ISLAMIC REVOLUTIONARY GUARD CORPS,

HEZBOLLAH,
an unincorporated association,

THE IRANIAN MINISTRY OF PETROLEUM,

THE NATIONAL IRANIAN TANKER CORPORATION,

THE NATIONAL IRANIAN OIL CORPORATION,

THE NATIONAL IRANIAN GAS COMPANY,

IRAN AIRLINES,

THE NATIONAL IRANIAN PETROCHEMICAL COMPANY,

IRANIAN MINISTRY OF ECONOMIC AFFAIRS AND FINANCE,

IRANIAN MINISTRY OF COMMERCE,

IRANIAN MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS,

THE CENTRAL BANK OF THE ISLAMIC REPUBLIC OF IRAN, *et al.*,

Defendants.

ADDENDUM TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO DAMAGES

AND NOW, with liability against all Defendants having been established by the entry of Plaintiffs' Findings of Fact and Conclusions of Law on December 22, 2011, Plaintiffs now come to hereby respectfully submit this Addendum to Plaintiffs' Proposed Findings of Fact and Conclusions of Law with Respect to Damages.

1. Plaintiffs' Proposed Findings of Fact and Conclusions of Law, ¶¶ 1-158, inclusive, contain a citation to the Foreign Sovereign Immunities Act ("FSIA") that is incorrect. These above-mentioned paragraphs cite to §1605(a) of the FSIA. The correct citation is §1605A.[1] Plaintiffs pray that this Honorable Court will consider Plaintiffs' Addendum and, should Plaintiffs' Proposed Findings of Fact and Conclusions of Law be entered by this Court, that ¶¶ 1-158, inclusive, will be amended to cite to §1605A of the FSIA.
2. In the alternative, Plaintiffs pray that this Honorable Court will consider ¶¶ 1-158, inclusive, so-amended via the submission of this Addendum for filing.

Respectfully submitted,

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[1] Section 1605A of the FSIA was added to the statute during the pendency of this litigation via the National Defense Authorization Act for Fiscal Year 2008, §1083(c).

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CERTIFICATE OF SERVICE

I, Thomas E. Mellon Jr., Esquire, hereby certify that the Defendants in the matter of *Havlish, et al. v. bin Laden, et al.*, are in default and have not registered for ECF and, therefore, those Defendants have not been served with the attached Addendum to Plaintiffs' Proposed Findings of Fact and Conclusions of Law. All other interested parties in the consolidated actions are being served through the ECF system this 27th day of February, 2012.

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ANNEX 371

325 F.R.D. 507
United States District Court, District of Columbia.

REPUBLIC OF KAZAKHSTAN, Plaintiff,
v.
Anatolie STATI, et al., Defendants.

Civil Action No. 17–2067 (ABJ)
|
Signed 04/24/2018

Synopsis
Background: Republic of Kazakhstan brought action against business owners and their companies, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), and fraud and civil conspiracy, arising from defendants allegedly obtaining an arbitral award from the Stockholm Chamber of Commerce (SCC) through fraud. After the Clerk of Court entered defaults against business owners, business owners moved to vacate entry of default.

The District Court, Amy Berman Jackson, J., held that good cause existed to set aside entry of default judgment.

Motion granted.

Attorneys and Law Firms

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Charlene C. Sun, James E. Berger, King & Spalding LLP, New York, NY, Taylor T. Lankford, King & Spalding LLP, Washington, DC, for Defendants.

MEMORANDUM OPINION

AMY BERMAN JACKSON, United States District Judge

Plaintiff, the Republic of Kazakhstan ("Kazakhstan"), has brought this action against defendants, Anatolie Stati and Gabriel Stati and the two companies they own, Ascom Group, S.A. ("Ascom") and Terra Raf Trans Traiding Ltd. ("Terra Raf") for alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, and the common law torts of fraud and civil conspiracy. Compl. ¶ 1 [Dkt. # 1]. Kazakhstan claims that defendants obtained an arbitral award from the Stockholm Chamber of Commerce ("SCC") in Sweden through fraud, and it seeks damages, attorneys' fees, and an injunction preventing defendants from enforcing the arbitral award in the United States. *Id.* at 92–93 ("Prayer for Relief").[1]

On February 26, 2018, the Clerk of Court entered defaults against two of the four defendants—Ascom and Terra Raf—due to their failure to answer the complaint. Clerk's Entry of Default Re: Terra Raf [Dkt. # 8]; Clerk's Entry of Default Re: Ascom [Dkt. # 9]. A few days later, on March 2, 2018, defendants moved to vacate the entries of default, *see* Defs.' Mot. to Vacate Entry of Default Against Ascom and Terra Raf [Dkt. # 13] ("Defs.' Mot."); Mem. in Supp. of Defs.' Mot. [Dkt. # 14] ("Defs.' Mem."), and plaintiff opposed the motion. Kazakhstan's Opp. to Defs.' Mot. [Dkt. # 15] ("Pl.'s Opp."). For the ***509** reasons that follow, the Court will grant defendants' motion.

ANALYSIS

Under Federal Rule of Civil Procedure 55(c), "[t]he court may set aside an entry of default for good cause." Fed. R. Civ. P. 55(c). The Court must exercise its discretion in making such a determination, but in this Circuit, "strong policies favor resolution of disputes on their merits." *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980); *see also Mohamad v. Rajoub*, 634 F.3d 604, 606 (D.C. Cir. 2011) (pointing to *Jackson v. Beech* for the same proposition). "In exercising its discretion, the district court is supposed to consider 'whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious.' " *Mohamad*, 634 F.3d at 606, quoting *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 373 (D.C. Cir. 1980). "Because of the strong preference for resolving disputes on the merits, any doubts must be resolved in favor of the party seeking relief from the default." *Gray v. Staley*, 310 F.R.D. 32, 35 (D.D.C. 2015), citing *Jackson*, 636 F.2d at 837.

Before the Court can analyze whether good cause exists to vacate the entry of default, it must first address the threshold requirement set forth in Local Civil Rule 7(g) which provides that "[a] motion to vacate an entry of default, or a judgment by default, or both, shall be accompanied by a verified answer presenting a defense sufficient to bar the claim in whole or in part." LCvR 7(g). Defendants have not filed an answer with their motion. Instead, they request that the Court exercise its discretion and permit them to file a motion to dismiss by May 4, 2018, which is sixty days from the date the last defendant in this case was served.[2] Defs.' Mem. at 5 n.3; Defs.' Reply at 6 n.2.

The Court will grant this request as a matter of judicial efficiency. It sees no reason why the four defendants, all represented by the same counsel, should be required to file separate answers or other responsive pleadings to the same complaint.[3] Furthermore, this ruling is consistent with the Circuit's strong preference to proceed on the merits. *See Jackson*, 636 F.2d at 837; *see also Azamar v. Stern*, 275 F.R.D. 1, 4 n.3 (D.D.C. 2011) (noting that "courts have proceeded with considering the merits of a motion to vacate default despite the failure to comply with [Local Civil Rule 7(g)], partially due to the preference for allowing a case to proceed on the merits rather than allowing the entry of default to stand on a purely procedural ground").

With respect to the motion to vacate the defaults, the Court has considered each of the Rule 55(c) factors, and it finds that there is good cause to vacate the defaults entered against Ascom and Terra Raf. The first factor—whether the default was "willful"—requires more than negligent conduct. *See, e.g., Gray*, 310 F.R.D. at 35 ("To show willfulness, a moving party need not establish bad faith, though it must demonstrate more than mere negligence."); *see also Wilson v. Superclub Ibiza, LLC*, 279 F.R.D. 176, 179 (D.D.C. 2012) (same). Here, defendants contend that their failure to respond to the complaint was "borne of negligence," Defs.' Reply at 2, that is "a combination of miscommunication, colorable questions concerning the sufficiency of service with respect to ... [d]efendant Terra [Raf], lack of service on Gabriel Stati, and [p]laintiff's failure to file certificates of service [on the public docket] when it considered service to have been completed." Defs.' Mem. at 3. And they assert that despite this initial delay in responding, defendants are now ready and eager to defend against the suit. Defs.' Reply at 2.

Although the Court does not condone defendants' negligent behavior, there is no indication that they deliberately tried to delay this case or acted with wanton or willful ***510** disregard for their legal responsibilities. *See Gray*, 310 F.R.D. at 35 (holding that the defendants' two-month delayed response was not willful under Rule 55(c) because they had not failed to defend against the case or otherwise engaged in "dilatory tactics"); *see also Kusi v. British Airways Corp.*, No. 96-2868, 1997 WL 420334, at *1 (D.D.C. July 17, 1997) (holding that the defendant's failure to respond to complaint due to miscommunication between its foreign corporate headquarters and its U.S. counsel was excusable neglect since there was no indication that the defendant "acted with willful disregard for its legal responsibilities").

In fact, a day after the Clerk of Court entered the defaults against Ascom and Terra Raf, counsel for defendants entered their appearance and emailed plaintiff's counsel seeking to negotiate a briefing schedule. Ex. A to Defs.' Reply [Dkt. # 16–3]; Notice of Appearance James E. Berger [Dkt. # 10]; Notice of Appearance Charlene C. Sun [Dkt. # 11]; Notice of Appearance Taylor T. Lankford [Dkt. # 12]. And shortly thereafter, defendants filed this motion to vacate the defaults. Defs.' Mot. So this is not a case where defendants were "totally unresponsive," *see Jackson*, 636 F.2d at 836 (noting that default judgment should be reserved for situations involving a "totally unresponsive party"), and since "enforcing judgments as a penalty for delays in filing is often contrary to the fair administration of justice," the Court finds that this delay is excusable under Rule 55(c). *Int'l Painters & Allied Trades Union & Indus. Pension Fund v. H.W. Ellis Painting Co.*, 288 F.Supp.2d 22, 25 (D.D.C. 2003).

Moreover, plaintiff will not be prejudiced by vacating the defaults. There is no indication that the delay in this case has caused witnesses to disappear or physical evidence to deteriorate. *See Capital Yacht Club v. Vessel AVIVA*, 228 F.R.D. 389, 394 (D.D.C. 2005), citing *KPS & Assocs., Inc. v. Designs By FMC, Inc.*, 318 F.3d 1, 15 (1st Cir. 2003) (noting that prejudice results from the dangers that accompany delay such as "loss of evidence, increased difficulties of discovery, or an enhanced opportunity for fraud or collusion"). Plaintiff asserts that "delay enhances [defendants'] opportunity to perpetuate their fraudulent scheme." Pl.'s Opp. at 9. But this claim is not well-founded since the danger plaintiff seeks to forestall is an effort by the defendants to enforce the arbitral award through legal systems in "multiple jurisdictions." *Id.* And the arbitral award has already been upheld by the Swedish Supreme Court and recently by this Court notwithstanding the fraud allegations. *See Stati*, —— F.Supp.3d at ——, ——, 2018 WL 1461898 at *5, 16.

Finally, defendants have met the third criteria for vacating

the defaults because they have proffered a potentially meritorious defense based on their contention that the complaint fails to allege a prima facie RICO claim because the vast majority of the conduct is lawful and occurred outside the United States. Defs.' Mem. at 5; *see Mohamad*, 634 F.3d at 606 ("[A]llegations are meritorious if they contain even a hint of a suggestion which, proven at trial, would constitute a complete defense."), quoting *Keegel*, 627 F.2d at 374.

Accordingly, for the reasons stated, the Court will grant defendants' motion, [Dkt. # 13], to vacate the defaults entered against Ascom and Terra Raf.

A separate order will issue.

All Citations

325 F.R.D. 507

Footnotes

1 In a related case to enforce the same arbitral award, Kazakhstan raised, and the Court rejected, similar arguments based on alleged fraud. *See Anatolie Stati v. Republic of Kazakhstan*, No. 14-1638, 302 F.Supp.3d 187, 193–201, 209, 2018 WL 1461898, at *3–9, 16 (D.D.C. Mar. 23, 2018) (granting petition to confirm SCC arbitral award because "none of the grounds for refusal or deferral of the award set forth in the New York Convention apply").

2 According to defendants, service of the other two defendants, Anatolie Stati and Gabriel Stati, was completed, although no certificate of service has been filed with the Court. *See* Reply Mem. in Supp. of Defs.' Mot. [Dkt. # 16] ("Defs.' Reply") at 6 n.2.

3 The Court notes that all four defendants have now filed a motion to dismiss the complaint. *See* Defendants' Motion to Dismiss [Dkt. # 19].

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ANNEX 372

877 F.2d 189
United States Court of Appeals,
Second Circuit.

FIRST FIDELITY BANK, N.A., a national banking association, formerly doing business as First National Bank of New Jersey, Appellee,
v.
The GOVERNMENT OF ANTIGUA & BARBUDA—PERMANENT MISSION, Appellant.

No. 777, Docket 88–7863.
|
Argued Feb. 23, 1989.
|
Decided June 7, 1989.

Synopsis

Bank brought action against government of Antiqua and Barbuda on note signed by government's ambassador to United Nations. The United States District Court, Southern District of New York, Louis L. Stanton, J., entered default judgment in favor of bank and subsequently denied government's motion for relief from judgment. Government appealed. The Court of Appeals, Oakes, Chief Judge, held that factual issues as to whether ambassador had apparent authority to obtain loan and waive governments sovereign immunity warranted setting aside default judgment.

Reversed and remanded.

Jon O. Newman, Circuit Judge, dissented and filed opinion.

Attorneys and Law Firms

***190** Pamela A. Bresnahan, Laxalt, Wash., Perito & Dubuc (Stacey E. Athans, New York City, Robert B. Washington, Jr., Anthony M. Alexis, Washington, D.C., of counsel), for appellant.

William M. O'Connor, Foyen & Peri (Joseph D. Giacoia, New York City, of counsel), for appellee.

Before OAKES, Chief Judge, NEWMAN, Circuit Judge, and HAIGHT, District Judge.*

Opinion

OAKES, Chief Judge:

The Government of Antigua and Barbuda appeals from a decision of the United States District Court for the Southern District of New York, Louis L. Stanton, Judge, which denied its motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure. First Fidelity Bank had secured a default judgment against Antigua in a suit on a note signed by Antigua's ambassador to the United Nations and had then entered into a consent order also executed by the ambassador purportedly on his country's behalf. Antigua requested the court to set aside the default judgment and dismiss the complaint or, in the alternative, to vacate the consent order. The issue is the extent to which Antigua is bound by the actions of its ambassador to the ***191** United Nations. We conclude that the default judgment should have been set aside and therefore reverse the decision and remand the case to the district court for further proceedings.

BACKGROUND

In November 1983, First Fidelity's predecessor, First National State Bank of New Jersey, loaned $250,000 to Lloydstone Jacobs, Antigua's ambassador to the United Nations. Jacobs signed for the loan as ambassador, representing the "Government of Antigua & Barbuda—Permanent Mission." The stated purpose of the loan was to pay for the renovation of Antigua's Permanent Mission to the United Nations in New York. Repayment of the loan ceased in mid–1985. In September 1985, the bank contacted government officials in Antigua, seeking repayment. The following month, the bank wrote to Jacobs and to Prime Minister Vere C. Bird's permanent secretary, threatening legal action. According to an officer of the bank, the permanent secretary told the officer by telephone in November that Jacobs and Robert Healy, in-house counsel for Antigua's Permanent Mission, were authorized to negotiate a settlement, but this is now disputed by Antigua.

No settlement was reached, and in July 1986 First Fidelity sued Antigua for repayment. Antigua did not answer the complaint, although it concedes that it was properly

served. Representatives of the bank met with Jacobs and Healy. According to the bank, Jacobs and Healy acknowledged that Antigua had no defense against the action and revealed that the proceeds from the loan had in fact been invested in a casino. There was still no settlement, however, so the bank sought a default judgment. The bank decided, "[a]fter a review of Mr. Healy's involvement and appearance in this action," to obtain the default judgment by formal motion. The district court granted the default judgment on December 19, 1986.

First Fidelity's efforts to levy upon Antigua's bank accounts in New York provoked a response from Jacobs. He wrote to the district court in September 1987, acknowledging the debt and seeking a settlement. The following month, the bank and Jacobs agreed to a settlement and signed a consent order. The consent order included a complete waiver of Antigua's sovereign immunity from jurisdiction, attachment, and execution; it was signed on behalf of the Government of Antigua and Barbuda by Lloydstone Jacobs, "Ambassador Extraordinary and Plenipotentiary," and by Robert Healy as the Government's attorney.

First Fidelity received $70,000 pursuant to the consent order, but in January 1988 payments ceased again. The bank executed upon a New York account of Antigua's Permanent Mission but obtained only $500. First Fidelity then sought to attach bank accounts maintained by Antigua's embassy in Washington, D.C. The Government of Antigua, sitting in the capital city of St. John's, then took its first direct action in this case: it moved in the district court to dismiss First Fidelity's complaint for lack of subject matter jurisdiction or, alternatively, to vacate the consent order. Antigua claimed that it was not bound by Jacobs' actions because he had acted without authority in borrowing the money and in consenting to the settlement. Since Antigua was not responsible for Jacobs' fraudulent activities, the argument ran, it retained its sovereign immunity. Judge Stanton denied the motion; in a brief memorandum, he applied agency law to hold Antigua responsible for Jacobs' actions. Antigua could not interpose sovereign immunity, he decided, because the loan fell within the Foreign Sovereign Immunity Act's commercial activity exception. Antigua then filed this appeal.[1]

DISCUSSION

First Fidelity asserts that Jacobs possessed the actual authority to bind Antigua. The bank goes on to claim that, even ***192** if Jacobs lacked that actual authority, under applicable agency law he nevertheless had ample apparent authority to bind Antigua. In this context, First Fidelity emphasizes the power inherent in an ambassador's position: the bank claims that, as "Ambassador Extraordinary and Plenipotentiary," Jacobs occupied the highest rank in diplomacy, as established by the Congresses of Vienna (1815) and Aix-la-Chapelle (1818). Under the Headquarters Agreement with the United Nations, an ambassador to the U.N. possesses the same privileges and immunities as diplomatic envoys accredited to the United States. *See* Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26, 1947, art. V, § 15, 61 Stat. 3416, 3427–28, T.I.A.S. No. 1676, at 13–15, *authorized by* S.J. Res. of Aug. 4, 1947, Pub.L. No. 80–357, 61 Stat. 756, *set out in* 22 U.S.C. § 287 note (1982).

The powers of an ambassador may include the authority to conclude international agreements. *See Restatement (Third) of Foreign Relations* § 311 (1987). "Heads of diplomatic missions and representatives accredited to international organizations are regarded as possessing powers to negotiate agreements on matters within their jurisdiction." *Id.* comment b. An ambassador thus may have the power to bind the state that he represents. Normally, of course, a state authorizes a representative to act on its behalf. However, a state can be bound by the representative's unauthorized actions where the lack of authority is not obvious. *Id.* § 311(3) & Reporters' Note 4. *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5), is an example of this. There, the Permanent Court of International Justice held that Norway was bound by an oral declaration of its foreign minister that his country would not contest Danish sovereignty over Eastern Greenland. *Id.* at 71. First Fidelity argues that this application of the principles of agency law of developed states in international law supports its claim against Antigua here.

The implication of First Fidelity's argument is that Antigua is bound by Jacobs' actions solely because he was Antigua's ambassador to the U.N. In effect, First Fidelity is telling us: "L'état, c'est lui." If it were true, as a matter of law, that an ambassador's actions under color of authority automatically bind the state that he represents, then we must affirm the decision below: Antigua would be bound by Jacobs' settlement of this lawsuit. We do not believe, however, that a person's position as ambassador, and nothing more, should be dispositive in this case, let alone all cases.

The authority to conclude international agreements, described in *Restatement (Third) of Foreign Relations* § 311, does not support an automatic rule binding the state in any transaction with non-sovereign third parties. The issue here is not whether Jacobs, as ambassador, possessed the authority to borrow money or to waive Antigua's sovereign immunity in a settlement of the lawsuit. Assuming that he had that authority does not lead inevitably to the conclusion that his actions here must be attributed to Antigua. Put another way, the possession of authority does not, *ipso facto,* validate every exercise of it. In the *Eastern Greenland* case, it was not simply the Norwegian minister's position or title that made his declaration binding upon Norway. The Court carefully examined the context in which the declaration was made. *See* 1933 P.C.I.J. (ser. A/B) No. 53, at 71–73. International agreements have considerably more dignity than Jacobs' purely commercial transactions with First Fidelity. *See Restatement (Third) of Foreign Relations* § 301(1) (defining international agreement). Even so, an ambassador's signature does not make an international agreement automatically binding upon the state. Coercion of a state's representative, for example, renders an agreement signed by that representative void, *id.* § 331(2)(a), and corruption of the representative permits the state to invalidate its consent to the agreement, *id.* § 331(1)(c). If the circumstances surrounding an ambassador's signature of a treaty may be grounds for invalidating that treaty, then surely a state cannot *automatically* be ***193** bound by its ambassador's settlement of a lawsuit by a non-sovereign third party arising from a commercial transaction.

The conduct of an ambassador may be attributed to his state under other circumstances. In the words of the *Restatement (Third) of Foreign Relations,* "[a] state is responsible for any violation of its obligations under international law resulting from action or inaction by ... any ... official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority." *Id.* § 207(c). This rule would apply even if the act were unauthorized by the responsible national authorities and even if it were forbidden by law. *Id.* comment d. However, by its own terms, section 207 applies only to violations of international law. A breach of a commercial contract, such as that alleged by First Fidelity in this case, is not a violation of international law unless the breach is discriminatory, or it occurs for governmental rather than commercial reasons and the state is not prepared to pay damages for the breach. *Restatement (Third) of Foreign Relations* § 712(2) comment h & Reporters' Note 8. Moreover, an assessment under section 207 of the scope and color of authority introduces elements of agency law: one must "consider all the circumstances." These include matters that are relevant in this case: "whether the affected parties reasonably considered the action to be official, [and] whether the action was for public purpose or for private gain." *Id.* comment d. Thus, we cannot derive from section 207 a broader rule making every action by an ambassador binding upon his government.

We conclude that an ambassador's actions under color of authority do not, as a matter of law, automatically bind the state that he represents. The facts of a given case must be examined, and the agency law of developed states, here our own, provides the proper framework for that examination. *Cf. Restatement (Third) of Foreign Relations* § 311 Reporters' Note 4 (noting that provision concerning apparent authority to conclude international agreements is analogous to national laws on the authority of agents).[2]

The question here would be whether Jacobs, as Antigua's ambassador to the United Nations, in the circumstances of this case possessed the apparent authority to borrow the money and to waive Antigua's sovereign immunity. *See Restatement (Second) of Agency* § 8 (1958) (defining apparent authority). Under the *Restatement (Second) of Agency,* a principal causes his agent to have apparent authority by conduct which, reasonably interpreted, causes third persons to believe that the principal consents to have an act done on his behalf. *Id.* § 27. The appointment of a person to a position with generally recognized duties may create apparent authority. *Id.* comment a; § 49 comment c. A decision whether apparent authority exists thus requires a factual inquiry into the principal's manifestations to third persons. *General Overseas Films, Ltd. v. Robin Int'l, Inc.,* 542 F.Supp. 684, 689 (S.D.N.Y.1982), *aff'd,* 718 F.2d 1085 (2d Cir.1983). ***194** In addition, under New York law,[3] the circumstances of the transaction must be examined to determine whether the person relying on the apparent authority fulfilled his "duty of inquiry." *Id.; cf. Restatement (Third) of Foreign Relations* § 456 comment b (party relying on waiver of sovereign immunity had burden of showing that person waiving had authority to bind the state).

Thus, agency law is flexible enough so that the fact that a person is an ambassador can be given its appropriate weight in determining the extent of his apparent authority. The fact that Jacobs was Antigua's ambassador to the U.N. does not make his settlement of the lawsuit binding upon Antigua, but that fact is relevant in deciding whether First Fidelity's reliance upon his authority was reasonable.

Antigua claims that Jacobs exceeded his authority (both actual and apparent) in borrowing the money and, later, in waiving Antigua's sovereign immunity. Jacobs may have acted, the argument runs, but Antigua did nothing. Antigua claims that it therefore retains its sovereign immunity despite the fact that the loan itself was commercial activity within the meaning of the Foreign Sovereign Immunity Act (FSIA). *See* 28 U.S.C. §§ 1603(d), 1605(a)(2) (1982) (defining commercial activity exception). The default judgment, Antigua concludes, was void for want of subject matter jurisdiction. This would entitle Antigua to relief from the default judgment under Rule 60(b)(4).

First Fidelity responds that Antigua cannot present its substantive defense when seeking relief under Rule 60(b)(4). The bank cites *Meadows v. Dominican Republic,* 628 F.Supp. 599 (N.D.Cal.1986), *aff'd,* 817 F.2d 517 (9th Cir.), *cert. denied,* 484 U.S. 976, 108 S.Ct. 486, 98 L.Ed.2d 485 (1987), in support of this argument. In *Meadows,* the Dominican Republic sought relief from a default judgment under Rule 60(b)(4), arguing that its codefendant, the Instituto de Auxilios Y Viviendas, was a separate juridical entity under Dominican law and that the Instituto's acts were not attributable to the Republic. Hence, the Republic was not properly joined as a defendant, and its contacts with the forum were not a basis for personal jurisdiction over the Instituto. The district court rejected this argument. The issue under Rule 60(b)(4), the district court said, is whether the default judgment is void. Under *First National City Bank v. Banco Para el Comercio Exterior de Cuba,* 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983), juridical separateness is a question of substantive law, not of subject matter jurisdiction. An error of substantive law, unlike an erroneous determination that jurisdiction exists, is not a ground for vacating a default judgment as void. The court therefore concluded that the issue of juridical separateness was "not open for consideration" in determining whether the default judgment was void. 628 F.Supp. at 608. *See also Gregorian v. Izvestia,* 658 F.Supp. 1224, 1236 (C.D.Cal.1987) ("An error in interpreting material facts is not equivalent to acting with total lack of jurisdiction.").

Meadows and *Gregorian* are relevant to our case, but they are not dispositive. Closer analysis of sovereign immunity and subject matter jurisdiction under the FSIA shows that the distinction between substance and procedure is not so clear-cut. Congress viewed sovereign immunity as an "affirmative defense." *See* H.R.Rep. No. 1487, 94th Cong., 2d Sess. 17, *reprinted in* 1976 U.S.Code Cong. & Admin.News 6604, 6616. However, the Supreme Court has recognized that a district court's subject matter jurisdiction depends upon the existence of an exception to foreign sovereign immunity. ***195** *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 493 & n. 20, 103 S.Ct. 1962, 1971 & n. 20, 76 L.Ed.2d 81 (1983). It is not surprising, then, that a decision concerning subject matter jurisdiction under the FSIA may require the resolution of substantive issues.

For example, in *Carl Marks & Co. v. USSR,* 665 F.Supp. 323 (S.D.N.Y.1987), *aff'd per curiam,* 841 F.2d 26 (2d Cir.), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2874, 101 L.Ed.2d 909 (1988), the Soviet Union moved under Rule 60(b) to vacate two default judgments. Judge Brieant distinguished between 60(b)(1) and (b)(6) motions, which require a court to examine the merits of a case, and 60(b)(4) motions, which are jurisdictional. *Id.* at 332–33. He noted, however, that a 60(b)(4) dismissal in an FSIA case can look like a decision on the merits. The FSIA begins with a presumption of immunity which the plaintiff must overcome by showing that the defendant sovereign's activity falls under one of the statutory exceptions. "Thus, ... '[i]n many cases a resolution of the substantive immunity law issues will be required in order to reach a decision on subject matter jurisdiction.... [A] court may have to interpret the substantive principles embodied in §§ 1605–1607 before deciding whether to take jurisdiction.' " *Id.* at 333 (quoting *Corporacion Venezolana de Fomento v. Vintero Sales Corp.,* 629 F.2d 786, 790–91 n. 4 (2d Cir.1980), *cert. denied,* 449 U.S. 1080, 101 S.Ct. 863, 66 L.Ed.2d 804 (1981)); *see also Upton v. Empire of Iran,* 459 F.Supp. 264, 265 (D.D.C.1978) (FSIA "creates an identity of substance and procedure"), *aff'd,* 607 F.2d 494 (D.C.Cir.1979).

In *Carl Marks,* Judge Brieant had to consider the merits of the case in order to determine whether his court had jurisdiction over the case: he found that the defendant's actions that were the basis for the suit occurred before the effective date of the FSIA. The default judgments were therefore void for want of jurisdiction under Rule 60(b)(4), and the complaints were dismissed. 665 F.Supp. at 349. Thus, *Carl Marks* seems to open the way for a consideration of the substantive issues here—i.e., the extent of Jacobs' authority and the validity of the waiver in the consent order—and indeed, Judge Stanton *did* examine the merits in denying Antigua's 60(b) motion.

The facts in our record are susceptible of two opposing interpretations. First Fidelity has alleged facts sufficient to show Jacobs' and Healy's apparent authority under New York law. *See Hallock v. State,* 64 N.Y.2d 224, 231, 474 N.E.2d 1178, 1181, 485 N.Y.S.2d 510, 513 (1984) (apparent authority exists where principal's conduct leads

third party reasonably to believe that agent has authority). If Jacobs and Healy acted within their apparent authority in their transactions with the bank, then Antigua would be liable. *See Restatement (Second) of Agency* § 159 (liability created by actions within apparent authority). However, there is also evidence that First Fidelity mistrusted Jacobs' and Healy's bona fides, which raises questions about the reasonableness of First Fidelity's reliance upon their apparent authority. *See Ford v. Unity Hosp.*, 32 N.Y.2d 464, 472, 299 N.E.2d 659, 664, 346 N.Y.S.2d 238, 244 (1973) ("One who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority."); *General Overseas Films, Ltd. v. Robin Int'l, Inc.*, 542 F.Supp. 684, 690 (S.D.N.Y.1982) (extraordinary nature of transaction should have altered plaintiff to danger of fraud), *aff'd*, 718 F.2d 1085 (2d Cir.1983); *Restatement (Third) of Foreign Relations* § 456 comment b (party relying on waiver has burden of showing that person waiving had authority to bind state); *Restatement (Second) of Agency* § 165 (principal is not liable for agent's improper actions if third party knows that agent is not acting for principal's benefit).

Thus, it may be that Antigua is the innocent victim of its ambassador's fraud and the bank's willful ignorance of the ambassador's lack of authority. If so, Antigua would retain its sovereign immunity, and the default judgment against it would be void for want of subject matter jurisdiction. On the other hand, Antigua may simply be trying to renege on a loan by disowning its agent who borrowed the money. In that case, the FSIA's commercial activity exception would strip Antigua of its sovereign immunity, and the district court would have ***196** subject matter jurisdiction. The default judgment would be valid, and the consent order would be enforceable. As in *Carl Marks*, it is impossible to make a decision concerning subject matter jurisdiction without considering the merits.

A decision that a default judgment is void for want of jurisdiction must be accompanied by dismissal of the action. *See Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1256 (9th Cir.1980) (per curiam); *Gregorian*, 658 F.Supp. at 1229. In this case, however, since subject matter jurisdiction is interwoven with the merits, dismissal of the suit before trial would leave both the substantive and the jurisdictional issues unexplored. We find that there are enough doubts about the facts in this case (where disputed affidavits from First Fidelity comprise vital parts of the record) to justify setting aside the default judgment. Yet these same doubts about the facts weigh against declaring the default judgment void and dismissing the complaint under Rule 60(b)(4); we cannot assess the validity of the default judgment because we know too little about the interwoven jurisdictional and substantive issues. We turn, then, to Rule 60(b)(6), under which a judgment may be set aside for "any other reason justifying relief."

Relief under Rule 60(b)(6) is appropriate only in cases presenting "extraordinary" circumstances. *See Ackermann v. United States*, 340 U.S. 193, 202, 71 S.Ct. 209, 213, 95 L.Ed. 207 (1950). Litigants may not use this clause simply to circumvent the time limits of other provisions of Rule 60(b). *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2d Cir.), *cert. denied*, 409 U.S. 883, 93 S.Ct. 173, 34 L.Ed.2d 139 (1972). However, default judgments are disfavored, especially those against foreign sovereigns. *Restatement (Third) of Foreign Relations* § 459 comment c & Reporters' Note 1. Courts go to great lengths to avoid default judgments against foreign sovereigns or to permit those judgments to be set aside. *See, e.g., Jackson v. People's Republic of China*, 794 F.2d 1490, 1494–96 (11th Cir.1986), *cert. denied*, 480 U.S. 917, 107 S.Ct. 1371, 94 L.Ed.2d 687 (1987); *Carl Marks*, 665 F.Supp. at 329–30. In this case, the fusion of substantive and jurisdictional issues also militates in favor of setting aside the default judgment under Rule 60(b)(6); the parties must proceed to discovery and possibly to trial before a court can rule on either substance or jurisdiction. We conclude that it was an abuse of discretion not to set aside the default judgment under Rule 60(b)(6). *See Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir.) (Rule 60(b) should be interpreted "to preserve the delicate balance between the sanctity of final judgments ... and the incessant command of the court's conscience that justice be done in light of *all* the facts"), *cert. denied*, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 793 (1970); *Radack v. Norwegian American Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir.1963) (Rule 60(b)(6) "should be liberally construed when substantial justice will thus be served").

Antigua should, then, have an opportunity to defend this case on its merits. *Cf. Practical Concepts, Inc. v. Bolivia*, 811 F.2d 1543, 1551–52 (D.C.Cir.1987) (vacating district court's decision to set aside default judgment and dismiss case; nonetheless declining to reinstate default judgment for policy reasons, instead remanding for consideration of defendant's substantive defenses). At the same time, First Fidelity's rights must be protected, for there is some evidence that Antigua responded to this lawsuit only when First Fidelity began to grasp its assets. Rule 60(b) provides for relief "upon such terms as are just." *See, e.g., Bennett v. Circus U.S.A.*, 108 F.R.D. 142, 149 (N.D.Ind.1985). The default judgment is vacated and the case is remanded to the district court for further proceedings on the condition that Antigua post a bond

covering the amount claimed by First Fidelity, including interest.

Judgment in accordance with opinion; costs to neither party.

JON O. NEWMAN, Circuit Judge, dissenting:

This case has serious implications for the relationships between the United States ***197** and all foreign states that send duly accredited ambassadors to head their diplomatic missions in this country. Because I believe the majority has fashioned a rule of law that risks impairment of those relationships, I respectfully dissent.

Though the case comes to us after entry of a default judgment, certain key facts are undisputed. In 1983, Lloydstone Jacobs was an Ambassador Extraordinary and Plenipotentiary of the Government of Antigua and Barbuda and the Permanent Representative of that government to the United Nations. He headed the Antiguan Mission to the UN in New York City. Ambassador Jacobs signed a note for the repayment of money borrowed from what is now known as the First Fidelity Bank. The note states that the borrower is the "Government of Antigua & Barbuda—Permanent Mission." Ambassador Jacobs represented that the loan proceeds were to be used for renovations at his government's UN Mission and its New York City tourist office. He subsequently used the funds for construction of a casino resort in Antigua, in which he and other officials of the Antiguan government held ownership interests. Antigua contends that under the Antiguan Constitution and statutes, the authority to borrow funds requires the prior approval of the cabinet and a delegation of authority to the Minister of Finance, and that neither had occurred in this case. For purposes of this appeal, I accept that contention.

Litigation brought by the Bank to collect the loan resulted initially in a default judgment against the Government of Antigua and Barbuda and subsequently in a stipulation of settlement, which was "so ordered" by the District Court. The stipulation contained an express waiver of the immunity of Antigua from the jurisdiction of the courts of the United States under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1604, 1605(a)(1) (1982). The stipulation was signed on behalf of Antigua by Jacobs in his capacity as Ambassador Extraordinary and Plenipotentiary and by an attorney representing Antigua.

The majority directs that the default judgment be vacated and that the District Court conduct an inquiry into whether the Bank was entitled to rely on the apparent authority of Ambassador Jacobs to borrow the money and to settle the ensuing litigation. In that inquiry, Antigua will be entitled to a dismissal of the Bank's claim on the basis of sovereign immunity if it can establish "that Antigua is the innocent victim of its ambassador's fraud and the bank's willful ignorance of the ambassador's lack of authority." 877 F.2d at 195. The majority decides the case by rejecting the proposition that Antigua is bound by the actions of its Ambassador solely by virtue of his office and by concluding that the only inquiry left once that proposition is rejected is whether Antigua is bound under the doctrine of apparent authority.

The initial question concerns choice of law. Though foreign states, if amenable to suit in this country, may, in most circumstances, be obliged to accept state substantive law that normally applies to such matters as contracts and creditors' rights, they are entitled to expect that this country will have a uniform body of federal law that determines those issues of agency law that implicate relationships between a foreign government and its ambassador accredited within this country. In this respect, it should make no difference that Jacobs was his country's Ambassador to the UN, rather than to the Government of the United States. As the host country to the United Nations headquarters, this country has an obligation to develop federal law on the sensitive subject of a UN ambassador's authority to bind his government on ordinary commercial matters. In the absence of federal legislation on the subject, the matter is appropriate for the development of federal common law. *Cf. First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623, 103 S.Ct. 2591, 2598, 77 L.Ed.2d 46 (1983) (federal common law is appropriate for deciding whether separate juridical status of foreign state's instrumentality should shield it from liability).

Turning, then, to the issue of agency law, as a matter of federal common law in ***198** this context, I can agree with the majority that a person's role as his country's UN ambassador does not automatically entitle him to bind his government in all cases. For example, that role would not entitle an ambassador to bind his government to an obligation collusively entered into between the ambassador and a third party for the third party's benefit. Nor would the foreign government automatically be bound when its ambassador contracts, without actual authority, as to matters far removed from the routine functioning of a diplomatic mission.

However, the fact that an ambassador's office does not

suffice to authorize him to bind his government in *all* cases does not inevitably lead to a conclusion that only apparent authority furnishes the appropriate standard whenever, as here, the ambassador/agent lacks actual authority from his government/principal. In addition to actual authority, which may be lacking in this case, and apparent authority, which is now to be explored on remand, there exists what the *Restatement of Agency* calls "Inherent Agency Power":

> Inherent agency power is a term used in the restatement of this subject to indicate the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent.

Restatement (Second) of Agency § 8A (1958).

Though the circumstances of the government-ambassador relationship are not precisely within the examples of inherent agency power set forth in the *Restatement, id.* comment b, that relationship is especially suitable for application of this doctrine. An ambassador is accredited to another country so that he will be his government's representative in that country. We are not concerned in this case with the extent of his authority to commit his government on matters of international affairs.[1] Instead, our context concerns only actions of an ambassador dealing with third parties on ordinary commercial matters ostensibly of benefit to his government's ability to maintain its presence in this country. In that context, whether to bind a government by the actions of its ambassador, under the doctrine of inherent agency power, poses this choice: Will the relationships between our government and foreign governments be better served by ensuring that an ambassador can promptly obtain the goods and services needed to operate his embassy or mission, even if on occasion a foreign government is held responsible for incurring obligations his government neither authorized nor condones, ***199** or by obliging third parties who supply such goods and services to ascertain from the foreign government in each instance whether the ambassador has actual authority. The latter option strikes me as the one to be avoided.

Though the Government of Antigua may find it preferable to tolerate an inquiry into its ambassador's authority in this case if it will thereby obtain a chance to avoid liability for the funds he borrowed, foreign governments generally will not appreciate inquiries from American vendors as to the authority of their ambassadors to obtain goods or services. They send their ambassadors here, as we do to their countries, in the expectation that they can carry out the normal incidents of living in the host country. There is nothing extraordinary about borrowing money to refurbish an embassy, or in this case, a UN mission. And how is the vendor to avoid all risk? It cannot obtain a routine resolution of borrowing authority from a corporation's board of directors. Must it inquire of the foreign ministry, the parliament, the head of state? Or should it examine the internal legal regulations that govern the purchasing and borrowing authority of each country's ambassadors? None of these alternatives seems likely to promote this country's relationships with foreign states.

Under the majority's approach, the third party's reliance on the apparent authority of an ambassador remains available, but, as the remand in this case demonstrates, it is an uncertain ground of support. A third party who supplies an embassy (or a UN mission) with champagne or credit expects payment, not an opportunity to persuade a trial court that its ignorance of an ambassador's lack of actual authority was not willful. The majority's unwillingness to recognize an ambassador's inherent authority in this context will, I fear, have the unfortunate consequences of making some vendors unwilling to extend credit for goods and services ordered by embassies and impelling others to make potentially intrusive and resented inquiries of foreign governments. An ambassador may not be "l'etat" for all purposes, but in the context of purporting to obtain goods and services for his country's diplomatic mission, I believe "c'est lui" indeed.

The majority suggests that the *Restatement* 's principle of inherent agency power should not apply to ambassadors because some circumstances can be imagined in which the principle would not apply. If that is a "defect" in the principle or in its application to an ambassador, it is one shared by every legal principle ever announced. In urging that the relationship of an ambassador to his government is one appropriate for the application of the inherent agency principle, I do not suggest that the transaction need not be examined to see if it is one to which the principle applies. In this case, however, there is no claim whatever by Antigua that the bank engaged in any unlawful or even questionable activities with the Ambassador, nor that the bank had any knowledge or basis for suspicion that the Ambassador was not borrowing the money for the stated purposes. Relationships with foreign governments are not put at risk by subjecting those who supply goods and services to foreign embassies to the prospect of an inquiry concerning the legitimacy of the transaction. Whenever a bank lends money, it faces the possibility of subsequent inquiry concerning the bona fides of the transaction. But relationships with foreign governments are put at risk by rules that oblige vendors to probe the relationship of an ambassador to his government in order to avoid the risk of

subsequent disputes concerning the ambassador's actual or apparent authority.

In any event, we ought not to reject inherent authority in this context without having the benefit of the views of the Executive Branch officially presented to this Court in an *amicus curiae* brief. We are informed that counsel for Antigua sought to have the State Department present an *amicus* brief in this case on behalf of Antigua, a request that was declined.

Even if this case should be governed solely by the principle of apparent authority, rather than inherent agency power, I fail to see why the judgment of the District Court should not be affirmed. In seeking ***200** to vacate the default judgment, Antigua has made no claim nor produced any affidavit that puts in issue the reasonableness of First Fidelity's reliance on the apparent authority of Ambassador Jacobs at the time the funds were borrowed. Any information that First Fidelity may have acquired concerning the need for explicit authorization for the loan from the Antiguan government came to its attention in the course of trying to collect the loan, long after the loan agreement was signed. Since Jacobs indisputably had the apparent authority to bind Antigua to the obligation to repay the funds and since sovereign immunity is not a defense to liability for this commercial transaction, 28 U.S.C. § 1605(a)(2), Antigua should be bound by Jacobs' action in borrowing the funds and by the subsequent default judgment entered upon the repayment obligation.

For these reasons I respectfully dissent.[2]

All Citations

877 F.2d 189, 14 Fed.R.Serv.3d 353

Footnotes

* Of the United States District Court for the Southern District of New York, sitting by designation.

1 Antigua asked the United States Department of State to file an amicus curiae brief on its behalf in its appeal to this court. In response, the Legal Advisor declined to file a brief and informally took a position favorable to First Fidelity.

2 The dissent asserts that, in view of the inherent authority of an ambassador, a foreign state should be bound when the ambassador acts "in the context of purporting to obtain goods and services for his country's diplomatic mission." Dissenting op. at 199. Yet the dissent also recognizes that the state should not automatically be bound if the ambassador collusively entered into an obligation with a third party for the third party's benefit or if the transaction concerned something "far removed from the routine functioning of a diplomatic mission." *Id.* at 198. These exceptions would swallow the rule of inherent authority proffered by the dissent. Examples that combine both the procedural and the substantive irregularities that the two exceptions guard against are easy to imagine: An ambassador might use embassy funds to purchase cocaine from a drug trafficker—and label the drugs "medical supplies for the embassy." Or an ambassador might borrow money from a bank to invest in a casino—and, with the bank's connivance, secure a favorable rate of interest by pretending that the money would be used to refurbish the embassy.... In other words, there cannot really be a rule of inherent authority that automatically binds a foreign government whenever its ambassador purports to obtain goods and services for the embassy. It must always be possible to look behind the deal.

3 The Supreme Court has held that the Foreign Sovereign Immunity Act does not affect the substantive law determining the liability of a foreign state. *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620–21, 103 S.Ct. 2591, 2597, 77 L.Ed.2d 46 (1983). We shall assume without deciding here that New York law governs Jacobs' transactions with the bank, although we do not believe that the federal common law rule, were we to follow the suggestion in Judge Newman's dissent, would be any different.

1 Thus, with deference, I suggest that the majority's citation to cases and to those passages of the *Restatement of Foreign Relations* concerning actions of an ambassador in the arena or international agreements between nations have little, if any, relevance to this case. It may be entirely appropriate, as the Permanent Court of International Justice held, to examine the entire context in which a foreign minister's disclaimer of sovereignty over disputed territory is made. *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5). And, even in the context of international agreements, the examples cited by the majority do not cast doubt on the appropriateness of binding a government by its ambassador's ordinary commitments to third parties ostensibly made in the course of carrying on the affairs of his diplomatic mission. The coercion of a state's representative, cited in section 331(2)(a) of the *Restatement* as grounds for permitting a state to invalidate its consent to an international agreement, is simply an example of a defense that is available to a principal because its agent has not acted under circumstances in which the law attaches consequences to his actions, let alone those of his principal. The example of a representative of a

negotiating state corrupted by a party to the negotiation, cited in section 331(1)(c) of the *Restatement,* also has no bearing on whether the law of this country ought to bind governments when their ambassadors deal with third parties on ordinary commercial matters.

The majority maintains that because international agreements have "more dignity" than Ambassador Jacobs' commercial transactions with First Fidelity, the binding effect of his signature on the loan agreement and the stipulation must be less than would arise from his signature on an international agreement. 877 F.2d at 192. I should think the "dignity" factor has precisely the opposite effect. A foreign state needs more insulation when its ambassador purports to commit it to an international treaty than when he orders groceries or borrows money to renovate a diplomatic mission.

2 Because I would affirm on the basis of Ambassador Jacobs' inherent authority to borrow the funds and to consent to a judgment settling the claim for collection, I need not consider whether Antigua became bound solely because the stipulation settling the litigation was signed by a lawyer purporting to represent the Government of Antigua.

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Annex 372

ANNEX 373

321 F.R.D. 20
United States District Court, District of Columbia.

FRIENDS CHRISTIAN HIGH SCHOOL, Plaintiff,
v.
GENEVA FINANCIAL CONSULTANTS, et al., Defendants.

Civil Action No. 13–1436 (ESH)
|
Signed 05/18/2017

Synopsis
Background: Prospective borrower brought action against escrow agent, its managing partner, and others, asserting claims for breach of contract, and fraud, relating to failure to return the $250,000 escrow deposit when funding for construction loan could not be obtained. Borrower moved for default judgment against managing partner.

The District Court, Ellen Segal Huvelle, J., held that borrower was entitled to default judgment against managing partner.

Motion granted.

Attorneys and Law Firms

Terry L. Goddard, Jr., pro hac vice, James Dygert Skeen, Skeen & Kaufman, LLP, Baltimore, MD, for Plaintiff.

Peter L. Goldman, O'Reilly & Mark, P.C., Alexandria, VA, for Defendants.

MEMORANDUM OPINION

ELLEN SEGAL HUVELLE, United States District Judge

Plaintiff Friends Christian High School ("Friends Christian") filed the above-captioned diversity action against defendants Geneva Financial Consultants, LLC ("Geneva"), Isam Ghosh, and Mark Lezell, alleging various state law torts and seeking compensatory ***21** and punitive damages. (Compl., Sept. 20, 2013, ECF No. 1.) Before the Court is Friends Christian's motion for entry of a default judgment against defendant Ghosh. (Mot. for Default Judgment, Apr. 24, 2017, ECF No. 46.) For the reasons stated herein, the motion will be granted and a default judgment entered against Ghosh and in favor of plaintiff in the amount of $252,249.14.

BACKGROUND

Friends Christian is a California religious corporation that "engages in the business of religious instruction through various mediums, including educational institutions like a high school." (Compl. ¶ 3.) On September 14, 2010, Friends Christian entered into a financing commitment agreement ("Loan Commitment Letter") with Geneva and Ghosh, who advertised himself as Geneva's managing member. (Compl. ¶¶ 5, 9.) Pursuant to the Loan Commitment Letter, Geneva and Ghosh were to secure $30 million in construction loan funding for Friends Christian in exchange for $3 million in fees reduced by an initial escrow deposit of $250,000. (Compl. ¶¶ 9, 10.) Exhibit A to the Loan Commitment Letter was an Escrow Agreement between Friends Christian and Lezell, an attorney in the District of Columbia. (Compl. ¶ 13.) If financing could not be obtained by October 31, 2010, the $250,000 in escrow was to be returned to Friends Christian. (Compl. ¶ 14.)

Friends Christian wired $250,000 into Lezell's escrow account on September 16, 2010. (Compl. ¶ 16.) No financing was ever obtained and the escrow funds were never returned to Friends Christian. (Compl. ¶ 15.) On January 26, 2011, Friends Christian tried to contact Ghosh to check on the current state of funding for the project. (Compl. ¶ 18.) On February 1, 2011, Friends Christian made its initial request for return of the escrow funds. (Compl. ¶ 19.) On September 8, 2011, Friends Christian asked Lezell for return of the escrow funds. (Compl. ¶ 20.) On or about March 21, 2012, Ghosh acknowledged liability for the escrow funds and that the escrow funds were to be returned to Friends Christian. (Compl. ¶ 21.) On August 3, 2012, Friends Christian sent Lezell and Ghosh its final demand for payment and received no response. (Compl. ¶ 22.)

On September 20, 2013, Friends Christian filed suit against Geneva, Ghosh and Lezell, alleging breach of contract, civil conspiracy, breach of fiduciary duty, negligence, and fraud/intentional misrepresentation and seeking return of the $250,000 it had put into the escrow account plus punitive damages. (Compl. ¶¶ 23–49.) Friends Christian served Ghosh with a summons and a copy of the complaint on February 18, 2014. (Return of Service/Affidavit, Mar. 4, 2014, ECF No. 16.) After Ghosh failed to timely file an answer or otherwise respond to the complaint, plaintiff filed its affidavit for entry of default as to Ghosh pursuant to Federal Rule of Civil Procedure 55(a).[1] (Aff. for Entry of Default, May 1, 2014, ECF No. 25.) On May 19, 2014, the Clerk of Court entered a default against Ghosh (*see* Clerk's Entry of Default, May 19, 2014, ECF No. 30), but proceedings against him were then stayed due to Ghosh's bankruptcy proceeding in the Eastern District of Virginia. (*See* Suggestion of Bankruptcy, Oct. 29, 2014, ECF No. 38; Minute Order, Jan. 28, 2015 (staying case against Ghosh).) Friends Christian has now settled its claims against Lezell (*see* Minute Order, Jan. 28, 2015), and secured a default judgment against Geneva in the amount of $250,000. (*See* Order and Default Judgment, May 28, 2015, ECF No. 43.)

On March 21, 2017, Friends Christian notified the Court that the bankruptcy stay against Ghosh had been terminated and that it wished to pursue its claims against him. (Notice of Termination of Bankruptcy Stay, ECF No. 44.) The Court lifted the stay, allowing Friends Christian's claims to proceed, but it also gave Ghosh until April 10, 2017, to move to vacate the 2014 default. (*See* Order, Mar. 22, 2017, ECF No. 45.) That Order was served on Ghosh and on Ghosh's bankruptcy counsel. Ghosh did not move to vacate the default. On April 24, 2017, pursuant to ***22** Federal Rule of Civil Procedure 55(b)(2),[2] Friends Christian filed the pending motion for default judgment. As of the date of this Memorandum Opinion, Ghosh has not entered an appearance nor filed any responsive pleadings.

DISCUSSION

Waiving any claim for punitive damages, Friends Christian seeks a default judgment against Ghosh in the amount of $250,000, the amount it put into the escrow account, plus costs totaling $2,249.14. (*See* Mot. for Default Judgment at 1 & Ex. 1, ¶ 13 (Affidavit of Terry L. Goddard, Jr., Apr. 24, 2017) ("Goddard Aff.").)

The "entry of a default judgment is not automatic." *Mwani v. bin Laden*, 417 F.3d 1, 6 (D.C. Cir. 2005). First, the procedural posture of a default does not relieve a federal court of its "affirmative obligation" to determine whether it has subject-matter jurisdiction over the action. *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996). Here, the Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1), and venue is proper under 28 U.S.C. § 1391(b)(2) ("A civil action may be brought in ... a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred....")

Moreover, the determination of whether default judgment is appropriate is committed to the discretion of the trial court. *Jackson v. Beech*, 636 F.2d 831, 836 (D.C. Cir. 1980). Courts strongly favor resolution of disputes on their merits. *Id.* However, default judgment is available "when the adversary process has been halted because of an essentially unresponsive party.... The diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights." *Jackson v. Beech*, 636 F.2d 831, 835–36 (D.C. Cir. 1980) (internal quotations omitted). Where, as here, there is a complete "absence of any request to set aside the default or suggestion by the defendant that it has a meritorious defense, it is clear that the standard for default judgment has been satisfied." *Int'l Painters and Allied Trades Indus. Pension Fund v. Auxier Drywall, LLC*, 531 F.Supp.2d 56, 57 (D.D.C. 2008) (internal quotations omitted).

Finally, while the entry of default establishes defendant's liability for the well-pleaded allegations of the complaint, *Adkins v. Teseo*, 180 F.Supp.2d 15, 17 (D.D.C. 2001), it "does not ... establish liability for the amount of damages claimed." *Boland v. Elite Terrazzo Flooring, Inc.*, 763 F.Supp.2d 64, 67 (D.D.C. 2011). If necessary, a court may hold a hearing to "(A) conduct an accounting; (B) determine the amount of damages; (C) establish the truth of any allegation by evidence; or (D) investigate any other matter." Fed. R. Civ. P. 55(b)(2). Here, though, no hearing is necessary as there are sufficient "detailed affidavits [and] documentary evidence" to allow the Court to independently assess "the appropriate sum for the default judgment." *Flynn v. Mastro Masonry Contractors*, 237 F.Supp.2d 66, 69 (D.D.C. 2002) (citing *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979)). Specifically, Friends Christian has filed an affidavit executed by its attorney, Terry L. Goddard, Jr., which has attached signed copies of the Loan Commitment Letter and Escrow Agreements and a cost summary sheet with copies of available receipts. (*See* Goddard Aff. ¶ 15 & Exs. 1–3.) The Court has reviewed these documents and finds that they substantiate its claim for compensatory

damages in the amount of $250,000.00 and for costs totaling $2,249.14.

CONCLUSION

Accordingly, and for the reasons set forth above, the Court will grant Friends Christian's motion for default judgment and enter judgment in favor of Friends Christian and against Ghosh in the amount of $250,000.00 plus $2,249.14 in costs. A separate Order of Judgment accompanies this Memorandum Opinion.

All Citations

321 F.R.D. 20

Footnotes

1 Rule 55(a) states: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerks must enter the party's default." Fed. R. Civ. P. 55(a).

2 Rule 55(b)(2) allows a party to "apply to the court for a default judgment" against a party in default.

End of Document

ANNEX 374

INTERNATIONAL LEGAL MATERIALS

VOLUME 7

1968

Annex 374

O.E.C.D. DRAFT CONVENTION ON THE PROTECTION OF FOREIGN PROPERTY*

On 12th October, 1967, the Council of the Organisation for Economic Co-operation and Development adopted a Resolution on the Draft Convention on the Protection of Foreign Property, which was drawn up by one of the Committees of the Organisation.

The text of that Resolution is reproduced hereafter.

RESOLUTION OF THE COUNCIL ON THE DRAFT CONVENTION ON THE PROTECTION OF FOREIGN PROPERTY

(Adopted by the Council at its 150th meeting, on 12th October, 1967)*

The Council

HAVING REGARD to the provisions of the Convention on the Organisation for Economic Co-operation and Development concerning economic expansion and assistance to developing countries;

HAVING REGARD to the Reports by the Committee for Invisible Transactions and the Comments by the Payments Committee on the Draft Convention on the Protection of Foreign Property;

HAVING REGARD to the text of the Draft Convention on the Protection of Foreign Property and to the Notes and Comments constituting its interpretation (hereinafter called the "Draft Convention");

OBSERVING that the Draft Convention embodies recognised principles relating to the protection of foreign property, combined with rules to render more effective the application of these principles;

CONSIDERING that a clear statement of these principles will be a valuable contribution towards the strengthening of international economic co-operation on the basis of international law and mutual confidence;

CONSIDERING that a wider application of these principles in domestic legislation and in international agreements would encourage foreign investments;

BELIEVING that the Draft Convention will be a useful document in the preparation of agreements on the protection of foreign property;

NOTING the conclusion of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States;

I. REAFFIRMS the adherence of Member States to the principles of international law embodied in the Draft Convention;

II. COMMENDS the Draft Convention as a basis for further extending and rendering more effective the application of these principles;

III. APPROVES the publication of the Draft Convention as well as this Resolution.

* The Delegates for Spain and Turkey abstained.

*[Reproduced with permission from Draft Convention on the Protection of Foreign Property and Resolution of the Council of the O.E.C.D. on the Draft Convention, Organisation for Economic Co-operation and Development Publication No. 23081 (November 1967).

[An earlier draft of the Convention appears at 2 International Legal Materials 241 (1963).]

DRAFT CONVENTION
ON THE
PROTECTION OF FOREIGN PROPERTY

Text with Notes and Comments

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PREAMBLE

DESIROUS of strengthening international economic co-operation on a basis of international law and mutual confidence ;

RECOGNISING the importance of promoting the flow of capital for economic activity and development ;

CONSIDERING the contribution which will be made towards this end by a clear statement of recognised principles relating to the protection of foreign property, combined with rules designed to render more effective the application of these principles within the territories of the Parties to this Convention ; and

DESIROUS that other States will join them in this endeavour by acceding to this Convention ;

The STATES signatory to this Convention HAVE AGREED as follows :

Article 1

TREATMENT OF FOREIGN PROPERTY

(a) Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures. The fact that certain nationals of any State are accorded treatment more favourable than that provided for in this Convention shall not be regarded as discriminatory against nationals of a Party by reason only of the fact that such treatment is not accorded to the latter.

(b) The provisions of this Convention shall not affect the right of any Party to allow or prohibit the acquisition of property or the investment of capital within its territory by nationals of another Party.

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NOTES AND COMMENTS TO ARTICLE 1

Paragraph (a) : GENERAL STANDARD OF TREATMENT OF FOREIGN PROPERTY

1. The Obligations

It is a well-established general principle of international law that a State is bound to respect and protect the property of nationals of other States. From this basic principle flow the three rules contained in paragraph (a) of Article 1 - that is to say, that, as towards the other Parties to the Convention, each Party must assure to the property of its nationals which comes within its jurisdiction (A) fair and equitable treatment; (B) most constant protection and security; and (C) that each Party must ensure that the exercise of rights relating to such property and mentioned in paragraph (a) shall not be impaired by unreasonable or discriminatory measures. Each of these rules is discussed in turn in Notes 4 to 8. That, however, Article 1 (or, for that matter, the other provisions of the Convention) does not provide a right for a national of one Party to acquire property in the territories of other Parties, nor for their duty to admit his property or investments, is expressly stated in paragraph (b) of Article 1 (see Note 9 below).

2. Object of Protection: Property

(a) In international law the rules contained in the Convention - and therefore in Article 1 - apply to property in the widest sense of the term which includes, but is not limited to, investments. For a definition of "property" see Article 9 (c) of the Convention and the Notes thereto.

(b) Within the jurisdiction of a Party, the provisions of the Convention apply to all property of nationals of the other Parties ir-

respective of whether it was acquired before or after the date on which the Convention has come into force as regards the Party concerned. However, legislative or administrative measures taken by that Party before that date and relating to such property are not covered by the Convention as such [see Article 12 (c)]. Generally, to come within the provisions of the Convention, the property must be lawfully acquired or invested by the foreign national or his predecessor in title.

3. Nationals

The duty of a State to respect the property of alien nationals is owed, in the first instance, not to the alien concerned, but to his State; it is only on behalf of its own nationals that the State may claim from other States compliance with that duty. This right is necessarily so

limited because - in the words of the Permanent Court of International Justice* - "it is the bond of nationality between the State and the individual which alone confers upon the State the right to diplomatic protection" [see also on the concept of nationality in relation to diplomatic protection Article 9 (a) and Note 1 to that Article]. And, again, as that Court said in another case** : "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on its behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law". The bond of nationality becomes apparent not only in the person of the national who is abroad, but also in his property within the jurisdiction of another State while he himself may remain within his own country.

First Rule: Fair and Equitable Treatment

4. (a) The phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that - subject to essential security interests [see Article 6 (i)] - protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the "minimum standard" which forms part of customary international law.

(b) Each Party must not only grant, but "ensure", fair and equitable treatment of the property of nationals of the other Parties. It will, of course, incur responsibility for any acts or omissions which may be properly attributed to it under customary international law (see Article 5).

Second Rule: Most Constant Protection and Security

5. "Most constant protection and security" must be accorded in the territory of each Party to the property of nationals of the other Parties. Couched in language traditionally used in the United States Bilateral Treaties***, the rule indicates the obligation of each Party to exercise due diligence as regards actions by public authorities as well as others in relation to such property.

* The Panevezys-Saldutiskis Railway Case, quoted in Edvard Hambro, The Case Law of the International Court, Vol. I, (hereinafter referred to as "Hambro I") No. 348, p. 289.

** Mavrommatis Case, quoted in Hambro I, No. 347, p. 289.

*** See, for instance, United States-German Treaty, Article V (1); United States-Nicaraguan Treaty, Article VI(1); and also United Kingdom-Iranian Treaty, Article 8 (1).

Third rule : Exclusion of Unreasonable and Discriminatory Measures

6. General

(a) In addition to the obligations examined in Notes 4 and 5, Article 1 provides that "management, maintenance, use, enjoyment or disposal" of property of nationals of other Parties shall not "in any way" be impaired by unreasonable or discriminatory measures*. "Maintenance" is probably implicit in the concept of "management" and, moreover, as a precondition, in "use" and "enjoyment". The term is added for the sake of clarity. It is more doubtful whether "disposal" is implicit in these notions. Yet knowledge alone of measures taken that prevent or limit the "disposal" of the property reduces its value and interferes with its "enjoyment". The term indicates therefore with greater precision the limits to which, under the Convention, the exercise of rights arising out of property is protected. It cannot, on the other hand, be assumed that the right to "enjoyment" of property implies for the Party concerned the obligation to permit automatically transfers in connection with that property.

(b) Exercise of the rights quoted in the preceding paragraph shall not in any way be "impaired" by unreasonable or discriminatory measures. This means that a breach of the obligation is established if it can be shown that a certain measure :

(i) is "unreasonable" or "discriminatory" - for an analysis of these terms see Notes 7 and 8 below ;

(ii) may be attributed to the Party against whom complaint is made - see Article 5 ; and that it

(iii) impairs the exercise of any of the rights quoted. Thus it is insufficient to prove - as in the case of "fair and equitable treatment" (see Note 4) - that the measure complained of is contrary to a standard set by international law ; it must also be established that, as its consequence, actual possibilities for the exercise of the right in question are reduced.

7. Unreasonable Measures

(a) A breach of obligations by a Party is established if it can be shown that the exercise of any right referred to in Article 1 is impaired by an "unreasonable" measure that may be attributed to that Party (see Article 5).

(b) The measure in issue may have been taken by or on behalf of the Party concerned in the exercise of its sovereign powers. The fact that it has thus been taken will undoubtedly carry weight in the determination of the question whether it is lawful. However, though the power by virtue of which the measure is taken may not be contested, the latter may be unlawful in view of the manner or circumstances in which the

* Recent bilateral treaties frequently provide for the exclusion of unreasonable and discriminatory measures. See United States-Netherlands Treaty, Article VI(3); also United States-Japanese Treaty, Article V(1); United Kingdom-Iranian Treaty, Article 8(2), etc.

power has been exercised. In many cases such a measure will also violate the standard of "fair and equitable treatment" (see Note 4).

(c) Thus, in interpreting Article 4 of the United Nations Charter, concerned with the admission to the United Nations, Judge Azvedo (quoting Brazilian, Soviet and Swiss law) in his Individual Opinion declared that under any legal system a right must be exercised in accordance with standards of what is normal, having in view the social purpose of the law and that there are, moreover, restrictions on an

arbitrary decision taken in the exercise of the right in question*. Again, it has been repeatedly held by the Permanent Court of International Justice that the abuse or misuse of a right would endow an act otherwise lawful with the character of a breach of treaty**.

(d) That a measure is unreasonable cannot be presumed ; it must be proved.

8. Discriminatory Measures

(a) A breach of obligations by a Party is established if it can be shown that the exercise of any right relating to property referred to in Article 1 is impaired by a "discriminatory" measure that can be attributed to that Party (see Note 1 to Article 5).

(b) This, again, is a restatement of the law. For the very fact that the history of international relations abounds in examples of representations by Governments against measures of economic discrimination resulting in injury, implies the recognition of the principle that measures, otherwise lawful, may be deprived of the protection of the law on the grounds of discrimination. Prohibition of discrimination is in accordance with the principles laid down by the Permanent Court of International Justice in the Case of Certain German Interests in Polish Upper Silesia and the Case of Treatment of Polish Nationals in Danzig***.

(c) It is immaterial whether the measure complained of is expressly or exclusively directed against the property of the national for whom redress is sought or is couched in general terms which bring such property within its scope. In other words, "de facto discrimination" is unlawful.

(d) The essence of discrimination, from the point of view of Article 1, is differentiation introduced in the treatment of property as a result of the measures in question, which is not justified by legitimate considerations. That differentiation consisting in the more favourable treatment of certain persons - whatever their nationality - does not constitute in itself discrimination against other nationals, is reaffirmed in the last sentence of paragraph (a).

(e) Such discrimination may take four forms, viz. represent differentiation as regards the treatment of property of : (i) nationals of the same (foreign) Party to the Convention; (ii) nationals of different

* Advisory Opinion on Conditions of Admission to the United Nations. ICJ Report 1947-48, p. 57 to p. 80 ; see also p. 83.

** Polish Upper Silesia Case and Free Zones of Upper Savoy Case, quoted in Hambro I, Nos. 100-101, p. 73.

*** See Hambro I. Nos 246 and 315, at pp. 201 and 261.

Parties ; (iii) nationals of a Party and of those of a third State ; and (iv) nationals of another Party and of its own nationals.

Paragraph (b) : THE CONVENTION AND THE ACQUISITION OF PROPERTY

9. (a) While respect is owed by each State to property of aliens which is in its jurisdiction (see Note 1), no State is bound - unless it agrees otherwise - to admit aliens into, or permit the acquisition of property by aliens in, its territory. Consequently, paragraph (b) of Article 1 confirms that the provisions of the Convention do not affect the right of each Party to control the acquisition of property and investment of capital by nationals of other Parties within its territory. The Convention is designed to safeguard property after its acquisition or investments after they have been made.

(b) Nothing in the Convention should be construed as prohibiting a Party from requiring divestiture of property obtained by inheritance by foreign nationals, provided that where such requirements are imposed, such nationals are allowed reasonable time and conditions in which to dispose of the property so obtained.

ANNEX 375

ORGANISATION FOR ECONOMIC
CO-OPERATION AND DEVELOPMENT

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COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES

INTERGOVERNMENTAL AGREEMENTS RELATING TO INVESTMENT IN DEVELOPING COUNTRIES

(Report by the Committee on International Investment and Multinational Enterprises)

1. It is the purpose of this report to review the experience with the main types of intergovernmental agreements that can be used for the protection and promotion of foreign direct investment in developing countries, i.e. friendship, commerce and navigation treaties (FNC), investment guarantee agreements, investment protection treaties, general agreements for economic co-operation with investment-related clauses and sector- or project-related agreements. To this end, the report first sets out the objectives and emerging trends of intergovernmental co-operation in this area (Section I), analyses the scope and main features of the various types of agreements (Section II) as well as their effectiveness in terms of the policy objectives pursued (Section III) and, finally, discusses the prospects for future developments. Contributions received from Member countries in response to a questionnaire form the basis of the present analysis.

I. MAIN OBJECTIVES OF AND EMERGING TRENDS IN INTERGOVERNMENTAL AGREEMENTS IN THE FIELD OF INVESTMENT

2. As it appears from the Committee's last survey of recent international investment trends (1), since 1974 there has been a significant use in direct foreign investment in developing countries. Furthermore, the developing countries' share as host countries of the foreign direct investment stocks of almost all major investing countries has increased, thus reversing the generally declining trends in earlier periods (2). At the same time, the share of direct investment in overall non-concessional flows was significantly

reduced, due mostly to the rapid expansion of export and financial credits. There has been a remarkable shift of foreign direct investment from mineral exploration and exploitation to manufacturing industries and services and the bulk of investment flowing to developing countries is concentrating on a very small number of these countries. These trends appear to result from a combination of economic and political factors such as inadequate market size and lack of basic infrastructure, inadequate economic structures, restrictions to the access of products from developing countries to markets of industrialised countries, and instability of relevant host country policies. If efforts to encourage a new phase of growth and a more balanced distribution of foreign direct investment in developing countries are to be successful, they will have to tackle all of these problems in the framework of a multi-faceted policy response of which intergovernmental agreements are an important ingredient.

3. Among the above-mentioned constraints, the perception of risk -- both of an economic and political nature -- seems to be a major impediment for investment, particularly in sectors involving capital-intensive and often very large projects with long lead times. Although economic and commercial considerations continue to be the primary factors in the decision-making process of potential investors, the political environment has become over the last two decades an important element in the formulation of strategy by international firms. Enterprises contemplating foreign direct investment face a broad range of contingencies arising from the political and economic environment which affect the ownership of assets, such as full or partial divestment through nationalisation or equivalent action and practices that affect operations and ultimately constrain cash flows or returns. Vulnerability to contingencies arising from the political environment and their potential cost vary across industries, firms and projects. Apart from the risk of expropriation directed against foreign firms in a given country, which seems to have considerably decreased over the last decade, vulnerability is generally a function of factors such as industrial sectors, level of technology, ownership structure and management styles.

4. Given the structural benefits of foreign investment for both home and host countries, the encouragement of investment flows through appropriate policy measures is in the interest of all countries and, as part of overall efforts to increase the transfer of resources to developing countries, constitutes an important element in North-South relations. How could intergovernmental agreements related to investment make a useful contribution in this area? By providing legal protection under international law, such agreements can help reduce to a considerable extent the political risk attached to foreign investment and create a climate of confidence between home and host countries and potential investors. They can also be designed to accommodate specific interests and concerns of the participating countries in such key areas as industrial policy, market access and finance, including such provisions as co-financing, and new forms of industrial co-operation not involving foreign equity participation. On a multinational basis, they can constitute a framework for co-operation between groups of countries not only in the North-South context but also in joint efforts by developing countries to promote investment on a regional basis.

5. Are there signs that the practice of intergovernmental agreements is evolving in these directions? Some notable features relating both to the diversification of the parties involved and the contents of the agreements are to be noted, in particular, the network of intergovernmental agreements has developed rapidly and, at the present time, more and more countries, both developing and developed, are showing interest in this approach. At the same time, there has been a remarkable diversificaton in the forms of such co-operation. The traditional patterns of investment treaties concluded between western industrialised countries and developing countries have been changing as new parties have entered the scene of international ivestment and as governments seek to extend agreements to cover a wider range of issues. This particularly applies to those developing countries which now also begin to find themselves cast in the role of home as well as host ountries for foreign investment. Such countries are interested in protecting their investment; consequently, intergovernmental investment agreements between developing countries have become more numerous and tend to show basically the same features as those concluded between developed and developing countries. In the framework of the European-Arab dialogue, negotiations on a multilateral investment convention which would provide strong reciprocal guarantees for investments of all participants have reached an advanced stage (3). In conjunction with the expansion of East-West trade, co-operation has extended to investment matters which are covered by a considerable number of bilateral co-operation agreements, and two socialist countries have entered into a number of more specific investment protection treaties.

6. The form and content of such agreements have become more diversified. There has been a shift away from global agreements on friendship, commerce and navigation, which included investment protection clauses, to more specific investment protection treaties. General agreements for technical, scientific and economic co-operation are also being used more frequently as a framework for promoting investment, in particular for major industrial or mining projects. An innovative approach has been taken by the second Lomé Convention between EEC and ACP countries, which provides for the possibility of concluding project-specific agreements in the mineral sector involving home and host countries and, under certain circumstances, enterprises participating in a given project, although experience within the limited time frame since the entry into force of this convention has shown that it is difficult to identify suitable projects for such agreements. Finally, the number of tax treaties between developed and developing countries is growing. Many of these treaties contain tax-sparing clauses designed to maintain for enterprises investing in the host country the benefit of investment incentives (4). The following sections of this report provide an analysis of the main types of agreement which are relevant to the protection and promotion of foreign investment in the developing countries.

II. ANALYSIS OF THE MAIN TYPES OF AGREEMENTS RELATED TO INVESTMENT

A. Friendship, Commerce and Navigation (FCN) Treaties

7. Historically, FCN treaties were the first type of agreement concluded by capital-exporting countries with a view to obtaining legal protection for their investments on a bilateral basis. In its present form, this type of agreement arose after the Second World War, but its origin goes back to the commercial treaties of the 19th and first half of the 20th Century. Friendship, commerce and navigation treaties were used first by the United States and later by Japan (5). The treaties between the United Kingdom and Iran (1959), and between the Federal Republic of Germany and the Dominican Republic (1957) also fall into this category. Of the 43 FCN treaties currently in effect between the United States and other countries, approximately a dozen of these treaties were concluded with developing countries since the end of the Second World War (6). The latest agreement of this type signed by the United States dates from the middle of the 1960s.

8. While individual treaties negotiated with specific developing countries vary according to the relevent circumstances, the standard US draft FCN Treaty contains the following principal provisions which are relevant to investment:

a) Equitable treatment of persons, property, enterprises and other interests of nationals and companies of the other party;

b) Nationals are permitted to enter and remain for purposes of developing and directing operations of enterprises within which they have invested or are actively in the process of investing a substantial amount of capital;

c) National treatment and most favoured nation (MFN) treatment with respect to access to local courts;

d) Enforceability of arbitration proceedings and awards pursuant to contracts;

e) Protection of property;

f) Prompt, adequate and effective compensation in the event of expropriation;

g) Treatment no less than national and MFN treatment with respect to all types of commercial, industrial, financial and other activity including establishment of branches, organisation of companies, control and management of enterprises, etc.;

h) Permission to engage technical experts, executive personnel, attorneys, agents, etc.;

i) National treatment with respect to leasing land, buildings, offices, etc.;

j) National treatment concerning patents, trademarks and other industrial property;

k) Provisions on tax matters.

l) National and MFN treatment on remittances and other transfers of funds;

m) Granting of MFN customs treatment to commercial travellers representing nationals and companies;

n) MFN treatment for products, and other provisions concerning duties, taxes, etc.;

o) Maintenance of competitive equality with respect to purchases and sales by governments, agencies and monopolies and with respect to special economic advantages enjoyed by government agencies and monopolies;

p) Provisions for consultation in the event that restrictive business practices cause harmful effects upon commerce between the two countries.

9. In the experience of the United States, the existence of an FCN treaty can have an encouraging effect for investors if the investment climate in the host country is favourable. While the instances in which the US has invoked FCN treaties for the protection of foreign investment are not great, there have, nevertheless, been a number of specific cases. In some cases, the provisions of these treaties have been cited during the course of normal diplomatic discussions when investment problems have arisen. Furthermore, there is a fairly large body of litigation within the US judicial system concerning various provisions of FCN treaties. While the United States will continue to rely on FCN treaties as the basic framework for investment with those countries with which it has such treaties, it is unlikely that a significant number of new FCN treaties will be negotiated in the future. There are a number of reasons for this policy. Trade relations are now generally subject to GATT rules that changes are made within the GATT framework. Recent practice in the United States has been to seek separate bilateral arrangements on maritime and consular matters in situations where this is deemed to be desirable. Finally, it is more difficult to negotiate the comprehensive FCN treaties under present conditions, particularly with developing countries.

B. Investment Guarantee Agreements

10. This type of agreement has been used only by the United States and Canada and is designed to provide a framework for extendng eligibility under an investment insurance scheme for investment in a particular country. To date, 116 countries have concluded such agreements with the United States and 30 with Canada. It is important to emphasise that these agreements are procedural in nature, i.e. they serve as an instrument for the operation of national investment insurance schemes but do not contain any provision concerning the treatment of the investment by the host country. They, therefore, do not constitute an alternative to more comprehensive forms of investment protection and promotion agreements.

11. The US investment guarantee agreement covers the following elements:

-- Foreign government approval of the investment. It is stipulated that the US Overseas Private Investment Corporation (OPIC) will not issue investment guarantees with respect to any project without the approval of the host government. This provision allows host countries a degree of selectivity in the light of their development strategy and thus reduces the likelihood of expropriation;

-- Subrogation. In the event that OPIC pays an investor's claim, it has the right to assume all rights, titles, claims, etc. previously held by the investor;

-- Arbitration. The agreement provides for third-party international arbitration in the case of a dispute between the US government and the host government which relates to the interpretation of the agreement or which, in the opinion of one of the governments, involves a question of international law arising out of any investment project for which OPIC coverage has been issued.

12. The investment guarantee agreements signed by Canada essentially contain subrogation clauses and provisions for dispute settlements between the host government and the Canadian Export Development Corporation (EDC) with respect to insured investments. According to the Canadian experience, the signing of such agreements with particular countries has increased the interest of potential investors in these countries. Thus far, Canada has not had to exercise its rights under the agreement to settle an outstanding claim.

C. Investment Protection Treaties (IPT)

13. IPT agreements are specifically designed to provide legal protection to the investment covered. While the details of such agreements vary from country to country, they generally contain the following basic provisions:

-- Definition of the investment to be protected under the agreement;

-- Fair and equitable treatment of the investor, national treatment and most favoured nation treatment;

-- Nationalisation and compensation;

-- Transfer of income from invested capital and the repatriation of capital in cases of disinvestment;

-- Subrogation in case of payment of claims by the home country (e.g. the Germany and United Kingdom prototype);

-- Dispute settlement (United States).

Many agreements concluded by Member countries also contain clauses relating to compensation for damages due to war or similar events.

Before analysing these main elements of investment protection treaties in the light of the experience of Member countries, it is interesting to review the main developments in the practice of these types of agreement.

a) The Evolving Practice of Investment Protection Treaties

14. The first IPTs were concluded with developing countries in the early 1960s by two countries, the Federal Republic of Germany and Switzerland. Germany concluded its first agreement in 1959 with Pakistan and has since signed agreements with numerous other developing countries, so that it is today the country with the most extensive and comprehensive treaty arrangements for the protection and promotion of investment (7). Switzerland is pursuing the same policy as Germany. Starting at an early date (an agreement with Tunisia on 2nd December 1961), it has concluded an extensive series of agreements dealing with investment protection and promotion. Both countries seem to be continuing in the same direction as negotiations for further treaties are currently under way.

15. Towards the end of the 1960s and, more particularly, during the 1970s, a second group of countries became interested in these agreements and started to adopt them. This group of countries have signed numerous treaties and includes France, the United Kingdom, the Belgium-Luxembourg Economic Union and the Netherlands, as well as countries with only a few such as Norway (8).

16. A third group of countries has only more recently (towards the end of the 1970s) begun to take an interest in agreements of this kind. Notable in this group are Japan, which signed its first two and so far only agreements with Egypt in 1977 and Sri Lanka in 1982, and the United States, which has drawn up a model agreement, and in 1982 concluded treaties with Egypt and Panama. It is clear that this group of countries, which appear to have opted for these agreements at a later stage, are taking a great interest in them and are following policies for their widespread use.

17. The developing countries which have entered into investment protection treaties are to be found primarily in Africa and South-East Asia. Most countries of Latin America have so far been reluctant to conclude such agreements (9), since they generally consider that such agreements conflict with the Calvo doctrine which reflects the South American concept of the sovereignty of states.

18. In the Middle East, a number of countries seem prepared to sign agreements, particularly Egypt which, since the middle of the 1970s, has been particularly active (10). Mention can also be made of Jordan, which signed agreements with Germany and Switzerland in 1977 and with France and the United Kingdom in 1979, and of Syria which reached agreement with Germany in 1977, Switzerland in 1978 and France in 1980. Another important event is the multilateral convention which is currently being negotiated between the Member states of the EEC and the Arab League and which should prove beneficial since few treaties exist between the two regions.

19. Thus it can be seen that the same developing countries are frequently parties to several agreements. This seems to indicate that a developing country which has decided to enter into a first agreement will then conclude others. The interest of two East European countries, Yugoslavia and Rumania (11) in such agreements should also be mentioned.

20. Almost all agreements for the protection and promotion of investment concluded between industrialised and developing countries (except the first generation of agreements entered into by France) provide for reciprocity. This means that they apply in an equal manner to investments by nationals of each contracting state on the territory of the other state. Nevertheless, the value of reciprocity for many of these agreements has in practice been limited, since capital streams have been rather one-sided.

21. A new trend however seems to be emerging due to the fact that an increasing number of developing countries find themselves in the role of home as well as host countries for international investment. This observation particularly applies to the so-called newly industrialised countries, which are now beginning to engage in investments in other developing countries and, to a lesser extent, in developed countries. Within the framework of South-South co-operation, efforts are being undertaken to stimulate flows of investment between developing countries, particularly on a regional scale. It is therefore not surprising that the developing countries concerned attach great importance to the protection of such investment against political or other risks. For example, this concern is reflected in the work of the Asian-African Legal Consultative Committee and has resulted in a draft model agreement which in many aspects is comparable to the investment protection agreements concluded between developed and developing countries (12).

22. The negotiations referred to above for the conclusion of a multilateral agreement between the Member States of the EEC and of the Arab League should also be seen in this light. Based on the commonality of interests of all partners in reciprocal protection of their investments, tentative agreement has been reached on the main principles which should be included in this treaty although some difficulties have yet to be overcome. The envisaged multilateral instrument will be similar to standard bilateral investment protection and promotion agreements, particularly as regards the category of risks covered and the treatment of the investor. Its main distinctive feature however is the fact that it would cover not only direct investment but also portfolio investment, monetary assets, governments stocks and bonds and other securities which are normally excluded from bilateral IPTs.

b) <u>The Contents of Investment Protection Treaties</u>

23. Based upon the information provided by Member countries and the texts of representative agreements concluded over the past 20 years, it appears that most bilateral investment protection treaties contain similar main elements. There are two reasons for these similarities:

-- The extension of the network of bilateral treaties was preceded in the early 1960s by intensive discussions within OECD on a draft convention for the protection of foreign property. On 12th October 1967, the OECD Council adopted a resolution reaffirming the adherence of Member countries to the principles of international law embodied in the Draft Convention (13);

-- Many Member countries interested in adopting bilateral investment treaties with developing countries are exchanging, on a bilateral basis, experience with the negotiation of such treaties.

It should not be overlooked, however, that a number of provisions in the various agreements show notable differences, reflecting differing negotiating situations and to some extent, a variety of policy approaches and degrees of emphasis.

24. Two approaches towards negotiations of IPIs with developing countries can be distinguished. First, a pre-existing model agreement may be used as a basis for negotiation. This is the procedure adopted by most OECD Member countries for such agreements, notably Germany, Switzerland, Netherlands, Sweden, the United Kingdom and France. It is also the method used by the United States, which has recently completed the draft of such a model agreement. However, other countries, in particular Belgium, follow a somewhat more flexible approach involving the negotiation of each treaty without reference to a pre-determined model. Most Member countries share a common view as to essential elements of the treaties. These include the principle of fair and equitable treatment of the investor, guarantees as to the transfer of income from investment and repatriation of capital, acceptable provisions governing nationalisation and compensation and dispute settlement.

25. The following paragraphs highlight the main elements of these agreements, together with the relative importance attached thereto by the various countries.

i) <u>The Coverage of the Agreements</u>

26. In order to obtain maximum protection, all countries favour a very broad definition of the investment covered. To the extent that an exhaustive or comprehensive definition of the term investment seems difficult or even impossible to reach, many countries opt for the following formula: "The term investment means assets of all kinds and in particular but not exclusively ...". This form of drafting is used by, among others, Switzerland, Belgium, the Netherlands, France, the United Kingdom and Sweden. The German model agreement contains the wording "shall comprise every kind of asset, in particular ..." and is similar to that in the agreement between Japan and Egypt. The US model agreement uses the following formula: "Investment means every kind of investment, owned or controlled directly or indirectly, including equity, debt and service and investment contracts; and includes, but is not limited to ...".

27. These various introductory statements are followed by an illustrative list, which in most instances includes:

a) Movable and immovable property, and all other property rights such as mortgages, pledges, sureties secured on real estate, life interests and similar rights;

b) Shares or other interests;

c) Debts and other valuable rights to services;

d) Copyright, industrial property rights, and rights in technical processes, know-how, trademarks, business names and goodwill;

e) Commercial concessions under public law, including those for the prospecting, extraction and exploitation of natural resources.

This very broad definition of investment is predominant in current practice and fits in well with the desire of OECD Member countries to protect the widest possible range of assets abroad.

28. The definitions retained in the agreements can be seen to be sufficiently broad to apply not only to traditional forms of equity and debt investment but also to "industrial property rights", "know-how" and "trademarks", terms that appear to be most relevant to non-equity investments. Nevertheless, it is for consideration whether the lists of examples given in the agreements should not be expanded to include more explicitly other categories of new forms of investment such as contractual and service type arrangements (14). In many agreements, the dividing line is drawn between direct investment implying some degree of control and lasting interest in an undertaking and indirect or portfolio investment. While the former are invariably covered, the latter are excluded in many agreements.

29. Broad definitions also apply to the investors protected by the agreements and generally include natural persons and companies. The term "companies" in most agreements is defined to cover a wide range of organisational forms, regardless of nature and extent of liability or nature of ownership. The definition given in the US model agreement explicitly includes the assets of charitable and non-profit organisations and enterprises with partial or total state ownership.

30. Concerning the geographical coverage of the protection of "companies", two approaches can be distinguished. In the treaties concluded according to the German and UK models and in most treaties concluded by France, the territoriality principle is used, i.e. only companies incorporated in, having their seat in or being constituted according to the law of one of the contracting parties are covered. The treaties concluded by most other countries, in particular the French in some cases, and US models, use the additional criterion of direct or indirect control of companies by nationals of one of the contracting parties. This definition allows treaty coverage of subsidiaries which are owned or controlled by nationals of a contracting party, but organised in third countries and which have investments or other operations in the territory of the other party. In the Swiss approach the principle of control constitutes the essential element in determining the nationality of a company. Although some investment protection agreements concluded between Switzerland and developing countries contain a reference to the principle of territoriality, the latter may only be applied as a substitute to the principle of control. The Netherlands model takes an intermediate approach defining nationals to include legal persons controlled directly or indirectly, by nationals of one contracting party but constituted in accordance with the law of the other contracting parties. This provision is identical to Article 25 (2) (b) of the ICSID Convention. The purpose is to enable the subsidiary to act independently from the parent and to ensure that investments made by the subsidiary in other affiliates are covered. The Netherlands treaty also covers investments via third countries on the condition that the investment is constituted in accordance with the law of the other contracting party.

31. Most IPTs protect both initial and subsequent investments. In those agreements in which subsequent investments by subsidiaries controlled by

nationals of the contracting party are not explicitly covered, the application of the principle of national treatment stipulated in other parts of the agreement would provide protection only to the extent that domestic companies are allowed to make such investments.

32. Most agreements thus far concluded, while encouraging the promotion of investment flows between the contracting parties, do not confer a right of entry or establishment. Under these agreements entry or admission is subject to the law, regulations and procedures of host countries. As stated for instance in paragraph 2 of the German model, each contracting party admits the investment of capital by nationals or companies of the other contracting party in accordance with its legislation. According to the terms used in the French model, the obligations under the treaty apply to investment of a contracting party on the understanding that these investments are to be made or have been made in conformity with the legislation of the other contracting party. The US model goes further, extending the principle of national treatment and most favoured nation treatment not only to investment made according to host countries' legislation and procedures, but also to the entry and establishment of such investment. As stipulated in Article 2 of that model, each party shall endeavour to maintain a favourable environment for investments in its territory by nationals and companies of the other party and shall permit such investment to be established and acquired on terms and conditions that accord treatment no less favourable than the treatment it accords in like situations to investments of its own companies or to nationals or companies of any third country, whichever is the most favourable.

33. One final problem concerning the coverage of investment treaties is whether they apply to investments made prior to the effective date of the treaty. It is clear that the developed countries want the agreements to apply to earlier investment. Long-standing links with developing countries have often resulted in significant existing investment which itself can be a source of new investment; and potential investors will often judge the investment climate by the experience of those already established in the host countries. Hence the importance attached by many Member countries to the coverage of existing investment. Not all existing treaties, however, cover such investments.

34. The agreements analysed follow these different patterns:

-- Some agreements only apply to investment undertaken after their entry into force and more or less explicitly exclude earlier operations. This is so in most of the treaties adopted by Belgium and for some by France and the Netherlands;

-- The second possibility involves the reverse situation, as prior investment is expressly covered. This is the case in the agreement between Japan and Egypt, in some agreements concluded by Belgium and the Netherlands and in most of those concluded by Germany, Switzerland and Sweden;

-- The third possibility falls between the two extremes and is often a compromise: the agreement covers investment subsequent to a certain date but earlier than the effective date of the agreement itself. This is found for example in some agreements concluded by the Netherlands, Sweden, Germany and Switzerland (15).

ii) Fair and Equitable Treatment

35. The principle of fair and equitable treatment to be accorded to investments of the contracting parties is an essential element of investment protection treaties. Almost all Member countries concluding such treaties insist on such a clause being included in the agreement. In most treaties, this principle is supplemented by detailed provisions referring for instance to non-discrimination and the respect of contractual obligations entered into between the investor and one of the contracting parties.

36. According to all Member countries which have commented on this point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated and is a general clause which can be used for all aspects of the treatment of the investment, in the absence of more specific guarantees. In addition, it provides general guidance for the interpretation of the agreement and the resolution of difficulties which may arise.

37. In a substantial number of treaties the importance of fair and equitable treatment is included by clauses specifically referring to the rules and principles of international law. Some treaties, for example, those concluded by France with El Salvador, Jordan, Paraguay, Sri Lanka, Sudan and Syria, provide for "just and equitable treatment in conformity with international law or the general principles of international law". The US model states that the treatment, protection and security of the investment shall in no case be less than that required by international law. Most UK treaties provide that, after termination of the treaty, the investment will continue to be protected for a stated number of years, without prejudice to the application thereafter of the general principles of international law.

iii) National Treatment and Most Favoured Nation Treatment

38. The most frequently encountered provisions (16), especially in model agreements, mention both types of treatment, and stipulate that the most advantageous of the two will apply. This is the case in agreements concluded by Germany, Japan, Switzerland, the United Kingdom, France and the United States. The combination of the two principles is important in instances where host countries grant to foreign investors specific favourable condition not available to national investors. In this context, the principle of most favoured nation treatment for investment under the second Lomé Convention between te EEC and the ACP countries is worth mentioning. Article 64 of the Convention and the Jont Declaration relating to Article 64 create a right to non-discriminatory treatment. This right consists of each EEC Member State being able to ask the ACP State concerned for the same treatment as that granted to nationals of another Member State under the terms of investment protection agreements which serve as reference agreements. It is, nevertheless, understood that this treatment is not automatic (there has to be a bilateral intergovernmental exchange of letters between the governments concerned) and certain adjustments can be made with respect to the reference agreement in specified circumstances.

39. Sweden does not include the national treatment clause in its agreements but exclusively relies on the most favoured nation clause. Belgium also considers the MFN principle to be more important to foreign investors than national treatment and consequently insisted on the inclusion of the latter principle in most of its agreements. The Netherlands, on the other hand, have expressed reservations as to the current use of the MFN principle in investment treaties. In their view, this principle, if not combined with substantive standards for foreign investment such as fair and equitable treatment, can still open the possibility for overall conditions detrimental to the interests of the foreign investor.

40. Finally, it should be mentioned that a number of bilateral investment treaties recognise certain limited exceptions to either national treatment or MFN treatment or both. Exceptions are provided in certain cases for the participation of the contracting party in a common market, customs union, or free trade association or even, as specified in certain agreements, for "other forms of regional co-operation". Some countries also provide for exceptions in tax matters which are dealt with through Double Taxation Agreements. In other cases, agreements specify that in certain circumstances special incentives granted by the host countries to stimulate the creation of local industries are considered compatible with national treatment. Still other countries provide for limited exceptions to national treatment for specific sectors or for specific measures which were in effect prior to the treaty date.

iv) Nationalisation and Compensation

41. For all OECD Member countries party to investment treaties, clauses dealing with the problems of nationalisation are of special importance and consequently such clauses can be found in all treaties that have been concluded. Nevertheless, depending on specific negotiating situations, there is considerable variety in the scope and degree of precision of these provisions.

42. A first point concerns the definition of nationalisation/expropriation which may be in broad or narrow terms and may cover measures other than direct nationalisation in the strict sense of the term. With the exception of treaties concluded by Belgium, where the term nationalisation is limited to direct interference with property rights, most treaties use a broad definition including not only the taking of property but also other measures curtailing or limiting the investment which are equivalent to nationalisation ("indirect, concealed or creeping nationalisation"). Such provisions can be particularly useful as dispossession of foreign property has become much less frequent than other actions by host countries severely affecting the substance of the investment.

43. The most precise and explicit clauses in this area are probably those used by the United Kingdom, Germany, Japan and the United States model. The Japanese treaty with Egypt contains the following clause: Article 5, para. 2: "Investments and returns ... shall not be subjected to expropriation, nationalisation, restriction or any other measures, the effects of which would be tantamount to expropriation, nationalisation or restriction." A similar clause is to be found in some agreements concluded by France (e.g. those with Rumania and Morocco). The Belgium-Luxembourg Economic

Union is also looking for a definition as broad as possible of property-depriving measures which give the right to compensation. It uses the expression "property-depriving measures and other similar measures". This is the definition which it would like to see inserted in its agreements unless this proves impossible in particular negotiations. Other countries (Switzerland, France, Netherlands) generally opt for a wording intended to be just as broad, referring to "direct and indirect measures of expropriation, nationalisation or dispossession". The language used by Sweden refers to the concept of "foreign wealth deprivation". This term is very general and seeks to define nationalisation/expropriation broadly, covering all related direct or indirect measures.

44. Although capital exporting countries try and on the whole succeed in giving a broad definition to the terms nationalisation/expropriation, they still must recognise that expropriation by the host country is possible and have therefore sought to stipulate on what grounds and in what circumstances. Thus, all countries provide that dispossession of foreign investments is only acceptable when it is in the "public interest". Three further conditions found in many agreements are: first, that nationalisation/expropriation measures must follow a procedure laid down by law ("due process"); second, that they must not involve discrimination; and third, they must not infringe on any specific contractual obligation. The clauses on due process of law are sometimes specified by provisions that the investor shall have the right to prompt or speedy review by judicial or other independent authority.

45. One final condition addresses compensation for the investor. Although most agreements state that this must be prompt, adequate and effective, some countries are more specific on this point than others (e.g. Japan, France, Germany and the United States). The term "adequate compensation" is generally understood to refer to the amount of compensation, while the term "effective" relates to the arrangements for payent (e.g. the payment must be made in a freely convertible currency). It is interesting to note that the concept of prompt, adequate and effective compensation can also be found in the draft model agreement for the promotion, encouragement and protection of investments prepared by the Asian-African Legal Consultative Committee for use in treaties between developing countries. The same term is also employed in a recent IPI concluded between Sri Lanka and Singapore.

46. Some treaties provide for considerable detail concerning the modalities of compensation. Thus, the German model agreement provides in its Article 4(2): "... such compensation shall be equivalent to the value of the investment expropriated immediately before the day the expropriation or nationalisation was publicly announced. The compensation shall be paid without delay and shall carry the usual bank interest until the time of payment; it shall be actually realisable and freely transferable ...". The treaty between Japan and Egypt is even more specific. In Article 5(3), it states that "the compensation referred to in the provisions of paragraph 2 of the present Article shall represent the equivalent of the normal market value of the investments and returns affected at the time when expropriation, nationalisation, restriction or any other comparable measure was publicly announced or when such measure was taken, whichever is the earlier, without reduction in that value due to the prospect of the very seizure which

ultimately occurs ...". The US model treaty defines the concept of adequate, prompt and effective compensation in terms of fair market value immediately before the expropriation occurred or became public knowledge, and bearing interest equivalent to current international rates until date of payment.

47. Many treaties require that the compensation be fixed or provided for all the time when, or before, the expropriation measures are taken. Such provision can also be found in IPTs concluded between developing countries, the agreement between Egypt and Yugoslavia being one example. Virtually all treaties require that compensation be effective, i.e. transferable to the home country to the extent necessary to make it effective. Finally, it is almost invariably provided that the payment be prompt and without delay.

v) Clauses dealing with Free Transfer

48. Agreements concluded by the different countries are essentially similar as regards acceptance of the principle of free transfer. All countries seem agreed on the need to guarantee the free transfer of capital invested, of income from the capital and the proceeds of any disinvestment. On the other hand, while some countries invoke the principle with a view to total freedom, others provide for possible restrictions. Among countries requiring total freedom of transfer are Germany and Switzerland and the United States (17).

49. According to the US model agreement, governments may only maintain laws and regulations requiring reports of currency transfers and imposing income taxes by such means as a withholding tax on dividends. In contrast, a second group of countries which includes Sweden and the Netherlands, accepts that transfers be effected in accordance with relevant national legislation specifying, however, in the case of the Netherlands, that transfers should be authorised without undue restrictions or delay.

50. Another approach is that chosen by the United Kingdom. Although, here again, some degree of [illegible]tion is accepted, it does not extend as far as compliance with national regulations but it is set out in limited terms. The wording of the British model agreement states, inter alia, that: "Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer to the country where they reside of their investments and returns, subject to the right of each Contracting Party in exceptional balance of payments difficulties and for a limited period to exercise equitably and in good faith powers conferred by its laws. Such powers shall not, however, be used to impede the transfer of profits, interests, dividends, royalties or fees; as regards investments and any other form of return, transfer of a minimum of 20 % a year is guaranteed."

vi) Dispute Settlement Procedures

51. First, two types of dispute should be distinguished: on the one hand, differences between the contracting parties themselves (on the interpretation and application of the treaty), and on the other hand, those between one of the contracting parties and nationals of the other contracting party or a company controlled directly or indirectly by such nationals. All countries

provide in their agreements that the first kind of dispute shall be submitted to an ad hoc arbitration tribunal when it cannot be resolved through diplomatic channels. The tribunal meets on the request of one of the two parties within the time limits laid down; it generally has three members, one nominated by each party and the third by the other two members. The tribunal establishes its own procedure and its decisions are binding on the parties. The US model treaty, in the event of disputes between the contracting parties on the application of the treaty, provides three options: diplomatic consultations, submission by consent to the International Court of Justice or binding arbitraton using an ad hoc arbitration procedure.

52. Disputes between host countries and foreign private investors are dealt with in a variety of ways. Such disputes are defined in the US model treaty to include disputes involving the interpretation or application of an investment contract concluded between a contracting party and a national or company of the other party, the interpretation of an investment authorisation granted by the foreign investment authority of a contracting party to such national or company or an alleged breach of any right conferred or created by the treaty with respect to any investment. Although treaties concluded by other countries are less explicit in this respect, they seem to reflect a similar understanding of the term "investment disputes".

53. As a result of the creation of the International Center for the Settlement of Investment Disputes (ICSID) by the Washington Convention in 1965, many treaties now privide for the submission of investment disputes to that institution. For this purpose,the treaties concluded by countries such as the United Kingdom and Belgium stipulate regulatory consent to use these faciities. The clearest wording used in this respect is that of Belgium, which states that "each of the contracting parties, by virtue of the present provision, shall be deemed to have consented irrevocably to the submission of any dispute to the Centre". Some of the French treaties provide that the investment contract between the investor and the host country must include an ICSID arbitration clause or that the host country shall agree to include such a provision in the investment contract at the request of the investor. It is interesting to note that several agreements concluded between developing countries, e.g. Egypt/Yugoslavia, Sri Lanka/Singapore provide for submission of investment disputes to ICSID and recourse to ICSID is mentioned as one of the options for dispute settlement in the draft model treaty developed by the Asian-African Legal Consultative Committee.

54. German treaties only allow for intra-state arbitration according to the procedures described in paragraph 51 above. However, the introduction of ICSID-related provisions for the settlement of disputes between investors and host countries is under consideration.

55. As regards prior exhaustion of local remedies, the treaties providing for arbitration in case of investment disputes follow different approaches. It is relatively rare (18) that any prior recourse to local remedies is specifically excluded but a number of treaties set time limits ranging between five and twelve months for the exhaustion of local remedies (19). Most agreements concluded by the Netherlands have provided that consent of the state concerned be obtained before a dispute could be submitted to ICSID.

This allowed for the possibility for the host country to request that prior to arbitration or conciliation through ICSID, local remedies be exhausted without time limits being stipulated. New treaties, however, provide that each contracting party "hereby consents" to submit a legal dispute to international arbitration. Furthermore, the Netherlands has adopted the policy to include a restricted time period for the submission to arbitration.

vii) The Relationship of Investment Protection Treaties to Other Instruments for the Promotion of Foreign Investment

56. Having reviewed the content of the various investment protection and promotion treaties, it must first be asked how they fit in with other measures taken by countries to protect and promote their investments. In this respect, the most interesting point is the possible link between the treaties and investment guarantee schemes. In this regard, three approaches can be discerned:

-- First, there is no link between the two systems, although they have some common elements and may be seen as complementary. This is so notably for Sweden, Japan and the United States and generally for all countries which are not parties to many agreements and therefore not in a position to take any other course of action;

-- Next, there are countries, e.g. Germany, the Netherlands and France, for which at least in principle the grant of an investment guarantee should be dependent on the existence of a protection treaty between the capital exporting country and the host country. In France, for instance, the 1971 Supplementary Finance Act (Section 26) provides that the grant of a guarantee is subject to the prior conclusion of an investment protection agreement. This provision was amended and relaxed by Section 14 of the 1973 Supplementary Finance Act, which provided for possible exceptions on a case by case basis, "where the country concerned is not generally prepared to sign such international treaties but does accord satisfactory treatment to foreign investments". For the countries in this group, adequate legal protection of the investment which is a pre-requisite for extending eligibility under their insurance schemes is automatically deemed to exist where an investment treaty has been concluded between the country concerned and the host country. Nevertheless, investment insurance coverage may be granted on an individual basis in the absence of a treaty if the national legal system and more particularly a favourable policy pursued by the host country assure satisfactory protection;

-- A third approach is that followed by the United Kingdom, Switzerland and to some extent Belgium. In these countries, the existence of an investment protection treaty is not a necessary condition of eligibility under the investment insurance scheme but is nevertheless taken into consideration.

57. Another important aspect, the close relationship between investment protection treaties and investment contracts concluded between host countries party to the treaty and nationals or companies of the other party, should be

mentioned. Investment treaties creating obligations under international law can provide a legal framework for investment contracts between investors and host countries. In particular, the complementary character of both types of agreement can be seen in the following elements:

-- The dispute settlement provisions of the treaties providing for arbitration in case of disputes arising from investment contracts;

-- The treaty provision of fair and equitable treatment which is understood as a reference to general principles of law, including those relating to State contracts;

-- The provision inserted in a number of treaties, notably those concluded by Germany, that contractual commitments entered into by the countries concerned will be observed.

58. As stated explicitly in a number of treaties, for instance those concluded by Switzerland, Germany and France in the US model treaty, it is not the intention of the treaties to displace applicable, previously agreed upon contractual arrangements between the investor and the host government to the extent that these are more favourable than those provided in the treaty. Where such favourable contractual arrangements exist, in particular in the areas of treatment, compensation or expropriation transfers or settlements of investment disputes, they remain unaffected by the treaty provisions covering similar areas.

D. The Inclusion of Investment-Related Provisions in Bilateral or Multilateral Co-operation Agreements

59. A number of OECD Member countries and the EEC have concluded general co-operation agreements which together with other areas such as trade and financial, technical and scientific co-operation include provisions for the promotion of direct investment. Such agreements are characterised by their flexibility. Typically, they offer the contracting states an institutional framework in which they can implement a co-operation programme; thus, they are operational rather than normative or regulatory standards. This means the use of general provisions with relatively unconstraining declarations of intent, usually setting up a joint commission and providing in broad terms for state intervention to facilitate co-operation. As far as investment is concerned, the institutional setting of the agreements (mixed commissions, joint technical working groups) can be used for an exchange of information on investment opportunities and the identification of suitable projects.

a) Investment Clauses in Bilateral Co-operation Agreements

60. A whole series of bilateral co-operation agreements contains more or less general investment clauses. This is particularly evident in some agreements concluded by Sweden, Belgium, Switzerland, the Netherlands and also Spain. As regards content, however, fairly clear distinctions have to be made between these different clauses, since their scope may vary considerably.

61. On the one hand, there are general clauses which tend to provide explicitly for the promotion of capital investment, but whose scope is very limited so far as legal protection is concerned, insofar as they are not accompanied by any concrete means to achieve this end. Such general clauses are found in co-operation agreements concluded by Belgium. Thus, in a treaty signed on 10th May 1978 with Saudia Arabia, Article 4 provides that: "The contracting parties shall mutually encourage capital investment in their respective countries". As regards other Belgian co-operation agreements, the reference to any investment protection or promotion is even less obvious. Swedish and Spanish co-operation and trade agreements also embody, although frequently indirectly, the desire to promote investment. A treaty between Sweden and Nigeria thus provides in its Article 11, Section 2 that: "The co-operation between the two countries shall involve:

-- Establishment of industries;

-- Setting up and running joint ventures."

The desire to promote the setting-up of joint ventures is expressly mentioned in the co-operation agreements conducted by Spain with Bolivia (1969), Ecuador (1974), Mexico (1977), Libya (1974) and Rumania (1977). The promotion of investment through wholly-owned subsidiaries, joint ventures, licensing and management contracts is also one of the main objectives of the New Zealand-Singapore Agreement for Industrial, Technological and Scientific Co-operation (1976).

62. More concrete and broader in scope are clauses providing most favoured nation treatment for capital from one of the contracting parties. Such clauses are found in agreements between Spain and Paraguay (1971), Costa Rica (1972), Guatemala (1972), Honduras (1972) and Argentina (1974).

63. The clauses with the broadest scope and which are most similar to the provisions in investment protection and promotion agreements are found in Swiss and Dutch treaties. These are "hybrid" agreements which cover both investment and more general co-operation. This type of agreement falls somewhere between the investment protection and promotion treaty and the co-operation treaty. The title given to the Swiss treaties is significant in this respect. For example, a 1966 treaty with Mauritania is entitled "Commercial, Investment Promotion and Protection, and Economic and Technical Co-operation Treaty between the Swiss Confederation and the Islamic Republic of Mauritania". Some ten treaties of this type have so far been concluded by Switzerland.

64. In terms of content, these latter agreements (Swiss or Dutch) mainly follow the provisions in traditional investment protection and promotion treaties, particularly those concerning treatment, free transfer, nationalisation and dispute settlement. This category also includes three trade agreements concluded by Sweden in the mid-1960s, respectively with the Ivory Coast (1966), Madagascar (1967) and Senegal (1968). These treaties contain clauses more or less equivalent to those in investment protection agreements.

b) Investment Clauses in Multilateral Co-operation Agreements

65. For some years, intensive discussions have been taking place within the EEC concerning the inclusion of investment-related clauses in general co-operation agreements concluded at Community level. The EC Council of Ministers confirmed this trend in its conclusions of 18th November 1980 which constitutes an important landmark in the efforts to prepare a common policy for the protection and promotion of European private investment in developing countries. The Council decided that the Community should in principle raise the subject of investment when negotiatig with the developing countries with the aim of obtaining the inclusion of investment-related clauses in any agreements with these countries. At the same time, the Council confirmed that this attempt to institute a joint approach to the promotion of European investment in developing countries was part of its aim to complement and support national action but was not intended to replace such action. Accordingly, national responsibilities in this respect would not be diminished. Finally, the Council pointed out that such clauses were intended to improve the climate for investment and should include, among other things, reference to the overall objective of non-discrimination between Member states.

66. Following this Council decision, the mandates for negotiating community co-operation agreements with LDCs will therefore, as a general rule, include one or more provisions concerning the objective and, where appropriate, the means of co-operation in investment matters. This is the case in the current negotiations with the Andean Group, and the Community will, in principle, adopt the same procedure when negotiating new agreements or renegotiating earlier ones.

67. Existing investment clauses within EC co-operation agreements reflect the diversity of attitudes among the Community's partners, existing situations as regards the treatment of foreign investment and the Community's own interests. What is common to all these clauses is a statement of intent on the part of the signatories to take appropriate steps to promote investment on a reciprocal basis.

68. The agreements between the EEC and Brazil and the EEC and India are confined to this general statement of intent. The agreement with Yugoslavia goes further by stipulating that the contracting parties will endeavour to conclude reciprocal investment promotion and protection agreements.

69. A further step was taken in the agreement with ASEAN of 6th March 1980. This agreement refers to the extension, by member countries of both groups, of investment promotion and protection arrangements which endeavour to apply the principle of non-discrimination, aim to ensure fair and equitable treatment and reflect the principle of reciprocity. In the ASEAN agreement, the principle of non-discrimination which the Council of November 1980 had stressed is stated in very general terms. It implies that any new agreements concluded within the EEC-ASEAN framework should not depart unduly from existing agreements so as to limit differences in treatment afforded to investors from different Member states. The principle of non-discrimination embodied in the Lomé II Convention has already been mentioned above in the context of the analysis of investment protection treaties.

70. The Community's co-operation agreements also include various clauses on economic or industrial co-operation, which make special reference to the aspect of promoting investment. A case in point is the chapter on "Industrial co-operation" in the Lomé II Convention and Article 77 in particular regarding industrial information and promotion activities as well as the provisions on mining co-operation whereby investments may be made for the purpose of developing -- and, where applicable, maintaining -- the mining and energy potential of the ACP states.

E. Sector- or Project-Related Agreements

71. A new category of agreements designed to promote and protect specific projects has attracted attention in recent years. Such agreements may be of two distinct types: framework agreements between governments referring to a particular project involving the participation of private investors, or trilateral arrangements including the home and host countries as well as the investor in a specific project.

72. As yet, there is very little experience with such agreements and they do not appear to have been used very extensively. Thus, although they may provide a useful tool under certain circumstances to overcome specific constraints to investment, Member countries remain very cautious as to their use. At the bilateral level, sector- or project-related agreements are presently found primarily in the area of development co-operation, where they serve as a means for mobilising private funds for development projects. One example is the US Agency for International Development (AID) Housing Guarantee Programme which facilitates construction in housing and related infrastructure. This programme guarantees projects of US investors when these projects are found technically acceptable and after conclusion of intergovernmental negotiations concerning the specific project. Other AID programmes concern funds allocated for investment in a specific sector with the parameters of the uses for these funds set by intergovernmental agreement.

73. Within the EEC, the potential exists for the development of project-specific investment agreements under the second Lomé Convention. Annex VII of that Convention provides for the possible conclusion between the ACP countries concerned, the Community and one or more Community countries of agreements relating to mining and energy projects when the Community considers that such projects are of interest to it and where European capital contributes to their financing. Such projects, aside from being technically and economically viable, must meet a number of specific requirements:

-- First, proposals for such projects must come from the ACP states as an indication of their interest in promoting investment;

-- Second, the proposed project must be consistent with one of the Community's priority interests (e.g. the supplying of Europe with products deriving from the project in question);

-- In order to justify the Community's commitment, such projects will as a general rule involve investors, or purchasers of the product from such investment, from several Member states.

This evidently concerns projects involving large amounts of capital and long lead times, since these are precisely the factors which make such investments vulnerable to the risks the agreements are intended to minimise.

74. The possibility of concluding project-specific agreements has not yet been translated into action, although suitable projects are currently being explored. This is due primarily to the innovative character of the concept, the risks involved and the consequent importance of careful preparation of the first project involving an agreement of this type, which is bound to constitute a precedent for subsequent operations.

III. THE EFFECTIVENESS OF INTERGOVERNMENTAL AGREEMENTS FOR THE PROTECTION AND PROMOTION OF INVESTMENT: A PRELIMINARY ASSESSMENT

75. Before undertaking an overall assessment of the effectiveness of the various types of intergovernmental agreements related to investment, in light of actual experience, it is important to recall the different policy objectives mentioned in Section I above which are or could be assigned to these agreements. The basic common purpose of the agreements, regardless of their nature or legal scope, is to provide protection to foreign investment and at the same time to stimulate increased flows of such investment to the developing countries party to the agreement. But this is no longer seen to be sufficient. What is emerging in some form or other is a co-operation between two or more countries in the area of industrial co-operation and finance. In trying to answer this question, it is necessary to differentiate between the various categories of the agreements analysed in the previous section, which correspond as it were to different levels of cognizance of these latter issues.

76. As regards investment promotion and protection treaties, it is clear that countries which have only recently started to adopt such treaties are not yet in a position to make a valid judgment as to their effectiveness. For other countries, two distinct though closely related questions should be asked. First, have the treaties fulfilled their original purpose, i.e. the protection of existing investment? Second, have the agreements themselves led to further investment?

77. On the basis of the experience of Member countries, the answer to the first of these questions must be affirmative. Countries such as Switzerland, France, Germany, the United Kingdom and Belgium do in fact believe that their experience with these agreements has been satisfactory.

78. On the whole, developing countries seem to fulfill their commitments. Of course, there are some obvious exceptions of marginal cases, such as the radical change in régime in Iran. This caused considerable prejudice to Germany, which had signed an investment protection and promotion treaty with Iran in 1965. The implications of any open breach of the agreement upon the attitude of investors not only of the respective home country but also of other countries and the repercussions for overall image and credit worthines of the country having violated the treaty are distinct deterrents to violations of treaty obligations. Thus, a number of Member countries have reported positive experience with the operation of existing treaties which either had a preventive function against expropriation or at least permitted a satisfactory resolution of disputes.

ANNEX 376

FRIENDSHIP, COMMERCE, AND NAVIGATION

Treaty, protocol, additional protocol, and exchanges of notes signed at Rome February 2, 1948
Senate advice and consent to ratification June 2, 1948
Ratified by the President of the United States June 16, 1949
Ratified by Italy June 18, 1949
Ratifications exchanged at Rome July 26, 1949
Entered into force July 26, 1949
Proclaimed by the President of the United States August 5, 1949
Supplemented by agreement of September 26, 1951 [1]

63 Stat. 2255; Treaties and Other International Acts Series 1965

Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic

The United States of America and the Italian Republic, desirous of strengthening the bond of peace and the traditional ties of friendship between the two countries and of promoting closer intercourse between their respective territories through provisions responsive to the spiritual, cultural, economic and commercial aspirations of their peoples, have resolved to conclude a Treaty of Friendship, Commerce and Navigation based in general upon the principles of national and of most-favored-nation treatment in the unconditional form, and for that purpose have appointed as their Plenipotentiaries,

The President of the United States of America:
Mr. James Clement Dunn, *Ambassador Extraordinary and Plenipotentiary of the United States of America to the Italian Republic,*

and,

The President of the Italian Republic:
The Honorable Carlo Sforza, *Minister Secretary of State for Foreign Affairs.*

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following Articles:

[1] 12 UST 131; TIAS 4685.

ARTICLE I

1. The nationals of either High Contracting Party shall be permitted to enter the territories of the other High Contracting Party, and shall be permitted freely to reside and travel therein.

2. The nationals of either High Contracting Party shall, within the territories of the other High Contracting Party, be permitted, without interference, to exercise, in conformity with the applicable laws and regulations, the following rights and privileges upon terms no less favorable than those now or hereafter accorded to nationals of such other High Contracting Party:

(*a*) to engage in commercial, manufacturing, processing, financial, scientific, educational, religious, philanthropic and professional activities except the practice of law; [2]

(*b*) to acquire, own, erect or lease, and occupy appropriate buildings, and to lease appropriate lands, for residential, commercial, manufacturing, processing, financial, professional, scientific, educational, religious, philanthropic and mortuary purposes;

(*c*) to employ agents and employees of their choice regardless of nationality; and

(*d*) to do anything incidental to or necessary for the enjoyment of any of the foregoing rights and privileges.

3. Moreover, the nationals of either High Contracting Party shall not in any case, with respect to the matters referred to in paragraphs 1 and 2 of this Article, receive treatment less favorable than the treatment which is or may hereafter be accorded to the nationals of any third country.

4. The provisions of paragraph 1 of this Article shall not be construed to preclude the exercise by either High Contracting Party of reasonable surveillance over the movement and sojourn of aliens within its territories or the enforcement of measures for the exclusion or expulsion of aliens for reasons of public order, morals, health or safety.

ARTICLE II

1. As used in this Treaty the term "corporations and associations" shall mean corporations, companies, partnerships and other associations, whether or not with limited liability and whether or not for pecuniary profit, which have been or may hereafter be created or organized under the applicable laws and regulations.

2. Corporations and associations created or organized under the applicable laws and regulations within the territories of either High Contracting Party shall be deemed to be corporations and associations of such High

[2] See also para. 4 of protocol, p. 283.

Contracting Party and shall have their juridical status recognized within the territories of the other High Contracting Party whether or not they have a permanent establishment, branch or agency therein.

3. Corporations and associations of either High Contracting Party shall, within the territories of the other High Contracting Party, be permitted, without interference, to exercise all the rights and privileges enumerated in paragraph 2 of Article I, in conformity with the applicable laws and regulations, upon terms no less favorable than those now or hereafter accorded to corporations and associations of such other High Contracting Party. The preceding sentence, and all other provisions of this Treaty according to corporations and associations of the Italian Republic rights and privileges upon terms no less favorable than those now or hereafter accorded to corporations and associations of the United States of America, shall be construed as according such rights and privileges, in any state, territory or possession of the United States of America, upon terms no less favorable than those upon which such rights and privileges are or may hereafter be accorded therein to corporations and associations created or organized in other states, territories or possessions of the United States of America.

4. Moreover, corporations and associations of either High Contracting Party shall not in any case, with respect to the matters referred to in this Article, receive treatment less favorable than the treatment which is or may hereafter be accorded to corporations and associations of any third country.

ARTICLE III

1. The nationals, corporations and associations of either High Contracting Party shall enjoy, throughout the territories of the other High Contracting Party, rights and privileges with respect to organization of and participation in corporations and associations of such other High Contracting Party, including the enjoyment of rights with respect to promotion and incorporation, the purchase, ownership and sale of shares and, in the case of nationals, the holding of executive and official positions, in conformity with the applicable laws and regulations, upon terms no less favorable than those now or hereafter accorded to nationals, corporations and associations of any third country. Corporations and associations of either High Contracting Party, organized or participated in by nationals, corporations and associations of the other High Contracting Party pursuant to the rights and privileges enumerated in this paragraph, and controlled by such nationals, corporations and associations, shall be permitted to exercise the functions for which they are created or organized, in conformity with the applicable laws and regulations, upon terms no less favorable than those now or hereafter accorded to corporations and associations that are similarly organized or participated in, and controlled, by nationals, corporations and associations of any third country.

2. The nationals, corporations and associations of either High Contracting Party shall be permitted, in conformity with the applicable laws and regulations within the territories of the other High Contracting Party, to organize, control and manage corporations and associations of such other High Contracting Party for engaging in commercial, manufacturing, processing, mining, educational, philanthropic, religious and scientific activities. Corporations and associations, controlled by nationals, corporations and associations of either High Contracting Party and created or organized under the applicable laws and regulations within the territories of the other High Contracting Party, shall be permitted to engage in the aforementioned activities therein, in conformity with the applicable laws and regulations, upon terms no less favorable than those now or hereafter accorded to corporations and associations of such other High Contracting Party controlled by its own nationals, corporations and associations.

ARTICLE IV

The nationals, corporations and associations of either High Contracting Party shall be permitted within the territories of the other High Contracting Party to explore for and to exploit mineral resources, in conformity with the applicable laws and regulations, upon terms no less favorable than those now or hereafter accorded to nationals, corporations and associations of any third country.

ARTICLE V

1. The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law. To these ends, persons accused of crime shall be brought to trial promptly, and shall enjoy all the rights and privileges which are or may hereafter be accorded by the applicable laws and regulations; and nationals of either High Contracting Party, while within the custody of the authorities of the other High Contracting Party, shall receive reasonable and humane treatment. In so far as the term "nationals" where used in this paragraph is applicable in relation to property it shall be construed to include corporations and associations.

2. The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation. The recipient of such compensation shall, in conformity with such applicable laws and regulations as are not inconsistent with paragraph 3 of Article XVII of this Treaty, be permitted without interference to withdraw the compensation by obtaining foreign exchange, in the currency of the High Contracting Party of which such

recipient is a national, corporation or association, upon the most favorable terms applicable to such currency at the time of the taking of the property, and exempt from any transfer or remittance tax, provided application for such exchange is made within one year after receipt of the compensation to which it relates.[3]

3. The nationals, corporations and associations of either High Contracting Party shall within the territories of the other High Contracting Party receive protection and security with respect to the matters enumerated in paragraphs 1 and 2 of this Article, upon compliance with the applicable laws and regulations, no less than the protection and security which is or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party and no less than that which is or may hereafter be accorded to the nationals, corporations and associations of any third country. Moreover, in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public control, enterprises in which nationals, corporations and associations of either High Contracting Party have a substantial interest shall be accorded, within the territories of the other High Contracting Party, treatment no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of such other High Contracting Party have a substantial interest, and no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of any third country have a substantial interest.

4. The nationals, corporations and associations of either High Contracting Party shall enjoy freedom of access to the courts of justice and to administrative tribunals and agencies in the territories of the other High Contracting Party, in all degrees of jurisdiction established by law, both in pursuit and in defense of their rights; shall be at liberty to choose and employ lawyers and representatives in the prosecution and defense of their rights before such courts, tribunals and agencies; and shall be permitted to exercise all these rights and privileges, in conformity with the applicable laws and regulations, upon terms no less favorable than the terms which are or may hereafter be accorded to the nationals, corporations and associations of the other High Contracting Party and no less favorable than are or may hereafter be accorded to the nationals, corporations and associations of any third country. Moreover, corporations and associations of either High Contracting Party which are not engaged in business or in nonprofit activities within the territories of the other High Contracting Party shall be permitted to exercise the rights and privileges accorded by the preceding sentence without any requirement of registration or domestication.

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[3] See also para. 1 of protocol, p. 282, and paras. 5 and 6 of additional protocol, p. 285.

ARTICLE VI

The dwellings, warehouses, factories, shops, and other places of business, and all premises thereto appertaining, of the nationals, corporations and associations of either High Contracting Party, located in the territories of the other High Contracting Party, shall not be subject to unlawful entry or molestation. There shall not be made any visit to, or any search of, any such dwellings, buildings or premises, nor shall any books, papers or accounts therein be examined or inspected, except under conditions and in conformity with procedures no less favorable than the conditions and procedures prescribed for nationals, corporations and associations of such other High Contracting Party under the applicable laws and regulations within the territories thereof. In no case shall the nationals, corporations or associations of either High Contracting Party in the territories of the other High Contracting Party be treated less favorably with respect to the foregoing matters than the nationals, corporations or associations of any third country. Moreover, any visit, search, examination or inspection which may be permissible under the exception stated in this Article shall [be] made with due regard for, and in such a way as to cause the least possible interference with, the occupants of such dwellings, buildings or premises or the ordinary conduct of any business or other enterprise.

ARTICLE VII

1. The nationals, corporations and associations of either High Contracting Party shall be permitted to acquire, own and dispose of immovable property or interests therein within the territories of the other High Contracting Party upon the following terms:

(*a*) in the case of nationals, corporations and associations of the Italian Republic, the right to acquire, own and dispose of such property and interests shall be dependent upon the laws and regulations which are or may hereafter be in force within the state, territory or possession of the United States of America wherein such property or interests are situated; and

(*b*) in the case of nationals, corporations and associations of the United States of America, the right to acquire, own and dispose of such property and interests shall be upon terms no less favorable than those which are or may hereafter be accorded by the state, territory or possession of the United States of America in which such national is domiciled, or under the laws of which such corporation or association is created or organized, to nationals, corporations and associations of the Italian Republic; provided that the Italian Republic shall not be obligated to accord to nationals, corporations and associations of the United States of America rights in this connection more extensive than those which are or may hereafter be accorded within the

territories of such Republic to nationals, corporations and associations of such Republic.

2. If a national, corporation or association of either High Contracting Party, whether or not resident and whether or not engaged in business or other activities within the territories of the other High Contracting Party, is on account of alienage prevented by the applicable laws and regulations within such territories from succeeding as devisee, or as heir in the case of a national, to immovable property situated therein, or to interests in such property, then such national, corporation or association shall be allowed a term of three years in which to sell or otherwise dispose of such property or interests, this term to be reasonably prolonged if circumstances render it necessary. The transmission or receipt of such property or interests shall be exempt from the payment of any estate, succession, probate or administrative taxes or charges higher than those now or hereafter imposed in like cases of nationals, corporations or associations of the High Contracting Party in whose territory the property is or the interests therein are situated.

3. The nationals of either High Contracting Party shall have full power to dispose of personal property of every kind within the territories of the other High Contracting Party, by testament, donation or otherwise and their heirs, legatees or donees, being persons of whatever nationality or corporations or associations wherever created or organized, whether resident or non-resident and whether or not engaged in business within the territories of the High Contracting Party where such property is situated, shall succeed to such property, and shall themselves or by their agents be permitted to take possession thereof, and to retain or dispose of it at their pleasure. Such disposition, succession and retention shall be subject to the provisions of Article IX and exempt from any other charges higher, and from any restrictions more burdensome, than those applicable in like cases of nationals, corporations and associations of such other High Contracting Party. The nationals, corporations and associations of either High Contracting Party shall be permitted to succeed, as heirs, legatees and donees, to personal property of every kind within the territories of the other High Contracting Party, left or given to them by nationals of either High Contracting Party or by nationals of any third country, and shall themselves or by their agents be permitted to take possession thereof, and to retain or dispose of it at their pleasure. Such disposition, succession and retention shall be subject to the provisions of Article IX and exempt from any other charges, and from any restrictions, other or higher than those applicable in like cases of nationals, corporations and associations of such other High Contracting Party. Nothing in this paragraph shall be construed to affect the laws and regulations of either High Contracting Party prohibiting or restricting the direct or indirect ownership by aliens or foreign corporations and associations of the shares in, or instru-

ments of indebtedness of, corporations and associations of such High Contracting Party carrying on particular types of activities.

4. The nationals, corporations and associations of either High Contracting Party shall, subject to the exceptions in paragraph 3 of Article IX, receive treatment in respect of all matters which relate to the acquisition, ownership, lease, possession or disposition of personal property, no less favorable than the treatment which is or may hereafter be accorded to nationals, corporations and associations of any third country.

ARTICLE VIII

The nationals, corporations and associations of either High Contracting Party shall enjoy, within the territories of the other High Contracting Party, all rights and privileges of whatever nature in regard to patents, trade marks, trade labels, trade names and other industrial property, upon compliance with the applicable laws and regulations respecting registration and other formalities, upon terms no less favorable than are or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party, and no less favorable than the treatment now or hereafter accorded to nationals, corporations and associations of any third country.

ARTICLE IX

1. Nationals, corporations and associations of either High Contracting Party shall not be subjected to the payment of internal taxes, fees and charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of the other High Contracting Party:

(*a*) more burdensome than those borne by nationals, residents, and corporations and associations of any third country;

(*b*) more burdensome than those borne by nationals, corporations and associations of such other High Contracting Party, in the case of persons resident or engaged in business within the territories of such other High Contracting Party, and in the case of corporations and associations engaged in business therein, or organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

2. In the case of corporations and associations of either High Contracting Party engaged in business within the territories of the other High Contracting Party, and in the case of nationals of either High Contracting Party engaged in business within the territories of the other High Contracting Party but not resident therein, such other High Contracting Party shall not impose or apply any internal tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportion-

able to its territories. A comparable rule shall apply also in the case of corporations and associations organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

3. Notwithstanding the provisions of paragraph 1 of the present Article, each High Contracting Party reserves the right to: (*a*) extend specific advantages as to taxes, fees and charges to nationals, residents, and corporations and associations of all foreign countries on the basis of reciprocity; (*b*) accord to nationals, residents, and corporations and associations of a third country special advantages by virtue of an agreement with such country for the avoidance of double taxation or the mutual protection of revenue; and (*c*) accord to its own nationals and to residents of contiguous countries more favorable exemptions of a personal nature than are accorded to other nonresident persons.

Article X

Commercial travelers representing nationals, corporations or associations of either High Contracting Party engaged in business within the territories thereof, shall, upon their entry into and sojourn within the territories of the other High Contracting Party and on departure therefrom, be accorded treatment no less favorable than the treatment now or hereafter accorded to commercial travelers of any third country in respect of customs and other rights and privileges and, subject to the exceptions in paragraph 3 of Article IX, in respect of all taxes and charges applicable to them or to their samples.

Article XI

1. The nationals of either High Contracting Party shall, within the territories of the other High Contracting Party, be permitted to exercise liberty of conscience and freedom of worship, and they may, whether individually, collectively or in religious corporations or associations, and without annoyance or molestation of any kind by reason of their religious belief, conduct services, either within their own houses or within any other appropriate buildings, provided that their teachings or practices are not contrary to public morals or public order.

2. The High Contracting Parties declare their adherence to the principles of freedom of the press and of free interchange of information. To this end, nationals, corporations and associations of either High Contracting Party shall have the right, within the territories of the other High Contracting Party, to engage in such activities as writing, reporting and gathering of information for dissemination to the public, and shall enjoy freedom of transmisson of material to be used abroad for publication by the press, radio, motion pictures, and other means. The nationals, corporations and associations of either High Contracting Party shall enjoy freedom of publication in the territories of the other High Contracting Party, in accordance with the applicable laws

and regulations, upon the same terms as nationals, corporations or associations of such other High Contracting Party. The term "information", as used in this paragraph, shall include all forms of written communications, printed matter, motion pictures, recordings and photographs.[4]

3. The nationals of either High Contracting Party shall be permitted within the territories of the other High Contracting Party to bury their dead according to their religious customs in suitable and convenient places which are or may hereafter be established and maintained for the purpose, subject to the applicable mortuary and sanitary laws and regulations.

ARTICLE XII

1. The nationals of either High Contracting Party, regardless of alienage or place of residence, shall be accorded rights and privileges no less favorable than those accorded to the nationals of the other High Contracting Party, under laws and regulations within the territories of such other High Contracting Party that (*a*) establish a civil liability for injury or death, and give a right of action to an injured person, or to the relatives, heirs, dependents or personal representative as the case may be, of an injured or deceased person, or that (*b*) grant to a wage earner or an individual receiving salary, commission or other remuneration, or to his relatives, heirs or dependents, as the case may be, a right of action, or a pecuniary compensation or other benefit or service, on account of occupational disease, injury or death arising out of and in the course of employment or due to the nature of employment.

2. In addition to the rights and privileges provided in paragraph 1 of this Article, the nationals of either High Contracting Party shall, within the territories of the other High Contracting Party, be accorded, upon terms no less favorable than those applicable to nationals of such other High Contracting Party, the benefits of laws and regulations establishing systems of compulsory insurance, under which benefits are paid without an individual test of financial need: (*a*) against loss of wages or earnings due to old age, unemployment or sickness or other disability, or (*b*) against loss of financial support due to the death of father, husband or other person on whom such support had depended.

ARTICLE XIII

1. The nationals of each High Contracting Party shall be exempt, except as otherwise provided in paragraph 2 of this Article, from compulsory training or service in the armed forces of the other High Contracting Party, and shall also be exempt from all contributions in money or in kind imposed in lieu thereof.

2. During any period of time when both of the High Contracting Parties are, through armed action in connection with which there is general com-

[4] See also para. 5 of protocol, p. 283.

pulsory service, (*a*) enforcing measures against the same third country or countries in pursuance of obligations for the maintenance of international peace and security, or (*b*) concurrently conducting hostilities against the same third country or countries, the exemptions provided in paragraph 1 of this Article shall not apply. However, in such an event the nationals of either High Contracting Party in the territories of the other High Contracting Party, who have not declared their intention to acquire the nationality of such other High Contracting Party, shall be exempt from service in the armed forces of such other High Contracting Party if within a reasonable period of time they elect, in lieu of such service, to enter the armed forces of the High Contracting Party of which they are nationals. In any such situation the High Contracting Parties will make the necessary arrangements for giving effect to the provisions of this paragraph.

ARTICLE XIV

1. In all matters relating to (*a*) customs duties and subsidiary charges of every kind imposed on imports or exports and in the method of levying such duties and charges, (*b*) the rules, formalities, and charges imposed in connection with the clearing of articles through the customs, and (*c*) the taxation, sale, distribution or use within the country of imported articles and of articles intended for exportation, each High Contracting Party shall accord to articles the growth, produce or manufacture of the other High Contracting Party, from whatever place arriving, or to articles destined for exportation to the territories of such other High Contracting Party, by whatever route, treatment no less favorable than the treatment now or hereafter accorded to like articles the growth, produce or manufacture of, or destined for, any third country.

2. With respect to the matters referred to in paragraph 1 of this Article, the nationals, corporations and associations of either High Contracting Party shall be accorded, within the territories of the other High Contracting Party, treatment no less favorable than the treatment which is or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party; and with respect to such matters the nationals, corporations and associations, vessels and cargoes of either High Contracting Party shall be accorded, within the territories of the other High Contracting Party, treatment no less favorable than the treatment which is or may hereafter be accorded to nationals, corporations and associations, vessels and cargoes of any third country.

3. No prohibition or restriction of any kind shall be imposed by either High Contracting Party on the importation, sale, distribution or use of any article the growth, produce or manufacture of the other High Contracting Party, or on the exportation of any article destined for the territories of the other High Contracting Party, unless the importation, sale, distribution or

use of the like article the growth, produce or manufacture of all third countries, or the exportation of the like article to all third countries, respectively, is similarly prohibited or restricted.[5]

4. If either High Contracting Party imposes any quantitative regulation, whether made effective through quotas, licenses or other measures, on the importation or exportation of any article, or on the sale, distribution or use of any imported article, it shall as a general rule give public notice of the total quantity or value of such article permitted to be imported, exported, sold, distributed or used during a specified period, and of any change in such quantity or value. Furthermore, if either High Contracting Party allots to any third country a share of such total quantity or value of any article in which the other High Contracting Party has an important interest, it shall as a general rule allot to such other High Contracting Party a share of such total quantity or value based upon the proportion of the total quantity or value supplied by, or in the case of exports a share based upon the proportion exported to, the territories of such other High Contracting Party during a previous representative period, account being taken in so far as practicable of any special factors which may have affected or may be affecting the trade in that article. The provisions of this paragraph relating to imported articles shall also apply in respect of the quantity or value of any article permitted to be imported free of duty or tax, or at a lower rate of duty or tax than the rate of duty or tax imposed on imports in excess of such quantity or value.[5]

5. If either High Contracting Party requires documentary proof of origin of imported articles, the requirements imposed therefor shall be reasonable and shall not be such as to constitute an unnecessary hindrance to indirect trade.

Article XV

1. Laws, regulations of administrative authorities and decisions of administrative or judicial authorities of each High Contracting Party that have general application and that pertain to the classification of articles for customs purposes or to rates of duty shall be published promptly in such a manner as to enable traders to become acquainted with them. Such laws, regulations and de isions shall be applied uniformly at all ports of each High Contracting Party, except as otherwise specifically provided for in statutes of the United States of America with respect to the importation of articles into its insular territories and possessions.

2. No administrative ruling by the United States of America effecting advances in rates of duties or charges applicable under an established and uniform practice to imports originating in the territories of the Italian Republic, or imposing any new requirement with respect to such importations, shall as a general rule be applied to articles the growth, produce or manu-

[5] See also paras. 1 and 2 of additional protocol, p. 283.

facture of the Italian Republic already en route at the time of publication thereof in accordance with the preceding paragraph; reciprocally, no administrative ruling by the Italian Republic effecting advances in rates of duties or charges applicable under an established and uniform practice to imports originating in the territories of the United States of America, or imposing any new requirement with respect to such importations, shall as a general rule be applied to articles the growth, produce or manufacture of the United States of America already en route at the time of publication thereof in accordance with the preceding paragraph. However, if either High Contracting Party customarily exempts from such new or increased obligations articles entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the date of such publication, such practice shall be considered full compliance by such High Contracting Party with this paragraph. The provisions of this paragraph shall not apply to administrative orders imposing antidumping or countervailing duties or relating to regulations for the protection of human, animal or plant life or health, or relating to public safety, or giving effect to judicial decisions.

3. Each High Contracting Party shall provide some administrative or judicial procedure under which the nationals, corporations and associations of the other High Contracting Party, and importers of articles the growth, produce or manufacture of such other High Contracting Party, shall be permitted to appeal against fines and penalties imposed upon them by the customs authorities, confiscations by such authorities and rulings of such authorities on questions of customs classification and of valuation of articles for customs purposes. Greater than nominal penalties shall not be imposed by either High Contracting Party in connection with any importation by the nationals, corporations or associations of the other High Contracting Party, or in connection with the importation of articles the growth, produce or manufacture of such other High Contracting Party, because of errors in documentation which are obviously clerical in origin or with regard to which good faith can be established.

4. Each High Contracting Party will accord sympathetic consideration to such representations as the other High Contracting Party may make with respect to the operation or administration of import or export prohibitions or restrictions, quantitative regulations, customs regulations or formalities, or sanitary laws or regulations for the protection of human, animal or plant life or health.

ARTICLE XVI

1. Articles the growth, produce or manufacture of either High Contracting Party, imported into the territories of the other High Contracting Party, shall be accorded treatment with respect to all matters affecting internal taxation, or the sale, distribution or use within such territories, no less favor-

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able than the treatment which is or may hereafter be accorded to like articles of national origin.[6]

2. Articles grown, produced or manufactured within the territories of either High Contracting Party in whole or in part by nationals, corporations and associations of the other High Contracting Party, or by corporations and associations of the High Contracting Party within the territories of which such articles are grown, produced or manufactured which are controlled by nationals, corporations and associations of the other High Contracting Party, shall be accorded within such territories treatment with respect to all matters affecting internal taxation, or the sale, distribution or use therein, or exportation therefrom, no less favorable than the treatment now or hereafter accorded to like articles grown, produced or manufactured therein in whole or in part by nationals, corporations and associations of the High Contracting Party within the territories of which the articles are grown, produced or manufactured, or by corporations and associations of such High Contracting Party which are controlled by such nationals, corporations and associations. The articles specified in the preceding sentence shall not in any case receive treatment less favorable than the treatment which is or may hereafter be accorded to like articles grown, produced or manufactured in whole or in part by nationals, corporations and associations of any third country, or by corporations and associations controlled by such nationals, corporations and associations.

3. In all matters relating to export bounties, customs drawbacks and the warehousing of articles intended for exportation, the nationals, corporations and associations of either High Contracting Party shall be accorded within the territories of the other High Contracting Party treatment no less favorable than the treatment which is or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party.

Article XVII

1. The treatment prescribed in this Article shall apply to all forms of control of financial transactions, including (*a*) limitations upon the availability of media necessary to effect such transactions, (*b*) rates of exchange, and (*c*) prohibitions, restrictions, delays, taxes, charges and penalties on such transactions; and shall apply whether a transaction takes place directly, or through an intermediary in another country. As used in this Article, the term "financial transactions" means all international payments and transfers of funds effected through the medium of currencies, securities, bank deposits, dealings in foreign exchange or other financial arrangements, regardless of the purpose or nature of such payments and transfers.

2. Financial transactions between the territories of the two High Contracting Parties shall be accorded by each High Contracting Party treatment

[6] See also para. 3 of additional protocol, p. 284.

no less favorable than that now or hereafter accorded to like transactions between the territories of such High Contracting Party and the territories of any third country.

3. Nationals, corporations and associations of either High Contracting Party shall be accorded by the other High Contracting Party treatment no less favorable than that now or hereafter accorded to nationals, corporations and associations of such other High Contracting Party and no less favorable than that now or hereafter accorded to nationals, corporations and associations of any third country, with respect to financial transactions between the territories of the two High Contracting Parties or between the territories of such other High Contracting Party and of any third country.

4. In general, any control imposed by either High Contracting Party over financial transactions shall be so administered as not to influence disadvantageously the competitive position of the commerce or investment of capital of the other High Contracting Party in comparison with the commerce or the investment of capital of any third country.

ARTICLE XVIII

1. If either High Contracting Party establishes or maintains a monopoly or agency for the importation, exportation, purchase, sale, distribution or production of any article, or grants exclusive privileges to any agency to import, export, purchase, sell, distribute or produce any article, such monopoly or agency shall accord to the commerce of the other High Contracting Party fair and equitable treatment in respect of its purchases of articles the growth, produce or manufacture of foreign countries and its sales of articles destined for foreign countries. To this end, the monopoly or agency shall, in making such purchases or sales of any article, be influenced solely by considerations, such as price, quality, marketability, transportation and terms of purchase or sale, which would ordinarily be taken into account by a private commercial enterprise interested solely in purchasing or selling such article on the most favorable terms. If either High Contracting Party establishes or maintains a monopoly or agency for the sale of any service or grants exclusive privileges to any agency to sell any service, such monopoly or agency shall accord fair and equitable treatment to the other High Contracting Party and to the nationals, corporations and associations and to the commerce thereof in respect of transactions involving such service as compared with the treatment which is or may hereafter be accorded to any third country and to the nationals, corporations and associations and to the commerce thereof.[7]

2. Each High Contracting Party, in the awarding of concessions and other contracts, and in the purchasing of supplies, shall accord fair and equitable treatment to the nationals, corporations and associations and to

[7] See also para. 3 of protocol, p. 283.

the commerce of the other High Contracting Party as compared with the treatment which is or may hereafter be accorded to the nationals, corporations and associations and to the commerce of any third country.

3. The two High Contracting Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among public or private commercial enterprises may have harmful effects upon the commerce between their respective territories. Accordingly, each High Contracting Party agrees upon the request of the other High Contracting Party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects.

ARTICLE XIX

1. Between the territories of the 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 national law in proof of nationality, shall be deemed to be vessels of that High Contracting Party both within the ports, places and waters of the other High Contracting Party and on the high seas. As used in this Treaty, "vessels" shall be construed to include all vessels of either High Contracting Party whether privately owned or operated or publicly owned or operated. However, the provisions of this Treaty other than this paragraph and paragraph 4 of Article XX shall not be construed to accord rights to vessels of war or fishing vessels of the other High Contracting Party; nor shall they be construed to extend to nationals, corporations and associations, vessels and cargoes of, or to articles the growth, produce or manufacture of, such other High Contracting Party any special privileges restricted to national fisheries or the products thereof.

3. The vessels of either High Contracting Party shall have liberty, equally with the vessels of any third country, to come with their cargoes to all ports, places and waters of the other High Contracting Party which are or may hereafter be open to foreign commerce and navigation.

ARTICLE XX

1. The vessels and cargoes of either High Contracting Party shall, within the ports, places and waters of the other High Contracting Party, in all respects be accorded treatment no less favorable than the treatment accorded to the vessels and cargoes of such other High Contracting Party, irrespective of the port of departure or the port of destination of the vessel, and irrespective of the origin or the destination of the cargo.

2. No duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges, of whatever kind or denom-

ination, levied in the name or for the profit of the government, public functionaries, private individuals, corporations or establishments of any kind, shall be imposed in the ports, places and waters of either High Contracting Party upon the vessels of the other High Contracting Party, which shall not equally and under the same conditions be imposed upon national vessels.

3. No charges upon passengers, passenger fares or tickets, freight moneys paid or to be paid, bills of lading, contracts of insurance or re-insurance, no conditions relating to the employment of ship brokers, and no other charges or conditions of any kind, shall be imposed in a way tending to accord any advantage to national vessels as compared with the vessels of the other High Contracting Party.

4. If a vessel of either High Contracting Party shall be forced by stress of weather or by reason of any other distress to take refuge in any of the ports, places or waters of the other High Contracting Party not open to foreign commerce and navigation, it shall receive friendly treatment and assistance and such repairs, as well as supplies and materials for repair, as may be necessary and available. This paragraph shall apply to vessels of war and fishing vessels, as well as to vessels as defined in paragraph 2 of Article XIX.

5. The vessels and cargoes of either High Contracting Party shall not in any case, with respect to the matters referred to in this Article, receive treatment less favorable than the treatment which is or may hereafter be accorded to the vessels and cargoes of any third country.

Article XXI

1. It shall be permissible, in the vessels of either High Contracting Party, to import into the territories of the other High Contracting Party, or to export therefrom, all articles which it is or may hereafter be permissible to import into such territories, or to export therefrom, in the vessels of such other High Contracting Party or of any third country; and such articles shall not be subject to any higher duties or charges whatever than those to which the articles would be subject if they were imported or exported in vessels of the other High Contracting Party or of any third country.

2. Bounties, drawbacks and other privileges of this nature of whatever kind or denomination which are or may hereafter be allowed, in the territories of either High Contracting Party, on articles imported or exported in national vessels or vessels of any third country shall also and in like manner be allowed on articles imported or exported in vessels of the other High Contracting Party.

Article XXII

1. Vessels of either High Contracting Party shall be permitted to discharge portions of cargoes, including passengers, at any ports, places or waters of the other High Contracting Party which are or may hereafter be open to foreign commerce and navigation, and to proceed with the remaining

portions of such cargoes or passengers to any other such ports, places or waters, without paying 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, in the same voyage outward, at the various ports, places and waters which are or may hereafter be open to foreign commerce and navigation. The vessels and cargoes of either High Contracting Party shall be accorded, with respect to the matters referred to in this paragraph, treatment in the ports, places and waters of the other High Contracting Party no less favorable than the treatment which is or may hereafter be accorded to the vessels and cargoes of any third country.

2. The coasting trade and inland navigation of each High Contracting Party are excepted from the requirements of national and most-favored-nation treatment.

ARTICLE XXIII

There shall be freedom of transit through the territories of each High Contracting Party by the routes most convenient for international transit (*a*) for persons who are nationals of any third country, together with their baggage, directly or indirectly coming from or going to the territories of the other High Contracting Party, (*b*) for persons who are nationals of the other High Contracting Party, together with their baggage, regardless of whether they are coming from or going to the territories of such other High Contracting Party, and (*c*) for articles directly or indirectly coming from or going to the territories of the other High Contracting Party. Such persons, baggage and articles in transit shall not be subject to any transit duty, to any unnecessary delays or restrictions, or to any discrimination in respect of charges, facilities or any other matter; and all charges and regulations prescribed in respect of such persons, baggage or articles shall be reasonable, having regard to the conditions of the traffic. Either High Contracting Party may require that such baggage and articles be entered at the proper customhouse and that they be kept whether or not under bond in customs custody; but such baggage and articles shall be exempt from all customs duties or similar charges if such requirements for entry and retention in customs custody are complied with and if they are exported within one year and satisfactory evidence of such exportation is presented to the customs authorities. Such nationals, baggage, persons and articles shall be accorded treatment with respect to all charges, rules and formalities in connection with transit no less favorable than the treatment which is or may hereafter be accorded to the nationals of any third country, together with their baggage, or to persons and articles coming from or going to the territories of any third country.

ARTICLE XXIV

1. Nothing in this Treaty shall be construed to prevent the adoption or enforcement by either High Contracting Party of measures:

(*a*) relating to the importation or exportation of gold or silver;

(*b*) relating to the exportation of objects the value of which derives primarily from their character as works of art, or as antiquities, of national interest or from their relationship to national history, and which are not in general practice considered articles of commerce;

(*c*) relating to fissionable materials, to materials which are the source of fissionable materials, or to radio-active materials which are by-products of fissionable materials;

(*d*) relating to the production of and traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;

(*e*) necessary in pursuance of obligations for the maintenance of international peace and security, or necessary for the protection of the essential interests of such High Contracting Party in time of national emergency; or

(*f*) imposing exchange restrictions, as a member of the International Monetary Fund, in conformity with the Articles of Agreement thereof signed at Washington December 27, 1945,[8] but without utilizing its privileges under Article VI, section 3, of that Agreement so as to impair any provision of this Treaty; provided that either High Contracting Party may, nevertheless, regulate capital transfers to the extent necessary to insure the importation of essential good or to effect a reasonable rate of increase in very low monetary reserves or to prevent its monetary reserves from falling to a very low level. If the International Monetary Fund should cease to function, or if either High Contracting Party should cease to be a member thereof, the two High Contracting Parties, upon the request of either High Contracting Party, shall consult together and may conclude such arrangements as are necessary to permit appropriate action in contingencies relating to international financial transactions comparable with those under which exceptional action had previously been permissible.

2. Subject to the requirement that, under like circumstances and conditions, there shall be no arbitrary discrimination by either High Contracting Party against the other High Contracting Party or against the nationals, corporations, associations, vessels or commerce thereof, in favor of any third country or the nationals, corporations, associations, vessels or commerce thereof, the provisions of this Treaty shall not extend to prohibitions or restrictions:

(*a*) imposed on moral or humanitarian grounds;

(*b*) designed to protect human, animal or plant life or health;

(*c*) relating to prison-made goods; or

(*d*) relating to the enforcement of police or revenue laws.

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[8] TIAS 1501, *ante*, vol. 3, p. 1351.

3. The provisions of this Treaty according treatment no less favorable than the treatment accorded to any third country shall not apply to:

(*a*) advantages which are or may hereafter be accorded to adjacent countries in order to facilitate frontier traffic;

(*b*) advantages accorded by virtue of a customs union of which either High Contracting Party may, after consultation with the other High Contracting Party, become a member so long as such advantages are not extended to any country which is not a member of such customs union;

(*c*) advantages accorded to third countries pursuant to a multilateral economic agreement of general applicability, including a trade area of substantial size, having as its objective the liberalization and promotion of international trade or other international economic intercourse, and open to adoption by all the United Nations; [9]

(*d*) advantages now accorded or which may hereafter be accorded by the Italian Republic to San Marino, to the Free Territory of Trieste or to the State of Vatican City, or by the United States of America or its territories or possessions to one another, to the Panama Canal Zone, to the Republic ing Party to areas other than those enumerated in subparagraph (*d*) of the Pacific Islands; or

(*e*) advantages which, pursuant to a decision made by the United Nations or an organ thereof or by an appropriate specialized agency in relationship with the United Nations, may hereafter be accorded by either High Contracting Party to areas other than those enumerated in subparagraph (*d*) of the present paragraph.

The provisions of subparagraph (*d*) shall continue to apply in respect of any advantages now or hereafter accorded by the United States of America or its territories or possessions to one another irrespective of any change in the political status of any of the territories or possessions of the United States of America.

4. The provisions of this Treaty shall not be construed to accord any rights or privileges to persons, corporations and associations to engage in political activities, or to organize or participate in political corporations and associations.

5. Each High Contracting Party reserves the right to deny any of the rights and privileges accorded by this Treaty to any corporation or association created or organized under the laws and regulations of the other High Contracting Party in the ownership or direction of which nationals of any third country or countries have directly or indirectly a controlling interest.

6. No enterprise of either High Contracting Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, proc-

[9] For an understanding relating to para. 3(*c*) of art. XXIV, see exchange of notes, p. 287.

essing, 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, from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein.

7. The provisions of this Treaty shall not be construed to affect existing laws and regulations of either High Contracting Party in relation to immigration or the right of either High Contracting Party to adopt and enforce laws and regulations relating to immigration; provided, however, that nothing in this paragraph shall prevent the nationals of either High Contracting Party from entering, traveling and residing in the territories of the other High Contracting Party in order to carry on trade between the two High Contracting Parties or to engage in any commercial activity related thereto or connected therewith, upon terms as favorable as are or may hereafter be accorded to the nationals of any third country entering, traveling and residing in such territories in order to carry on trade between such other High Contracting Party and such third country or to engage in commercial activity related to or connected with such trade.

ARTICLE XXV

Subject to any limitation or exception provided in this Treaty or hereafter agreed upon between the High Contracting Parties, the territories of the High Contracting Parties to which the provisions of this Treaty extend shall be understood to comprise all areas of land and water under the sovereignty or authority of either of the High Contracting Parties, other than the Canal Zone, and other than the Trust Territory of the Pacific Islands except to the extent that the President of the United States of America shall by proclamation extend provisions of the Treaty to such Trust Territory.

ARTICLE XXVI

Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means.

ARTICLE XXVII

1. This Treaty shall be ratified, and the ratifications thereof shall be exchanged at Rome as soon as possible.

2. This Treaty shall enter into force on the day of the exchange of ratifications, and shall continue in force for a period of ten years from that day.

259-517—72——20

3. Unless one year before the expiration of the aforesaid period of ten years either High Contracting Party shall have given written notice to the other High Contracting Party of intention to terminate this Treaty upon the expiration of the aforesaid period, the Treaty shall continue in force thereafter until one year from the date on which written notice of intention to terminate it shall have been given by either High Contracting Party.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed this Treaty and have affixed hereunto their seals.

DONE in duplicate, in the English and Italian languages, both equally authentic, at Rome, this second day of February one thousand nine hundred forty-eight.

For the Government of the United States of America:

JAMES CLEMENT DUNN

For the Italian Government:

SFORZA

PROTOCOL

At the time of signing the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, the undersigned Plenipotentiaries, duly authorized by their respective Governments, have further agreed on the following provisions, which shall be considered as integral parts of said Treaty:

1. The provisions of paragraph 2 of Article V, providing for the payment of compensation, shall extend to interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party.

2. Rights and privileges with respect to commercial, manufacturing and processing activities accorded, by the provisions of the Treaty, to privately owned and controlled enterprises of either High Contracting Party within the territories of the other High Contracting Party shall extend to rights and privileges of an economic nature granted to publicly owned or controlled enterprises of such other High Contracting Party, in situations in which such publicly owned or controlled enterprises operate in fact in competition with privately owned and controlled enterprises. The preceding sentence shall not, however, apply to subsidies granted to publicly owned or controlled enterprises in connection with: (*a*) manufacturing or processing 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 practicably obtainable by such groups.

3. The concluding sentence of paragraph 1 of Article XVIII shall not be construed as applying to postal services.

4. The provisions of paragraph 2(*a*) of Article I shall not be construed to extend to the practice of professions the members of which are designated by law as public officials.

5. The provisions of paragraph 2 of Article XI shall not be construed to affect measures taken by either High Contracting Party to safeguard military secrets.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed this Protocol and have affixed hereunto their seals.

DONE in duplicate, in the English and Italian languages, both equally authentic, at Rome this second day of February one thousand nine hundred forty-eight.

For the Government of the United States of America:
JAMES CLEMENT DUNN

For the Italian Government:
SFORZA

ADDITIONAL PROTOCOL

In view of the grave economic difficulties facing Italy now and prospectively as a result of, *inter alia,* the damage caused by the late military operations on Italian soil; the looting perpetrated by the German forces following the Italian declaration of war against Germany; the present inability of Italy to supply, unassisted, the minimum needs of its people or the minimum requirements of Italian economic recovery; and Italy's lack of monetary reserves; at the time of signing the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, the undersigned Plenipotentiaries, duly authorized by their respective Governments, have further agreed on the following provisions, which shall be considered as integral parts of said Treaty:

1. The provisions of paragraph 3 of Article XIV of the abovementioned Treaty and that part of paragraph 4 of the same Article which relates to the allocation of shares, shall not obligate either High Contracting Party with respect to the application of quantitative restrictions on imports and exports:

(*a*) that have effect equivalent to exchange restrictions authorized in conformity with section 3(*b*) of Article VII of the Articles of Agreement of the International Monetary Fund;

(*b*) that are necessary to secure, during the early post-war transitional period, the equitable distribution among the several consuming countries of goods in short supply;

(*c*) that are necessary in order to effect, for the purchase of imports, the utilization of accumulated inconvertible currencies; or

(*d*) that have effect equivalent to exchange restrictions permitted under section 2 of Article XIV of the Articles of Agreement of the International Monetary Fund.

2. The privileges accorded to either High Contracting Party by subparagraphs (*c*) and (*d*), paragraph 1, of the present Protocol, shall be limited to situations in which (*a*) it is necessary for such High Contracting Party to apply restrictions on imports in order to forestall the imminent threat of, or to stop, a serious decline in the level of its monetary reserves or, in the case of very low monetary reserves, to achieve a reasonable rate of increase in its reserves, and (*b*) the application of the necessary restrictions in the manner permitted by the aforesaid paragraph 1 will yield such High Contracting Party a volume of imports above the maximum level which would be possible if such restrictions were applied in the manner prescribed in paragraphs 3 and 4 of Article XIV of the Treaty.

3. During the current transitional period of recovery from the recent war, the provisions of Article XVI, paragraph 1, of the Treaty shall not prevent the application by either High Contracting Party of needed controls to the internal sale, distribution or use of imported articles in short supply, other than or different from controls applied with respect to like articles of national origin. However, no such controls over the internal distribution of imported articles shall be (*a*) applied by either High Contracting Party in such a manner as to cause unnecessary injury to the competitive position within its territories of the commerce of the other High Contracting Party, or (*b*) continued longer than required by the supply situation.

4. Neither High Contracting Party shall impose any new restriction under paragraph 1 of the present Protocol without having given the other High Contracting Party notice thereof which shall, if possible, be not less than thirty days in advance and shall not in any event be less than ten days in advance. Each High Contracting Party shall afford to the other High Contracting Party opportunity for consultation at any time concerning the need for and the application of restrictions to which such paragraph relates as well as concerning the application of paragraph 3; and either High Contracting Party shall have the right to invite the International Monetary Fund to participate in such consultation, with reference to restrictions to which subparagraphs (*a*), (*c*) and (*d*) of paragraph 1 relate.

5. Whenever exchange difficulties necessitate that pursuant to Article XXIV, paragraph 1(*f*), the Italian Government regulate the withdrawals provided for in Article V, paragraph 2, the Italian Government may give priority to applications made by nationals, corporations and associations of the United States of America to withdraw compensation received on account of property acquired on or before December 8, 1934, or, if subsequently acquired:

(*a*) in the case of immovable property, if the owner at the time of acquisition had permanent residence outside Italy, or, if a corporation or association, had its center of management outside Italy;

(*b*) in the case of shares of stock, if at the time of acquisition Italian laws and regulations permitted such shares to be traded outside Italy;

(*c*) in the case of bank deposits, if carried on free account at the time of taking;

(*d*) in any case, if the property was acquired through importing foreign exchange, goods or services into Italy, or through reinvestments of profits or accrued interest from such imports whenever made.

The Italian Government undertakes to grant every facility to assist applicants in establishing their status for the purposes of this paragraph; and to accept evidence of probative value as establishing, in the absence of preponderant evidence to the contrary, a priority claim.

6. Whenever a multiple exchange rate system is in effect in Italy, the rate of exchange which shall be applicable for the purposes of Article V, paragraph 2, need not be the most favorable of all rates applicable to international financial transactions of whatever nature; provided, however, that the rate applicable will in any event permit the recipient of compensation actually to realize the full economic value thereof in United States dollars. In case dispute arises as to the rate applicable, the rate shall be determined by agreement between the High Contracting Parties.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed this Protocol and have affixed hereunto their seals.

DONE in duplicate, in the English and Italian languages, both equally authentic, at Rome, this second day of February one thousand nine hundred forty-eight.

For the Government of the United States of America
JAMES CLEMENT DUNN

For the Italian Government
SFORZA

EXCHANGES OF NOTES

The American Ambassador to the Minister of Foreign Affairs

F.O. No. 827 ROME, *February 2, 1948*

EXCELLENCY:

I have the honor to refer to the proposals advanced by representatives of your Government, during the course of negotiations for the Treaty of Friendship, Commerce and Navigation signed this day, for facilitating and expanding the cultural relations between the peoples of our two countries.

I take pleasure in informing you that my Government, recognizing the importance of cultural ties between nations as developing increased understanding and friendship, will undertake to stimulate and foster cultural relations between our two countries, including the interchange of professors, students, and professional and academic personnel between the territories of the United States of America and of Italy, and agrees to discuss at a later time the possibility of agreements designed to establish arrangements whereby such interchange may be facilitated and whereby the cultural bonds between the two peoples may generally be strengthened.

cept, Excellency, the renewed assurances of my highest consideration.

JAMES CLEMENT DUNN

His Excellency
Count CARLO SFORZA,
Minister of Foreign Affairs,
Rome.

The Minister of Foreign Affairs to the American Ambassador

[TRANSLATION]

THE MINISTER OF FOREIGN AFFAIRS

ROME, *February 2, 1948*

EXCELLENCY:

I have the honor to refer to Your Excellency's note of this date, which reads as follows:

[For text of U.S. note, see above.]

I have the honor to inform Your Excellency that the Italian Government will undertake, for its part, to stimulate and foster cultural relations, including the interchange of professors, students and academic personnel, and to discuss the possibility of cultural agreements between our two Governments in accordance with the ideas expressed in Your Excellency's note.

I take pleasure in availing myself of this occasion, Excellency, to renew to you the assurances of my highest consideration.

SFORZA

To His Excellency
JAMES CLEMENT DUNN,
Ambassador of the United States of America
Rome.

The American Ambassador to the Minister of Foreign Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA

F.O. No. 3170

EXCELLENCY,

I have the honor to refer to paragraph 3(c) of Article XXIV of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic signed at Rome on February 2, 1948, and to inform Your Excellency that it is the understanding of the Government of the United States of America that the provisions of the aforesaid Treaty relating to the treatment of goods do not preclude action by either of the parties thereto which is required or specifically permitted by the General Agreement on Tariffs and Trade [10] or by the Havana Charter for an International Trade Organization,[11] during such time as the party applying such measures is a contracting party to the General Agreement or is a member of the International Trade Organization, as the case may be.

I shall be glad if Your Excellency will confirm this understanding on behalf of the Government of the Italian Republic.

Accept, Excellency, the renewed assurances of my highest consideration.

JAMES CLEMENT DUNN

ROME, *July 26, 1949.*

His Excellency
Count CARLO SFORZA
Minister of Foreign Affairs
Rome

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[10] TIAS 1700, *ante,* vol. 4, p. 641.
[11] Unperfected; for excerpts, see *A Decade of American Foreign Policy: Basic Documents, 1941–49* (S. Doc. 123, 81st Cong., 1st sess.), p. 391.

The Minister of Foreign Affairs to the American Ambassador

[TRANSLATION]

MINISTRY OF FOREIGN AFFAIRS

ROME, *July 26, 1949*

EXCELLENCY:

I have the honor to refer to your letter dated today in which, referring to paragraph 3 (c) of Article XXIV of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, signed at Rome on February 2, 1948, you inform me that it is the understanding of the Government of the United States of America that the provisions of the aforesaid Treaty relating to the treatment of goods do not preclude action by either of the parties thereto which is required or specifically permitted by the General Agreement on Tariffs and Trade or by the Havana Charter for an International Trade Organization, during such time as the party applying such measures is a contracting party to the General Agreement or is a member of the International Trade Organization.

I have the honor to inform you that the Italian Government agrees to the foregoing.

Accept, Excellency, the assurances of my high consideration.

SFORZA

His Excellency
JAMES CLEMENT DUNN
Ambassador of the United States of America
Rome

ANNEX 377

Date of dispatch to the parties:
April 29, 1999

AWARD

in the Arbitration ARB/94/2 of the

International Centre for Settlement of Investment Disputes
(ICSID)

Tradex Hellas S.A. (Greece)

represented by Mr. E. Koronis
Counsel: Prof. L. Georgakopoulos

vs.

Republic of Albania
represented by the
Ministry of Agriculture and Food
which was represented
by Ms. Rezarta Gaba
by Mr. Sali Metani
and by Ms. Julinda Hajno

Counsel: Prof. James Crawford
Mr. Philippe Sands

by the Arbitral Tribunal
consisting of
Prof. Dr. Karl-Heinz Böckstiegel, President
Mr. Fred F. Fielding, Esquire, Arbitrator
Prof. Andrea Giardina, Arbitrator

Date of Award:

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72. Though Article 4 also mentions "Nationalization" as a possible basis for a claim, Tradex has not alleged that its investment was nationalized and, therefore, this aspect of a possible claim also does not have to be considered.

F. Reasons for the Decisions

1. Burden of Proof

73. As many factual aspects of this Case are disputed between the Parties, the Tribunal at the outset has to establish who has the burden of proof, i.e. who has to show the elements required as conditions for the claim, and—insofar as they are disputed—has to prove them to the satisfaction of the Tribunal.

74. As seen above, the conditions for the compensation claimed by Tradex are mentioned in Art. 4 and 5 of the 1993 Law. The wording of these provisions confirms what can be considered as a general principle of international procedure—and probably also of virtually all national civil procedural laws—, namely that it is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim. In the ICSID Case Arb/87/3, Asian Agricultural Products Ltd. v. Republic of Sri Lanka (published in 6 ICSID Review— Foreign Investment Law Journal (1991), p. 527 seq.) the Tribunal considered this to be one of the "established international law rules" (at p. 549), relying on Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, Cambridge 1987, p. 327, and further sources. Relying also on Bin Cheng (p. 329-331, with quotations from further supporting authorities), the Tribunal also considered as an established international law rule that "A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof" (at p. 549).

75. Thus, taking these considerations into account, this Tribunal concludes that Tradex has the burden of proof, in the above sense, for the conditions required in the 1993 Law to establish its claim for compensation.

2. Rules of Evidence

76. After having established which Party, in principle, has the burden of proof, the Tribunal must now clarify the rules of evidence applicable in this Case in order to establish the procedural framework within which it has to decide whether or not a disputed fact has, indeed, been proved.

77. Primarily, the rules on evidence in this Case are established by Rules 33 to 37 of the ICSID Arbitration Rules. Particularly relevant is Rule 34 (1):

ANNEX 378

GENERAL PRINCIPLES OF LAW

as applied by

INTERNATIONAL COURTS AND TRIBUNALS

BY

BIN CHENG, PH.D., LICENCIÉ EN DROIT
Lecturer in International Law
University College, London

$75.00

WITH A FOREWORD BY

GEORG SCHWARZENBERGER, PH.D., DR.JUR.
Reader in International Law in the University of London;
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Reprint

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Annex 378

of information exclusively in the possession of another party, and this well-known principle of domestic law is one which it seems to me an international tribunal is justified in giving application in a proper case." [4]

An attempt has been made above to elicit some of the "common-sense principles underlying rules of evidence" as they have been applied by international tribunals. It is quite natural, if not inevitable, that these principles should be the same in different legal systems, since, in the final analysis, they merely represent the concrete embodiment of the long experience of judges in seeking to ascertain the truth. To sum up, the words of the British Commissioner in the *Mexico City Bombardment Claims* (1930) may be quoted:—

"If, after giving due weight to all these considerations, it [the Commission] feels a reasonable doubt as to the truth of any alleged fact, that fact cannot be said to be proved. But if the Commissioners, acting as reasonable men of the world and bearing in mind the facts of human nature, do feel convinced that a particular event occurred or state of affairs existed, they should accept such things as established." [5]

In dubio pro reo. [6]

BURDEN OF PROOF

We may now turn to the question of burden of proof and inquire whether international tribunals admit the existence of any general principles of law governing its incidence.

In this connection, the *Parker Case* (1926), decided by the Mexican-United States General Claims Commission (1923), needs to be carefully examined; for the language used by the Commission in that case has sometimes given rise to the impression [7] that, contrary to the view generally accepted by

[4] Mex.-U.S. G.C.C. (1923): *Op. of Com., 1929*, p. 61, at p. 65.

[5] Brit.-Mex. Cl.Com. (1926): D.O. by British Commissioner, *Dec. & Op. of Com.* p. 100, at p. 109.

[6] Span.-U.S. Cl.Com. (1871): *Zaldivar Case* (1882), 3 *Int.Arb.*, p. 2982. U.S.-Ven. M.C.C. (1903): *Gage Case*, *Ven.Arb. 1903*, p. 164, at p. 167. ICJ: *Corfu Channel Case* (Merits) (1949), D.O. by Ečer, *ICJ Reports 1949*, p. 4, at pp. 120, 124, 129.

[7] See Fran.-Mex. Cl.Com. (1924): *Pinson Case* (1928), *Jurisprudence*, p. 1, at pp. 94–5.

international tribunals, it gave a negative answer to the question.[8]

In the first place, the Commission held as follows:—

"The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as 'universal principles of law,' or 'the general theory of law,' and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with a view of discovering the whole truth with respect to each claim submitted. . . . As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure."[9]

It may, however, be pointed out that, with regard to principles of adjective law in general, the reference in the decision to "'universal principles of law,' or 'the general theory of law,' and the like," relates only to the misuse of these terms to cover "municipal restrictive rules of adjective law or of evidence" and in no way excludes *a priori* the existence of true general principles of adjective law applicable to all legal systems; for the same Commission clearly recognised that "with respect to matters of evidence they [international tribunals] must give effect to common-sense principles underlying rules of evidence in domestic law."[10]

With regard to the incidence of the burden of proof in particular, international judicial decisions are not wanting which expressly hold that there exists a general principle of law placing the burden of proof upon the claimant and that this principle is applicable to international judicial proceedings. In *The Queen Case* (1872), for instance, it was held that:—

"One must follow, as a general rule of solution, the principle of jurisprudence, accepted by the law of all countries, that it is for the claimant to make the proof of his claim."[11]

[8] *Op. of Com., 1927*, p. 35, at pp. 39–40.
[9] *Ibid.*, at p. 39.
[10] See *supra*, p. 308.
[11] 2 *Arb.Int.*, p. 706, at p. 708. (Transl.)
See Lord Phillimore in the Advisory Committee of Jurists for the Establishment of the PCIJ, *Procès-verbaux*, p. 316. Speaking of the "principes du droit commun qui sont applicables aux rapports internationaux," he said: "Another principle of the same kind is that by which the plaintiff must prove his contention under penalty of having his case refused."
Fran.-Germ. M.A.T.: *Firme Ruinart Père et Fils Case* (1927), 7 T.A.M.,

It may, therefore, be asked whether the Mexican-United States General Claims Commission (1923) really maintained that the maxim *onus probandi actori incumbit* did not express a general principle of law or that in any event it was not applicable to international judicial proceedings, thus contradicting *The Queen Case* (1872). The answer would appear to be in the negative. It would seem that the Commission did not use the term "burden of proof" in its usual sense. Thus after saying that "as an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure," the Commission continued:—

"On the contrary, it holds that it is the duty of the respective Agencies to co-operate in searching out and presenting to this tribunal all facts throwing any light on the merits of the claim presented." [12]

From the context of this passage, it is clear that the Commission used the term "burden of proof" in the sense of a duty to produce evidence, and to disclose the facts of the case. But the term is used in a different sense when it is asked on whom the burden of proof falls, or when it is said that the burden of proof rests upon this or the other party.

To illustrate the distinction between these two meanings of the term, the *Taft Case* (1926), decided by the German-United States Mixed Claims Commission (1922) may be mentioned. In this case, the claimants alleged that their ship the *Avon* had been sunk by a German submarine. On behalf of the claimants, "all available evidence tending however remotely to establish the loss of the *Avon* through an act of war has been diligently assembled and presented by able counsel," while on behalf of

p. 599, at p. 601: The Tribunal, "in the absence of any contrary provision of the Treaty, can only rely on the usual principle that lays the burden of proof on the plaintiff" (Transl.).

Greco-Turk. M.A.T.: *Banque d'Orient Case* (1928), 7 T.A.M., p. 967, at p. 973.

See also cases cited *infra passim*.

[12] *Op. of Com. 1927*, p. 35, at p. 39. The following passages from the same decision are to the same effect: "The Parties before this Commission are sovereign Nations who are in honour bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them" (p. 40). "Article 75 of the said Hague Convention of 1907 affirms the tenet adopted here by providing that the parties undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the case" (p. 40).

the defendant, " a full disclosure has been made to the Commission by the German Agent " of the activities of German submarines operating at the material time in the vicinity of the *Avon's* projected course. In his conclusion the Umpire held, however, that:—

" Weighing the evidence as a whole . . . , the claimants have failed to discharge the burden resting upon them to prove that the *Avon* was lost through an act of war." [13]

Thus although both parties had scrupulously observed the duty of disclosing all material facts relative to the merits of the claim, it was held that the claimants had failed to discharge their burden of proof. Burden of proof, however closely related to the duty to produce evidence, therefore implies something more.[14] It means that a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.

The real intention of the Mexican-United States General Claims Commission (1923) may be gathered from what it went on to say, after the above quoted passage:—

" The Commission denies the ' right ' of the respondent merely to wait in silence in cases where it is reasonable that it should speak. . . . On the other hand, the Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive. But, when the claimant has established a prima facie case and the respondent has afforded no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting. While ordinarily it is encumbent [*sic*] upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be. . . . In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent government, the

[13] *Dec. & Op.*, p. 801, at p. 805.
[14] The Mex.-U.S. G.C.C. (1923) itself seems also to have accepted this view, since, despite the fact that it identified the principle it enunciated with Art. 75 of the Hague Convention of 1907, it said that that Convention contained no provision as to burden of proof (*loc. cit.*, p. 40).

failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision." [15]

This, then, is not so much a denial of the validity of the maxim *onus probandi actori incumbit* as a general principle of law, but rather a statement that in proper cases the Commission might be satisfied with prima facie evidence whenever the allegations, if unfounded, could be easily disproved by the opposing party. Strictly speaking, however, this is a question of the quantum of evidence required to sustain an allegation or a claim, and not of the burden of proof.

That the Commission in the *Parker Case* (1926) was not speaking of burden of proof, and that in practice it admitted the validity of the general principle *onus probandi actori incumbit* may also be gathered from its decision in the *Pomeroy's El Paso Transfer Co. Case* (1930). In this case, although the deciding Commissioner was of the opinion that:—

"The Mexican Agency has not fully complied, in regard to evidence, with the duties imposed upon it by this arbitration as defined by the Commission in paragraphs 5, 6, 7 of its decision in the case of *William A. Parker*," [16]

he disallowed the claim because:—

"In this case it appears that the evidence submitted by the claimant government is not sufficient to establish a prima facie case." [17]

Indeed, the Commission on several occasions held that:—

"The mere fact that evidence produced by the respondent government is meagre, cannot in itself justify an award in the absence of concrete and convincing evidence produced by the claimant government." [18]

This is all that is meant by the general principle of law that the burden of proof is upon the claimant.

[15] *Loc. cit.*, pp. 39–40.
[16] *Op. of Com. 1931*, p. 1, at p. 4.
[17] *Ibid.*, at p. 7.
[18] *Melczer Mining Co. Case* (1929), *Op. of Com. 1929*, p. 228, at p. 233. See also *Archuleta Case* (1928), *ibid.*, p. 78, at p. 77; *Costello Case* (1929), *ibid.*, p. 252, at p. 264.

Thus, in spite of appearance to the contrary, the *Parker Case* (1926), when properly understood, does not deny the validity and applicability of the general principle *onus probandi actori incumbit* in international judicial proceedings. In the first place, when the Tribunal denied the existence of any general legal principles governing the incidence of the burden of proof, it was not using the term in its commonly accepted meaning. Moreover, the Tribunal in practice applied the principle *onus probandi actori incumbit.*

Another point raised by the *Parker Case* (1926) may also be mentioned. The Commission said:—

"The absence of international rules relative to a division of the burden of proof between the parties is especially obvious in international arbitrations between governments in their own right, as in those cases the distinction between a plaintiff and a respondent often is unknown, and both parties often have to file their pleadings at the same time." [19]

To this the *Chevreau Case* (1931) provides a ready answer. The case which was between France and Great Britain concerned alleged unlawful arrest and improper treatment of a French national.

"The Arbitrator, before examining these various grievances, deems it his duty to make some observation concerning the burden of proof. While the British Government asserts that the burden is upon the French Government as the plaintiff, the latter maintains that in the present case there is neither plaintiff nor defendant. In this connection, it calls attention to an Order issued on August 15, 1929, by the Permanent Court of International Justice, where it was said that, the case in issue having been submitted by a *compromis*, there was neither plaintiff nor defendant. But on that point, in the opinion of the Arbitrator, there is a misunderstanding. The Order only refers to a question of procedure and decides nothing in regard to questions relating to the burden of proof. The matter is complicated, and if Article 3 of the *compromis* imposes upon both Parties the duty of 'determining to the satisfaction of the Arbitrator the authenticity of all points of fact offered to establish or disapprove responsibility,' that provision, in the Arbitrator's opinion, is not intended to exclude the application of the ordinary rules of evidence.

[19] *Loc. cit.*, p. 40.

It only shows that there can also be a duty to prove the existence of facts alleged in order to deny responsibility." [20]

Thus, despite the fact that there was no procedural distinction between the plaintiff and defendant, the burden of proof was laid upon France, who was the claimant in fact.[21]

That, in any given case, it is possible to determine the effective positions of the parties without reference to questions of procedure is shown by the *Corfu Channel Case* (Jurisdiction) (1948), where, without considering the form in which the case was submitted, the International Court of Justice held that:—

"There is in fact a claimant, the United Kingdom, and a defendant, Albania." [22]

The *Corfu Channel Case* was first brought before the Court by a unilateral application of the United Kingdom (May 22, 1947). When the Albanian Preliminary Objection to the Court's jurisdiction was rejected by the Court on March 25, 1948, the two parties notified the Court on the same day of the conclusion of a Special Agreement. That Special Agreement formed the basis of subsequent proceedings before the Court in that case.[23] But the respective positions of the parties as regards burden of proof was not thereby altered. As far as the British claim was concerned, the burden of proof was undoubtedly laid upon the United Kingdom.[24] The Court expressly held that the mere fact that an act contrary to international law had occurred in Albanian territory did not shift the burden of proof to Albania.[25]

Indeed, it may be said that the term *actor* in the principle *onus probandi actori incumbit* is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issues involved. The ultimate distinction between the claimant and the defendant lies in the fact that the claimant's submission requires to be substantiated, whilst that of the defendant does not.

It may in fact happen that the claimant is procedurally the defendant, as in the *United States Nationals in Morocco Case*

[20] P.C.A.: 2 UNRIAA, p. 1113, at pp. 1124–25.
[21] *Cf.* PCIJ: *Oscar Chinn Case* (1924), A/B 63. See particularly, p. 81.
[22] *ICJ Reports 1947–1948*, p. 15, at p. 28.
[23] (Order of March 26, 1948), *ibid.*, p. 53, at p. 55.
[24] (Merits), *ICJ Reports 1949*, p. 4, at pp. 13 *et seq.*
[25] *Ibid.*, p. 18.

(1952), between France and the United States.[26] In that case, the United States was in fact in the position of a claimant, in that it claimed special rights and privileges in the French Zone of Morocco and alleged that certain acts of the Moroccan authorities were contrary to such rights and privileges. France, in denying the existence of these rights and privileges and maintaining the legality of the acts of the Moroccan authorities, was in fact in the position of a defendant; for she could rely on the principle that neither restrictions on sovereignty nor international responsibility are to be presumed.[27]

For political reasons, however, the French Government, in order to bring the dispute before the Court, took the initiative and applied to the International Court of Justice under the Optional Clause, thus abandoning, as it said in its Memorial,[28] its logical position as defendant and placing itself, from the procedural standpoint, in the position of a plaintiff. Thereupon, the United States claimed that the burden of proof lay upon France because the latter had assumed the position of plaintiff, and because of "the nature of the legal issues involved."[29]

This, however, was not the view taken by the Court. What the Court in fact did in its judgment was to examine each of the United States claims, and rejected them to the extent to which they were not supported by treaties which the United States was entitled to invoke against Morocco.[30] The United States also adduced "custom and usage" as a basis for some of its alleged special rights and privileges. The Court here specifically laid the burden of proof upon the United States and rejected the allegation for want of sufficient evidence of such a custom binding upon Morocco.[31] In the operative part of the judgment, the Court referred to only one of the Submissions of the French Government. But, even in this case, its rejection of the French Submission that the Decree of December 30, 1948, issued by the French Resident General in Morocco, was lawful, was in fact only a favourable decision on the United States Submission that the Decree violated the treaty rights of the

[26] *ICJ Reports 1952*, p. 176. See the present writer's "Rights of United States Nationals in the French Zone of Morocco," 2 I.C.L.Q. (1953), p. 354.
[27] See *supra*, pp. 305–6.
[28] *ICJ Pleadings*, 1 *Morocco Case*, pp. 29–30.
[29] *Ibid.*, p. 180; *ICJ Reports 1952*, p. 176, at p. 180.
[30] *Cf. ICJ Reports 1952*, p. 176, at pp. 212–13.
[31] *Ibid.*, at pp. 200, 202.

United States derived from the Act of Algeciras of 1906 and its treaty of 1836 with Morocco. Thus, notwithstanding its procedural position of respondent, the burden of proof was laid upon the United States, the claimant in fact.

There may, however, be cases where there is genuinely no distinction between claimant and defendant. Thus in the case of a territorial dispute, both parties put forward rival claims. It will then be incumbent upon each party to substantiate its contention. In the *Palmas Case* (1928), the Arbitrator held that:—

"Each party is called upon to establish the arguments on which it relies in support of its claim to sovereignty over the object in dispute." [32]

This is not, however, an exception to the general principle that the burden of proof falls upon the claimant, but is due to the fact that both parties are in the position of claimants before the tribunal.

Taking into consideration that the *actor*, whether termed claimant or plaintiff, is to be determined according to the issues involved rather than the incidents of procedure, what has been said above shows that there is in substance no disagreement among international tribunals on the general legal principle that the burden of proof falls upon the claimant, *i.e.*, "the plaintiff must prove his contention under penalty of having his case refused." [33] *Actore non probante reus absolvitur.*

The burden of proof so far discussed relates to the proof of the factual basis of the claim as a whole, although in a single action, there may be several claims, as well as counter-claims. This may be called the ultimate burden of proof.[34] The term burden of proof may, however, also be used in a more restricted sense as referring to the proof of individual allegations advanced by the parties in the course of proceedings. This burden of proof may be called procedural. As has been seen at the beginning of the present Chapter, in this sense of the term, the burden of proof rests upon the party alleging the fact, unless the truth of the fact is within judicial knowledge or is presumed by the

[32] P.C.A.: 2 H.C.R., p. 83, at p. 90.
[33] *Supra*, p. 327, note 11.
[34] *Cf.* A. T. Denning, "Presumptions and Burdens," 61 L.Q.R. (1945), pp. 379–83.

Tribunal. In the absence of convincing evidence, the Tribunal will disregard the allegation.[35]

In conclusion, it may be said that the aim of a judicial inquiry is to establish the truth of a case, to which the law may then be applied. While the greatest latitude is enjoyed by international tribunals in the carrying out of their task, their activity is nevertheless governed by certain general principles of law based on common sense and developed through human experience. These principles create certain initial presumptions, guide the weighing of evidence and determine the incidence of the burden of proof.

[35] *Supra*, pp. 307 *et seq.*

ANNEX 379

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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I.2.2 Existence of Discrimination

173. The limited facts made available to the Tribunal demonstrate on balance to a majority of the Tribunal that CEMSA has been treated in a less favorable manner than domestically owned reseller/exporters of cigarettes, a *de facto* discrimination by SHCP, which is inconsistent with Mexico's obligations under Article 1102. The only confirmed cigarette exporters on the limited record before the tribunal are CEMSA, owned by U.S. citizen Marvin Roy Feldman Karpa, and the Mexican corporate members of the Poblano Group, Mercados I and Mercados II. According to the available evidence, CEMSA was denied the rebates for October-November 1997 and subsequently; SHCP also demanded that CEMSA repay rebate amounts initially allowed from June 1996 through September 1997. Thus, CEMSA was denied IEPS rebates during periods when members of the Poblano Group were receiving them (see *supra* para. 167, memorial, p. 3*)*.

174. Even if Mexico is auditing Mr. Poblano, the process was begun long after the audit of CEMSA, and according to the files provided to the Tribunal concerning this audit, there is no documentation that the audit continued after approximately March 2000, or that it even involved IEPS rebates (transcript, July 11, 2001, p. 2). CEMSA's rebates (before and after audits) have already been denied, and several years later no such action has been taken with regard to the Poblano Group. Arguably, the fact that CEMSA has been audited well before any other domestic reseller/exporters is in itself evidence of discrimination, even if SHCP is legally authorized to audit all taxpayers. If Mexican authorities are auditing or intend to audit other taxpayers who are in like circumstances with CEMSA, the Government of Mexico, as the only party with access to such information, has not been particularly forthcoming in presenting the necessary evidence. The two files presented to the Tribunal during the hearing (designated nos. 328 and 333) are incomplete, indicating no final or even continuing audit action (transcript, July 11, 2001, p. 2). The only clear knowledge that Mr. Poblano is subject to some sort of audit was supplied by the Claimant (first Feldman affidavit, para. 92), and counsel for the Claimant asserts that the evidence in the record demonstrates only that Mr. Poblano is subject to a personal audit for 1997 (transcript, July 13, 2001, p. 155). The Mexican Government has declined to provide any specific information as to the number of other possible taxpayers in like circumstances (resellers). The government's witness, Mr. Obregon-Castellanos, admitted that there were more

than five, and likely more than ten firms registered as cigarette exporters (transcript, July 9, 2001, p.141), but was evasive with regard to tobacco exporter numbers even though he testified confidently and explicitly that there were 400 registered exporters of alcoholic beverages (transcript, July 11, 2001, p. 10).

175. The evidence also shows that CEMSA was denied registration as an export trading company, apparently in part because this action was filed, and in part as a result of the ongoing audit of the rebates for exports during 1996 and 1997, even though, as Mr. Diaz Guzman indicated, three other cigarette export trading companies had been granted registration. An unsigned memorandum which reasonably could have been generated only in SHCP indicates that registration was being denied on the basis of the audit of the Claimant's rebate payments. There is no evidence that any domestic reseller/exporter has been denied export privileges in this manner. Moreover, there appears to have been differential treatment between CEMSA and Mr. Poblano with regard to registration issues as well. According to the Claimant's witness, Mr. Carvajal, taxpayer CEMSA filed its application for export registration status on June 30, 1998; information was still being requested in writing seven months later. For taxpayer Mr. Poblano, information was requested by SHCP orally within 14 days of the date of Poblano's application, and any questions were apparently resolved (transcript, July 11, 2001, p. 3).

176. The extent of the evidence of discrimination on the record is admittedly limited. There are only a few documents in the record bearing directly on the existence of differing treatment, particularly the statement of Mr. Diaz Guzman, the "mystery" memorandum from SHCP's files, and the tax registration statement for Mercados Regionales, owned by the Poblano Group. One member of this Tribunal believes that this evidence on the record is insufficient to prove discrimination (see dissent). The majority's view is based first on the conclusion that the burden of proof was shifted from the Claimant to the Respondent, with the Respondent then failing to meet its new burden, and on an assessment of the record as a whole. But it is also based on a very simple two-pronged conclusion, as neither point was ever effectively challenged by the Respondent:

a. No cigarette reseller-exporter (the Claimant, Poblano Group member or otherwise) could legally have qualified for the IEPS rebates, since none under the facts established in this

case would have been able to obtain the necessary invoices stating the tax amounts separately.

b. The Claimant was denied the rebates at a time when at least three other companies in like circumstances, i.e. resellers and exporters (see *supra* para. 171) apparently including at least two members of the Poblano Group, were granted them.

177. On the question of burden of proof, the majority finds the following statement of the international law standard helpful, as stated by the Appellate Body of the WTO:

> … various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. *If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.* (Emphasis supplied.)38

Here, the Claimant in our view has established a presumption and a *prima facie* case that the Claimant has been treated in a different and less favorable manner than several Mexican owned cigarette resellers, and the Respondent has failed to introduce any credible evidence into the record to rebut that presumption.

178. In weighing the evidence, including the record of the five day hearing, the majority is also affected by the Respondent's approach to the issue of discrimination. If the Respondent had had available to it evidence showing that the Poblano Group companies had not been treated in a more favorable fashion than CEMSA with regard to receiving IEPS rebates, it

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38 *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India,* Adopted 23 May 1997, WT/DS33/AB/R, p. 14. Accordingly, *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Reports, pp. 246, 272, 1990. ("In case a party adduces some evidence which *prima facie* supports his allegation, the burden of proof shifts to his opponent.").

has never been explained why it was not introduced. Instead, the Respondent spent a substantial amount of its time during the hearing and in its memorials seeking (unsuccessfully in the Tribunal's view) to demonstrate that CEMSA and the Poblano Group were related companies (as there could be no discrimination, presumably within a single company group)39. Yet, if the Poblano Group firms had not received the rebates, that evidence of relationship would have been totally irrelevant. Why would any rational party have taken this approach at the hearing and in the briefs if it had information in its possession that would have shown that the Mexican owned cigarette exporters were being treated in the same manner as the Claimant, that is, denied IEPS rebates for cigarette exports where proper invoices were not available? Thus, it is entirely reasonable for the majority of this Tribunal to make an inference based on the Respondent's failure to present evidence on the discrimination issue. It is also notable that despite the lengthy presentation of evidence by the Respondent seeking (unsuccessfully in the Tribunal's view) to link the Claimant with an alleged smuggling operation *operated by or on behalf of Mr. Poblano*, export registration was nevertheless granted for Mr. Poblano's companies. This occurred at approximately the same time as registration was being denied for CEMSA, apparently because of the pending CEMSA audit. Again, the differing treatment of CEMSA and the Poblano Group is obvious.

179. There is also evidence in the record to suggest that Lynx, an earlier Poblano Group company, was treated somewhat more favorably by Mexico, as the Federal Fiscal Tribunal decided in February 1996 that Lynx was entitled to IEPS rebates on cigarette exports,

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39 Counter-memorial, para. 488; see, *e.g.,* transcript, July 10, 2001, pp. 110-113. It is undeniable that CEMSA and the Poblano Group maintained a business relationship; CEMSA, *inter alia*, was a seller of cigarettes to several of the Poblano Group companies from time to time, and had borrowed working capital from Mr. Poblano (memorial, paras. 101-102). However, there is no evidence of any common stock ownership, common membership on corporate boards of directors or any of the normal indices of common ownership and control. Moreover, SHCP has treated the two as completely separate taxpayers, audited CEMSA early on, while more than three years later no final action has been taken against the Poblano Group. Clearly, there is no evidence that the Mexican government considered CEMSA and the Poblano Group companies to be a common enterprise prior to this proceeding. Accordingly, this Tribunal would not be inclined to treat them as such so as to defeat the Claimant's assertion of discrimination.

despite the likely absence of invoices stating the tax amounts separately (*e.g*. memorial, para. 36; App. 1047-1070). As a result of this decision and Lynx' *Amparo* victory (which applied specifically only to alcoholic beverage exports), SHCP also paid rebates to Lynx for IEPS taxes applicable to cigarette exports in 1992, along with substantial additional amounts for interest and inflation.40 This was a period during which CEMSA faced uncertainty over the availability of rebates for cigarette exports, despite the fact that limited exports were made in 1992 by CEMSA. However, by 1996, when SHCP recognized Lynx' right to the rebates, SHCP had denied rebates to CEMSA for test shipments for several years.

180. All of this confirms a further weakness in the Respondent's argument that there can be no *de facto* discrimination under circumstances where rebates are essentially granted initially on the basis of a ministerial decision, with the detailed analysis coming later in the event of questions or an audit. Given the Claimant's notoriety at SHCP over the years, the newspaper articles and threats of litigation against SHCP officials, the audit that was initiated and then abruptly terminated in 1995, the multiple meetings with SHCP officials, etc., it is difficult for the Tribunal to believe that the Claimant's requests and actions were not well-known to and carefully monitored by SHCP officials. Those factors certainly created the necessary conditions for discrimination.

I.2.3 Discrimination as a Result of Nationality

181. It is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or "by reason of nationality." (U.S. Statement of Administrative Action, Article 1102.) However, it is not self-evident, as the Respondent argues, that any departure from national treatment must be

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40 See Zaga-Hadid testimony, transcript, July 13, 2001, p. 142, tables introduced into evidence during the hearing. Allegations that Lynx had been intentionally paid excessive rebates by SHCP were denied (third witness statement of Diaz-Guzman, App. 06455-06456) and further disputed at the hearing by both parties. The evidence on this issue before the Tribunal is conflicting, and the Tribunal is not convinced that the amounts paid, including interest paid and the inflation adjustment for the 1993-1996 period, were in fact excessive.

explicitly shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances. In this instance, the evidence on the record demonstrates that there is only one U.S. citizen/investor, the Claimant, that alleges a violation of national treatment under NAFTA Article 1102 (transcript, July 13, 2001, p. 178), and at least one domestic investor (Mr. Poblano) who has been treated more favorably. For practical as well as legal reasons, the Tribunal is prepared to assume that the differential treatment is a result of the Claimant's nationality, at least in the absence of any evidence to the contrary.

182. However, in this case there is evidence of a nexus between the discrimination and the Claimant's status as a foreign investor. In the first place, there does not appear to be any rational justification in the record for SHCP's less favorable *de facto* treatment of CEMSA other than the obvious fact that CEMSA was owned by a very outspoken foreigner, who had, prior to the initiation of the audit, filed a NAFTA Chapter 11 claim against the Government of Mexico. Certainly, the action of filing a request for arbitration under Chapter 11 could *only* have been taken by a person who was a citizen of the United States or Canada (rather than Mexico), i.e., as a result of his (foreign) nationality. While a tax audit in itself is not, of course, evidence of a denial of national treatment, the fact that the audit was initiated shortly after the Notice of Arbitration (first Feldman affidavit, paras. 85-86) and the existence of the unsigned memo at SHCP noting the filing of the Chapter 11 claim in the context of the Claimant's export registration efforts, at minimum raise a very strong suspicion that the events were related, given that no similar audit action was taken against domestic reseller/exporter taxpayers at the time.

183. More generally, requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason. Also, as the Respondent argues, if the motives for a government's actions should not be examined, there is effectively no way for the Claimant or this Tribunal to make the subjective determination that the discriminatory action of the government is a result of

the Claimant's nationality, again in the absence of credible evidence from the Respondent of a different motivation. If Article 1102 violations are limited to those where there is explicit (presumably *de jure*) discrimination against foreigners, e.g., through a law that treats foreign investors and domestic investors differently, it would greatly limit the effectiveness of the national treatment concept in protecting foreign investors.

184. This conclusion is consistent with that reached in an earlier Chapter 11 proceeding, *Pope & Talbot v. Government of Canada.* The *Pope & Talbot* tribunal indicated its inclination to presume that discriminatory treatment of foreign investors in like circumstances would be in violation of Article 1102. According to that tribunal such differences between domestic and foreign investors would "presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA." One of that tribunal's concerns was that if there had to be a showing that the discrimination was based on nationality, it would "tend to excuse discrimination that is not facially directed at foreign owned investments" (*Pope & Talbot v. Government of Canada*, Award on the Merits of Phase 2, April 10, 2001, paras. 78, 79, http://www.dfait-maeci.gc.ca/tna-nac/Award_Merits-e.pdf) (The *Pope & Talbot* tribunal, on the facts, ultimately declined to find a violation of national treatment). In the instant case, the treatment between the foreign investor and domestic investors in like circumstances is different on a *de facto* basis, and such discrimination is clearly in conflict with the investment liberalization objective found in Article 1102. This Tribunal sees no reason to disagree with the *Pope & Talbot* tribunal's articulation in this respect.

I.2.4 Most Favored Investor Requirement?

185. NAFTA is on its face unclear as to whether the foreign investor must be treated in the most favorable manner provided for *any* domestic investor, or only with regard to the treatment generally accorded to domestic investors, or even the least favorably treated domestic investor. There is no "most-favored investor" provision in Chapter 11, parallel to the most favored nation provision in Article 1103, that suggests that a foreign investor must be treated no less favorably than the most favorably treated national investor, if there are other national

investors that are treated less favorably, that is, in the same manner as the foreign investor. At the same time, there is no language in Article 1102 that states that the foreign investor must receive treatment equal to that provided to the *most* favorably treated domestic investor, if there are multiple domestic investors receiving differing treatment by the respondent government.

186. It may well be that the size of the domestic investor class here is larger than two – one Mexican government witness stated that there might be 5-10 or more registered to export cigarettes – and it may also be that some of those other investors have been treated in a manner more similar to the Claimant's treatment than to the more favorable treatment afforded to the Poblano Group. However, in the absence of evidence to this effect presented by Mexico – the only party in a position to provide such information – the Tribunal need not decide whether Article 1102 requires treatment equivalent to the best treatment provided to *any* domestic investors. Presumably, if there was evidence that another domestic investor had been treated in a manner equivalent to the Claimant, in terms of export registration, audit, and granting or withholding of rebates, the Respondent would have provided that evidence to the Tribunal. In this case, the known "universe" of investors is only two, or at the most three, one foreign (the Claimant) and one domestic (the Poblano Group companies), and the Tribunal must make its decision on the evidence before it. Thus, the only relevant domestic investor is the Poblano Group and the comparison must be between the Poblano Group and Claimant.

187. On the basis of this analysis, a majority of the Tribunal concludes that Mexico has violated the Claimant's rights to non-discrimination under Article 1102 of NAFTA. The Claimant has made a *prima facie* case for differential and less favorable treatment of the Claimant, compared with treatment by SHCP of the Poblano Group. For the Poblano Group and for other likely cigarette reseller/exporters, the Respondent has asserted that audits are or will be conducted in the same manner as for the Claimant, and implied that they will ultimately be treated in the same way as the Claimant. However, the evidence that this has occurred is weak and unpersuasive. The inescapable fact is that the Claimant has been effectively denied IEPS rebates for the April 1996 through November 1997 period, while domestic export trading companies have been given rebates not only for much of that period but through at least May 2000, suggesting that Article 4(III) of the law has been *de facto* waived for some if not all

domestic firms. While the Claimant has also been effectively precluded from exporting cigarettes from 1998 to 2000, there is evidence that the Poblano Group companies have apparently been allowed to do so, notwithstanding Article 11 of the IEPS law. Finally, the Claimant has not been permitted to register as an exporting trading company, while the Poblano Group firms have been granted this registration. All of these results are inconsistent with the Respondent's obligations under Article 1102, and the Respondent has failed to meet its burden of adducing evidence to show otherwise.

188. In reaching the conclusion that the Respondent has breached its obligations to the Claimant under Article 1102, the majority observes that the cigarette exports by the Claimant and other similar situated resellers may be economically unsustainable, if IEPS rebates are unavailable, but there is nothing in the IEPS law during the relevant period (after the 1993 *Amparo* decision and before the 1998 amendments) that legally precludes the exports per se. The majority is also of the view that the factual pattern in this case reveals more than a minor error or two by the Respondent. Rather, it demonstrates a pattern of official action (or inaction) over a number of years, as well as de facto discrimination that is actionable under Article 1102. That being said, there is no disagreement that Chapter 11 jurisdiction over tax matters is carefully circumscribed by Article 2103, or that this Tribunal would be derelict in its duties if it either expanded or reduced that jurisdiction.

J DAMAGES

189. Concerning the quantum of damages to be awarded to the Claimant, the Tribunal observes at the outset that the appropriate measure and amount of damages is only generally and cursorily discussed by the Parties. Still more limited is the amount of evidence presented to the Arbitral Tribunal in this respect.

190. The Claimant assumes that CEMSA's damages for the Respondent's unlawful discrimination under Article 1102 are identical to those claimed for the unlawful expropriation, without either allowing for any divergence in both cases or taking into account the particular

ANNEX 380

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF

INVESTMENT DISPUTES

(ADDITIONAL FACILITY)

Washington, D.C.

(ICSID Case No. ARB(AF)/05/2)

Cargill, Incorporated

(Claimant)

- AND -

United Mexican States

(Respondent)

AWARD

Before the Arbitral Tribunal
constituted under Chapter 11
of the North American Free Trade
Agreement, and comprised of:

Dr. Michael C. Pryles
Professor David D. Caron
Professor Donald M. McRae

Secretary of the Tribunal
Mr. Gonzalo Flores

Legal Assistant to the Tribunal
Ms. Leah D. Harhay

Date of dispatch to the parties: 18 September 2009

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The Fair and Equitable Treatment Standard

266. Article 1105(1) of the NAFTA 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." The content of this obligation has been difficult to define with precision and the statements of various NAFTA tribunals are difficult to apply to particular facts.

267. The Tribunal first observes that it is beyond cavil that the reference to "fair and equitable treatment" in Article 1105(1) is to be understood by reference to customary international law. On 31 July 2001, in response to the concern of State Parties that tribunals were reading this provision over-broadly, the NAFTA Free Trade Commission issued an FTC Note providing, *inter alia*, that:

> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

268. In light of the FTC's interpretation and the binding force of that interpretation on this Tribunal by virtue of Article 1132(2),[39] the Tribunal joins all previous NAFTA tribunals in the view that Article 1105 requires no more, nor less, than the minimum standard of treatment demanded by customary international law. As stated by the *Mondev* tribunal, the FTC Note made "clear that Article 1105(1) refers to a standard existing under customary international law, and not to standards established by other treaties of the three NAFTA Parties."[40] Likewise, as explained by Mexico in its 1128

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[39] Article 1131, titled "Governing Law," in its second paragraph provides: "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

[40] Mondev Int'l Ltd. v. United States ("*Mondev*"), NAFTA/ICSID Case No. ARB(AF)/99/2, Award, ¶ 121 (11 Oct. 2002). *See also* ADF Group Inc. v. United States ("*ADF Group*"), NAFTA/ICSID Case No. ARB(AF)/00/1, Award, ¶ 178 (9 Jan. 2003) (holding that the FTC Note "clarifies that so far as the three NAFTA Parties are concerned, the

Submission to the *ADF* tribunal, "'fair and equitable treatment' and 'full protection and security' are provided as examples of the customary international law standards incorporated in Article 1105(1). ... The international law minimum standard [of treatment] is an umbrella concept incorporating a set of rules that has crystallized over the centuries into customary international law in specific contexts."[41]

269. Although Claimant initially argued that the meaning of "fair and equitable treatment" should be approached as a question of treaty interpretation, both Claimant and Respondent agreed by the time of the hearing that Article 1105 is a codification of the customary international law minimum standard of treatment. The Parties, however, continue to disagree as to the content of that customary international law standard.

270. In approaching the task of ascertaining the customary international law standard of "fair and equitable treatment," the Tribunal emphasizes a foundational point to its mode of reasoning, which it simultaneously views as a point of weakness in some of the awards it has reviewed.

271. The shift in approach from seeking the meaning of "fair and equitable treatment" as a matter of treaty interpretation to seeking to ascertain the content of custom has fundamental implications for the legal reasoning of a tribunal. A tribunal confronted with a question of treaty interpretation can, with little input from the parties, provide a legal answer. It has the two necessary elements to do so; namely, the language at issue and rules of interpretation. A tribunal confronted with the task of ascertaining custom, on the other hand, has a quite different task because ascertainment of the content of custom involves not only questions of law but involves primarily a question of fact, where custom is found in the practice of States regarded as legally required by them. The content of a particular custom may be clear; but where a custom is not clear, or is disputed, then it is for the party asserting the custom to establish the content of that custom.

272. In the case of the customary international law standard of "fair and equitable treatment," the Parties in this case and the other two NAFTA State Parties agree that

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long-standing debate as to whether there exists such a thing as a minimum standard of treatment of non-nationals and their property prescribed in customary international law, is closed.").

[41] *ADF Group*, Second Article 1128 Submission of the United Mexican States, p. 8 (22 July 2002).

the customary international law standard is at least that set forth in the 1926 *Neer* arbitration. In that award it was held that "the treatment of an alien ... should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[42] The Parties and the other two NAFTA State Parties also agree that the standard may evolve and, indeed, may have evolved since 1926.

273. The Parties disagree, however, as to how that customary standard has in fact, if at all, evolved since that time. The burden of establishing any new elements of this custom is on Claimant. The Tribunal acknowledges that the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.

274. The initial issue before the Tribunal therefore is to evaluate Claimant's assertions as to the content of the customary international law standard of "fair and equitable treatment" in light of the sources placed before the Tribunal. Consistent and widespread State practice conducted out of a sense of legal obligation would establish the content of customary international law. The Tribunal acknowledges, however, that surveys of State practice are difficult to undertake and particularly difficult in the case of norms such as "fair and equitable treatment" where developed examples of State practice may not be many or readily accessible. Claimant has not provided the Tribunal with such a survey of recent State practice, nor is the Tribunal aware of such a survey.

275. In such instances, recourse may be made to other evidence of custom. The statements of States can—with care—serve as evidence of the content of custom. In the case of the NAFTA State Parties, they have made statements in the context of their position as respondents or as non-disputing State Parties in Chapter 11 arbitrations. Thus, Mexico has not only presented its view on the content of customary international law standard in this proceeding, but also as a non-disputing State Party in an Article 1128

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[42] *Neer*, 4 I.R.A.A. 60 (15 Oct. 1926).

Submission in the *ADF* proceeding. In *ADF*, Mexico's Article 1128 Submission approvingly quotes Canada's submission as respondent in *Pope & Talbot*, which states: "The conduct of the government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, an outrage, bad faith or the willful neglect of duty."[43] The Tribunal acknowledges that the weight of these statements needs to be assessed in light of their position as respondents at the time of the statement. However, the Tribunal also observes that, for example, the United States maintains a similar position as to the customary international law standard of fair and equitable treatment in its model bilateral investment treaty, a situation in which it is at least equally possible that the United States would be in the position of either respondent or the state of nationality of the claiming investor.

276. It also is widely accepted that extensive adoption of identical treaty language by many States may in and of itself serve—again with care—as evidence of customary international law. The Tribunal notes that Claimant has not attempted to establish such a circumstance to this Tribunal except in the most general terms. Even accepting that such clauses are widespread, the Tribunal views the evidentiary weight of this possibility cautiously. The Tribunal observes that the requirement to provide "fair and equitable treatment" is included in many bilateral investment treaties ("BITs"). The Tribunal notes first that some of these clauses involve a reference to customary international law, while others apparently involve autonomous treaty language. It is the Tribunal's view that significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom. It may be that widespread adoption of a strict autonomous meaning to "fair and equitable treatment" may in time raise international expectations as to what constitutes good governance, but such a consequence is different than such clauses evidencing directly an evolution of custom. The Tribunal notes second that the explosion in the number of BITs is a recent phenomenon and that responses of States to the questions presented in terms, for example, of calls for renegotiation or statements of approval is only now

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[43] *ADF Group*, Second Article 1128 Submission of the United Mexican States, p. 15 (22 July 2002), quoting *Pope & Talbot*, Post-Hearing Submission of the United Mexican States (Damages Phase), ¶ 8 (3 Dec. 2001), quoting *Pope & Talbot*, Respondent Canada's Counter-Memorial (Phase 2), ¶ 309 (10 Oct. 2000).

emerging. In such a fluid situation, the Tribunal does not believe it prudent to accord significant weight to even widespread adoption of such clauses.

277. Finally, the writings of scholars and the decisions of tribunals may serve as evidence of custom.[44] It is important to emphasize, however, as Mexico does in this instance, that the awards of international tribunals do not create customary international law but rather, at most, reflect customary international law. Moreover, in both the case of scholarly writings and arbitral decisions, the evidentiary weight to be afforded such sources is greater if the conclusions therein are supported by evidence and analysis of custom.

278. A substantial number of arbitral decisions have been rendered over the last decade in proceedings based on such BITs. In the Tribunal's view, these decisions are relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.

279. The Tribunal observes that Claimant in the instant case has not offered a survey of all arbitral decisions bearing on the customary international law of fair and equitable treatment. Claimant's effort to establish the current customary content of "fair and equitable treatment" relies rather heavily on the award rendered in *Tecmed*, a reliance that Respondent contends is misplaced. The Tribunal agrees.

280. The Tribunal notes that the claim in *Tecmed* alleges violations of a BIT between Spain and Mexico.[45] Article 4(1) of the BIT involved in the *Tecmed* proceeding provides that each party guarantees in its territory just and equitable treatment, conforming with "International Law", to the investments of investors of the other contracting party. Article 4(2) explains further that this treatment will not be less favourable than that granted in similar circumstances by each contracting party to the investments in its territory by an investor of a third State. Although the language of Article 4(2) permits several interpretations, the *Tecmed* tribunal specifically states that it "understands that

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[44] *See, e.g.*, The Statute of the International Court of Justice, Article 38 (1)(d).
[45] *See* Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States (1996).

the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described ... is that resulting from *an autonomous interpretation* ...."[46] The award and statements of the *Tecmed* tribunal thus do not bear on the customary international law minimum standard of treatment, but rather reflect an autonomous standard based on an interpretation of the text. Thus, the Tribunal determines that the holding in *Tecmed* is not instructive in this arbitration as to the scope and bounds of the fair and equitable treatment required by Article 1105 of the NAFTA.

281. The Tribunal observes that several NAFTA arbitrations, the significance of which was argued before this Tribunal, in contrast do analyze and elaborate upon the customary international law minimum standard of treatment as required by NAFTA Article 1105. These tribunals agree, for instance, that the customary international law minimum standard of treatment is dynamic and therefore evolves with the rights of individuals under international law. As the *ADF* tribunal wrote: the customary international law minimum standard of treatment is "constantly in a process of development."[47] The *Mondev* tribunal held similarly:

> [B]oth the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien.[48]

282. As stated above, the Parties in this proceeding and this Tribunal agree with the view that the customary international law minimum standard of treatment may evolve in accordance with changing State practice manifesting to some degree expectations within the international community. As the world and, in particular, the international business community become ever more intertwined and interdependent with global trade, foreign investment, BITs and free trade agreements, the idea of what is the minimum treatment a country must afford to aliens is arising in new situations simply not present at the time of the *Neer* award which dealt with the alleged failure to properly investigate the murder of a foreigner.

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[46] *Tecmed*, Award, ¶ 155 (29 May 2003) (emphasis added).
[47] *ADF Group*, Award, ¶ 179 (9 Jan. 2003).
[48] *Mondev*, Award, ¶ 116 (11 Oct. 2002).

283. The central inquiry therefore is: what does customary international law *currently* require in terms of the minimum standard of treatment to be accorded to foreigners? The *Waste Management II* tribunal concluded that a general interpretation was emerging from NAFTA awards:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[49]

284. In reviewing the awards cited and, as importantly, the evidence of custom analyzed in those proceedings, this Tribunal agrees in part with the assessment cited above. The Tribunal observes a trend in previous NAFTA awards, not so much to make the holding of the *Neer* arbitration more exacting, but rather to adapt the principle underlying the holding of the *Neer* arbitration to the more complicated and varied economic positions held by foreign nationals today. Key to this adaptation is that, even as more situations are addressed, the required severity of the conduct as held in *Neer* is maintained. In this regard, the Tribunal finds particularly significant the statement of the standard found in the Article 1128 Submissions of Mexico and Canada in *ADF*. That standard is:

> [T]he conduct of the government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, bad faith or the willful neglect of duty.[50]

285. As outlined in the *Waste Management II* award quote above, the violation may arise in many forms. It may relate to a lack of due process, discrimination, a lack of transparency, a denial of justice, or an unfair outcome. But in all of these various forms, the "lack" or "denial" of a quality or right is sufficiently at the margin of acceptable conduct and thus we find—in the words of the 1128 submissions and

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[49] Waste Management, Inc. v. United Mexican States ("*Waste Management II*"), NAFTA/ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (30 Apr. 2004).

[50] *ADF Group*, Second Article 1128 Submission of the United Mexican States, p. 15 (22 July 2002), quoting *Pope & Talbot*, Post-Hearing Submission of the United Mexican States (Damages Phase), ¶ 8 (3 Dec. 2001), quoting *Pope & Talbot*, Respondent Canada's Counter-Memorial (Phase 2), ¶ 309 (10 Oct. 2000).

previous NAFTA awards—that the lack or denial must be "gross," "manifest," "complete," or such as to "offend judicial propriety." The Tribunal grants that these words are imprecise and thus leave a measure of discretion to tribunals. But this is not unusual. The Tribunal simultaneously emphasizes, however, that this standard is significantly narrower than that present in the *Tecmed* award where the same requirement of severity is not present.

286. The Tribunal thus holds that Claimant has failed to establish that the standard present for example in the *Tecmed* award reflects the content of customary international law. The Tribunal holds that the current customary international law standard of "fair and equitable treatment" at least reflects the adaptation of the agreed *Neer* standard to current conditions, as outlined in the Article 1128 submissions of Mexico and Canada. If the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, bad faith or the willful neglect of duty, whatever the particular context the actions take in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment.

287. In articulating the above standard, the Tribunal finds the four "implications" identified by the *GAMI* tribunal to be both helpful and consistent. The Tribunal therefore joins the *GAMI* tribunal in the adoption of these four implications: (1) "The failure to fulfill the objectives of administrative regulations without more does not necessarily rise to a breach of international law"; (2) "A failure to satisfy requirements of national law does not necessarily violate international law"; (3) "Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements"; and (4) "The record as a whole—not isolated events—determines whether there has been a breach of international law."[51]

288. As noted above, Claimant argues that fair and equitable treatment creates several specific obligations for each State Party: the provision of a stable and predictable environment that does not offend reasonable expectations; a general lack of arbitrariness, ambiguity and inconsistency; transparency; and a lack of discrimination.

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[51] *GAMI Investments*, Final Award, at ¶ 97 (15 Nov. 2004).

As far as these particular requirements, the Tribunal examines each briefly as to how it is to be approached in light of the Tribunal's holding in the previous paragraph.

Stable and Predictable Environment that Does Not Frustrate Reasonable Expectations

289. Claimant provides the Preamble to the NAFTA as its sole legal or textual support for its contention that NAFTA State Parties are bound to provide a stable and predictable environment in which reasonable expectations are upheld.[52]

290. The Tribunal notes that there are at least two BIT awards, both involving a clause viewed as possessing autonomous meaning, that have found an obligation to provide a predictable investment environment that does not affect the reasonable expectations of the investor at the time of the investment.[53] No evidence, however, has been placed before the Tribunal that there is such a requirement in the NAFTA or in customary international law, at least where such expectations do not arise from a contract or quasi-contractual basis.

Arbitrariness, Ambiguity and Inconsistency

291. With respect to arbitrariness, the Tribunal agrees with the view expressed by a Chamber of the International Court of Justice in the *ELSI* case, where it is stated:

> Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the court in the *Asylum* case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' ... It is a wilful [*sic*] disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.[54]

This holding, though not based on the NAFTA, has been accepted by at least two of the State Parties to the NAFTA as the "best expression" of arbitrariness.[55]

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[52] Claimant also cites to *Tecmed* to support its arguments with respect to the alleged requirement to provide a stable and predictable environment. However, as the Tribunal has determined that *Tecmed* arose from an autonomous interpretation of "fair and equitable treatment," as opposed to that drawn from the customary international law minimum standard of treatment, the Tribunal does not consider the *Tecmed* award a persuasive authority in evaluating these allegations.

[53] *See Tecmed*, Award, ¶ 154 (29 May 2003); Saluka Investments BV (Netherlands) v. Czech Republic ("*Saluka v. Czech Republic*"), UNCITRAL, Partial Award, ¶¶ 301-02 (17 Mar. 2006).

[54] *ELSI*, Judgment, ¶ 128 (1989) (internal citation omitted).

[55] *See ADF Group*, Award, ¶ 121 (9 Jan. 2003) (describing Canada's approval of the standard); *ADF Group*, Second Article 1128 Submission of the United Mexican States, pp. 16-18 (22 July 2002) (detailing Mexico's view of the standard as instructive).

292. The Tribunal also agrees with the view expressed in *S.D. Myers* that a tribunal, in assessing whether an action of a State is arbitrary, need recognize that governments "make many potentially controversial choices" and, in doing so, may "appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive."[56] Therefore, an actionable finding of arbitrariness must not be based simply on a tribunal's determination that a domestic agency or legislature incorrectly weighed the various factors, made legitimate compromises between disputing constituencies, or applied social or economic reasoning in a manner that the tribunal criticizes.

293. The Tribunal thus finds that arbitrariness may lead to a violation of a State's duties under Article 1105, but only when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive.

Transparency

294. The Tribunal holds that Claimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment owed to foreign investors per Article 1105's requirement to afford fair and equitable treatment. The principal authority relied on by the Claimant—*Tecmed*—involved the interpretation of a treaty-based autonomous standard for fair and equitable treatment and treated transparency as an element of the "basic expectations" of an investor rather than as an independent duty under customary international law.

Discrimination

295. The Tribunal finds that a discussion of whether a finding of discrimination will independently violate Article 1105 of the NAFTA is not called for at this time. In support of its contention that the customary international law minimum standard of

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[56] *S.D. Myers*, Partial Award, ¶ 261 (13 Nov. 2000).

ANNEX 381

Draft conclusions on identification of customary international law, with commentaries

2018

Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10). The report, which also contains commentaries to the draft articles (para. 66), will appear in *Yearbook of the International Law Commission, 2018*, vol. II, Part Two.

Part Seven
Particular customary international law

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.

2. Text of the draft conclusions and commentaries thereto

66. The text of the draft conclusions, together with commentaries thereto, adopted by the Commission on second reading, is reproduced below.

Identification of customary international law

General commentary

(1) As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries.

(2) The present draft conclusions concern the methodology for identifying rules of customary international law. They seek to offer practical guidance on how the existence of rules of customary international law, and their content, are to be determined. This is not only of concern to specialists in public international law: others, including those involved with national courts, are increasingly called upon to identify rules of customary international law. In each case, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.

(3) Customary international law is unwritten law deriving from practice accepted as law. It remains an important source of public international law.[663] Customary international law is among the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, which refers, in subparagraph (b), to "international custom, as evidence of a general practice accepted as law".[664] This wording reflects the two constituent

[663] Some important fields of international law are still governed essentially by customary international law, with few if any applicable treaties. Even where there is a treaty in force, the rules of customary international law continue to govern questions not regulated by the treaty and continue to apply in relations with and among non-parties to the treaty. In addition, treaties may refer to rules of customary international law; and such rules may be taken into account in treaty interpretation in accordance with article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331 ("1969 Vienna Convention")). Moreover, it may sometimes be necessary to determine the law applicable at the time when certain acts occurred ("the intertemporal law"), which may be customary international law even if a treaty is now in force. In any event, a rule of customary international law may continue to exist and be applicable, separately from a treaty, even where the two have the same content and even among parties to the treaty (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 93–96, paras. 174–179; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at pp. 47–48, para. 88).

[664] This wording was proposed by the Advisory Committee of Jurists, established by the League of Nations in 1920 to prepare a draft statute for the Permanent Court of International Justice; it was retained, without change, in the Statute of the International Court of Justice in 1945. While the drafting has been criticized as imprecise, the formula is nevertheless widely considered as capturing the essence of customary international law.

elements of customary international law: a general practice and its acceptance as law (the latter often referred to as *opinio juris*).[665]

(4) The identification of customary international law is a matter on which there is a wealth of material, including case law and scholarly writings.[666] The draft conclusions reflect the approach adopted by States, as well as by international courts and organizations and most authors. Recognizing that the process for the identification of customary international law is not always susceptible to exact formulations, the draft conclusions aim to offer clear guidance without being overly prescriptive.

(5) The 16 draft conclusions are divided into seven parts. Part One deals with scope and purpose. Part Two sets out the basic approach to the identification of customary international law, the "two-element" approach. Parts Three and Four provide further guidance on the two constituent elements of customary international law, which also serve as the criteria for its identification: "a general practice" and "acceptance as law" (*opinio juris*). Part Five addresses certain categories of materials that are frequently invoked in the identification of rules of customary international law. Whereas rules of customary international law are binding on all States, Parts Six and Seven deal with two exceptional cases: the persistent objector; and particular customary international law (rules of customary international law that apply only among a limited number of States).

Part One
Introduction

Part One, comprising a single draft conclusion, defines the scope of the draft conclusions, outlining their function and purpose.

Conclusion 1
Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

Commentary

(1) Draft conclusion 1 is introductory in nature. It provides that the draft conclusions concern the way in which rules of customary international law are to be determined, that is, the legal methodology for undertaking that exercise.

(2) The term "customary international law" is used throughout the draft conclusions, being in common use and most clearly reflecting the nature of this source of international law. Other terms that are sometimes found in legal instruments, in case law and in scholarly writings include "custom", "international custom", and "international customary law" as well as "the law of nations" and "general international law".[667]

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[665] The Latin term *opinio juris* has been retained in the draft conclusions and commentaries alongside "acceptance as law" because of its prevalence in legal discourse (including in the case law of the International Court of Justice), and also because it may capture better the particular nature of the subjective element of customary international law as referring to legal conviction and not to formal consent.

[666] The present commentary does not contain references to scholarly writings in the field, though they may be useful (and were referred to extensively in the Special Rapporteur's reports). For a bibliography, including sections that correspond to issues covered by individual draft conclusions, as well as sections addressing customary international law in various fields, see annex II to the fifth report (A/CN.4/717/Add.1).

[667] Some of these terms may be used in other senses; in particular, "general international law" is used in various ways (not always clearly specified) including to refer to rules of international law of general application, whether treaty law or customary international law or general principles of law. For a judicial discussion of the term "general international law" see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 665, at p. 782 (separate opinion of Judge Donoghue, para. 2) and pp. 846–849 (separate opinion of Judge *ad hoc* Dugard, paras. 12–17).

(3) The reference to "rules" of customary international law in the present draft conclusions and commentaries includes rules of customary international law that may be referred to as "principles" because of their more general and more fundamental character.[668]

(4) The terms "identify" and "determine" are used interchangeably in the draft conclusions and commentaries. The reference to determining the "existence and content" of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise content is disputed. This may be the case, for example, where the question arises as to whether a particular formulation (usually set out in texts such as treaties or resolutions) does in fact correspond precisely to an existing rule of customary international law, or whether there are exceptions to a recognized rule of customary international law.

(5) Dealing as they do with the identification of rules of customary international law, the draft conclusions do not address, directly, the processes by which customary international law develops over time. Yet in practice identification cannot always be considered in isolation from formation; the identification of the existence and content of a rule of customary international law may well involve consideration of the processes by which it has developed. The draft conclusions thus inevitably refer in places to the formation of rules of customary international law. They do not, however, deal systematically with how such rules emerge, change, or terminate.

(6) A number of other matters fall outside the scope of the draft conclusions. First, they do not address the substance of customary international law: they are concerned only with the methodological issue of how rules of customary international law are to be identified.[669] Second, no attempt is made to explain the relationship between customary international law and other sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice (international conventions, whether general or particular, and general principles of law); the draft conclusions touch on the matter only in so far as is necessary to explain how rules of customary international law are to be identified. Third, the draft conclusions are without prejudice to questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*), or questions concerning the *erga omnes* nature of certain obligations. Fourth, the draft conclusions do not address the position of customary international law within national legal systems. Finally, the draft conclusions do not deal in general terms with the question of a possible burden of proof of customary international law.

Part Two
Basic approach

Part Two sets out the basic approach to the identification of customary international law. Comprising two draft conclusions, it specifies that determining a rule of customary international law requires establishing the existence of two constituent elements: a general practice, and acceptance of that practice as law (*opinio juris*). This requires a careful analysis of the evidence for each element.

Conclusion 2
Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

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[668] See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 288–290, para. 79 ("the association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context [of defining the applicable international law] 'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character").

[669] Thus, reference in these commentaries to particular decisions of courts and tribunals is made in order to illustrate the methodology of the decisions, not for their substance.

Commentary

(1) Draft conclusion 2 sets out the basic approach, according to which the identification of a rule of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice, and whether such general practice is accepted as law (that is, accompanied by *opinio juris*). In other words, one must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way. This methodology, the "two-element approach", underlies the draft conclusions and is widely supported by States, in case law, and in scholarly writings. It serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exist.[670]

(2) A general practice and acceptance of that practice as law (*opinio juris*) are the two constituent elements of customary international law: together they are the essential conditions for the existence of a rule of customary international law. The identification of such a rule thus involves a careful examination of available evidence to establish their presence in any given case. This has been confirmed, *inter alia*, in the case law of the International Court of Justice, which refers to "two conditions [that] must be fulfilled"[671] and has repeatedly laid down that "the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris*".[672] To establish that a claim concerning the existence or the content of a rule of customary international law is well-founded thus entails a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation (namely, that it is required, permitted or prohibited as a matter of law).[673] The test must always be: is there a general practice that is accepted as law?

(3) Where the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist. In the *Asylum* case, for example, the International Court of Justice considered that the facts relating to the alleged existence of a rule of (particular) customary international law disclosed:

> so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.[674]

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[670] The shared view of parties to a case is not sufficient; it must be ascertained that a general practice that is accepted as law actually exists. See also *Military and Paramilitary Activities in and against Nicaragua* (see footnote 663 above), at pp. 97–98, para. 184 ("Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice").

[671] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77.

[672] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 122–123, para. 55; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 29–30, para. 27; and *North Sea Continental Shelf* (see footnote above), at p. 44, para. 77.

[673] For example, in the *Jurisdictional Immunities of the State* case, an extensive survey of the practice of States in the form of national legislation, judicial decisions, and claims and other official statements, which was found to be accompanied by *opinio juris*, served to identify the scope of State immunity under customary international law (*Jurisdictional Immunities of the State* (see footnote 672 above), at pp. 122–139, paras. 55–91).

[674] *Colombian-Peruvian asylum case, Judgment of 20 November 1950, I.C.J. Reports 1950*, p. 266, at p. 277.

(4) As draft conclusion 2 makes clear, the presence of only one constituent element does not suffice for the identification of a rule of customary international law. Practice without acceptance as law (*opinio juris*), even if widespread and consistent, can be no more than a non-binding usage, while a belief that something is (or ought to be) the law unsupported by practice is mere aspiration; it is the two together that establish the existence of a rule of customary international law.[675] While writers have from time to time sought to devise alternative approaches to the identification of customary international law, emphasizing one constituent element over the other or even excluding one element altogether, such theories have not been adopted by States or in the case law.

(5) The two-element approach is often referred to as "inductive", in contrast to possible "deductive" approaches by which rules might be ascertained other than by empirical evidence of a general practice and its acceptance as law (*opinio juris*). The two-element approach does not in fact preclude a measure of deduction as an aid, to be employed with caution, in the application of the two-element approach, in particular when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law,[676] or when concluding that possible rules of international law form part of an "indivisible regime".[677]

(6) The two-element approach applies to the identification of the existence and content of rules of customary international law in all fields of international law. This is confirmed in the practice of States and in the case law, and is consistent with the unity and coherence of international law, which is a single legal system and is not divided into separate branches with their own approach to sources.[678] While the application in practice of the basic approach may well take into account the particular circumstances and context in which an alleged rule has arisen and operates,[679] the essential nature of customary international law as a general practice accepted as law (accompanied by *opinio juris*) must always be respected.

Conclusion 3
Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found.

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675 In the *Right of Passage* case, for example, the Court found that there was nothing to show that the recurring practice of passage through Indian territory of Portuguese armed forces and armed police between Daman and the Portuguese enclaves in India, or between the enclaves themselves, was permitted or exercised as of right. The Court explained that: "Having regard to the special circumstances of the case, this necessity for authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right. The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation" (*Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at pp. 40–43). In *Legality of the Threat or Use of Nuclear Weapons*, the Court considered that: "The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 73). See also *Prosecutor v. Sam Hinga Norman*, *Case No. SCSL-2004-14-AR72(E), decision on preliminary motion based on lack of jurisdiction (child recruitment) of 31 May 2004*, Special Court for Sierra Leone, p. 13, para. 17.

676 This appears to be the approach in *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 55–56, para. 101.

677 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at p. 674, para. 139.

678 See also conclusions of the work of the Study Group on fragmentation of international law, *Yearbook ... 2006*, vol. II (Part Two), para. 251 (1).

679 See draft conclusion 3 below.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Commentary

(1) Draft conclusion 3 concerns the assessment of evidence for the two constituent elements of customary international law.[680] It offers general guidance for the process of determining the existence and content of a rule of customary international law from the various pieces of evidence available at the time of the assessment, which reflects both the systematic and rigorous analysis required and the dynamic nature of customary international law as a source of international law.

(2) Paragraph 1 sets out an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and contextual. Whether a general practice that is accepted as law (accompanied by *opinio juris*) exists must be carefully investigated in each case, in the light of the relevant circumstances.[681] Such analysis not only promotes the credibility of any particular decision, but also allows the two-element approach to be applied, with the necessary flexibility, in all fields of international law.

(3) The requirement that regard be had to the overall context reflects the need to apply the two-element approach while taking into account the subject matter that the alleged rule is said to regulate. This implies that in each case any underlying principles of international law that may be applicable to the matter ought to be taken into account.[682] Moreover, the type of evidence consulted (and consideration of its availability or otherwise) depends on the circumstances, and certain forms of practice and certain forms of evidence of acceptance as law (*opinio juris*) may be of particular significance, according to the context. For example, in the *Jurisdictional Immunities of the State* case, the International Court of Justice considered that

> [i]n the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention [on Jurisdictional Immunities of States and Their Property]. *Opinio juris* in this context is reflected in particular in the assertion by

[680] The term "evidence" is used here as a broad concept relating to all the materials that may be considered as a basis for the identification of customary international law, not in any technical sense as used by particular courts or in particular legal systems.

[681] See also *North Sea Continental Shelf* (footnote 671 above), dissenting opinion of Judge Tanaka, at p. 175 ("To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances"); *Freedom and Justice Party v. Secretary of State for Foreign and Commonwealth Affairs*, Court of Appeal of England and Wales, [2018] EWCA Civ 1719 (19 July 2018), para. 19 ("the ascertainment of customary international law involves an exhaustive and careful scrutiny of a wide range of evidence").

[682] In the *Jurisdictional Immunities of the State* case, the International Court of Justice considered that the customary rule of State immunity derived from the principle of sovereign equality of States and, in that context, had to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory (*Jurisdictional Immunities of the State* (see footnote 672 above), at pp. 123–124, para. 57). See also *Certain Activities carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River* (footnote 667 above), separate opinion of Judge Donoghue (paras. 3–10). It has also been explained that "a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, at p. 76, para. 10).

> States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.[683]

(4) The nature of the rule in question may also be of significance when assessing evidence for the purpose of ascertaining whether there is a general practice that is accepted as law (accompanied by *opinio juris*). In particular, where prohibitive rules are concerned, it may sometimes be difficult to find much affirmative State practice (as opposed to inaction[684]); cases involving such rules are more likely to turn on evaluating whether the inaction is accepted as law.

(5) Given that conduct may be fraught with ambiguities, paragraph 1 further indicates that regard must be had to the particular circumstances in which any evidence is to be found; only then may proper weight be accorded to it. In the *United States Nationals in Morocco* case, for example, the International Court of Justice, in seeking to ascertain whether a rule of (particular) customary international law existed, said:

> There are isolated expressions to be found in the diplomatic correspondence which, if considered without regard to their context, might be regarded as acknowledgments of United States claims to exercise consular jurisdiction and other capitulatory rights. On the other hand, the Court can not ignore the general tenor of the correspondence, which indicates that at all times France and the United States were looking for a solution based upon mutual agreement and that neither Party intended to concede its legal position.[685]

Similarly, when considering legislation as practice, what may sometimes matter more than the actual text is how it has been interpreted and applied. Decisions of national courts will count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law. Statements made casually, or in the heat of the moment, will usually carry less weight than those that are carefully considered; those made by junior officials may carry less weight than those voiced by senior members of the Government. The significance of a State's failure to protest will depend upon all the circumstances, but may be particularly significant where concrete action has been taken, of which that State is aware and which has an immediate negative impact on its interests. Practice of a State that goes against its clear interests or entails significant costs for it is more likely to reflect acceptance as law.

(6) Paragraph 2 states that to identify the existence and content of a rule of customary international law each of the two constituent elements must be found to be present, and explains that this calls for an assessment of evidence for each element. In other words, while practice and acceptance as law (*opinio juris*) together supply the information necessary for the identification of customary international law, two distinct inquiries are to be carried out. The constituent elements may be intertwined in fact (in the sense that practice may be

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683 *Jurisdictional Immunities of the State* (see footnote 672 above), at p. 123, para. 55. In the *Navigational and Related Rights* case, where the question arose whether long-established practice of fishing for subsistence purposes (acknowledged by both parties to the case) has evolved into a rule of (particular) customary international law, the International Court of Justice observed that "the practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record. For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant" (*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 265–266, para. 141). The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has noted the difficulty of observing State practice on the battlefield: *Prosecutor v. Tadić, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995*, para. 99.

684 On inaction as a form of practice see draft conclusion 6, below, and paragraph (3) of the commentary thereto.

685 *Case concerning rights of nationals of the United States of America in Morocco, Judgment of 27 August 1952, I.C.J. Reports 1952*, p. 176, at p. 200.

accompanied by a certain motivation), but each is conceptually distinct for purposes of identifying a rule of customary international law.

(7) Although customary international law manifests itself in instances of conduct that are accompanied by *opinio juris*, acts forming the relevant practice are not as such evidence of acceptance as law. Moreover, acceptance as law (*opinio juris*) is to be sought with respect not only to those taking part in the practice but also to those in a position to react to it.[686] No simple inference of acceptance as law may thus be made from the practice in question; in the words of the International Court of Justice, "acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature".[687]

(8) Paragraph 2 emphasizes that the existence of one element may not be deduced merely from the existence of the other, and that a separate inquiry needs to be carried out for each. Nevertheless, the paragraph does not exclude that the same material may be used to ascertain practice and acceptance as law (*opinio juris*). A decision by a national court, for example, could be relevant practice as well as indicate that its outcome is required under customary international law. Similarly, an official report issued by a State may serve as practice (or contain information as to that State's practice) as well as attest to the legal views underlying it. The important point remains, however, that the material must be examined as part of two distinct inquiries, to ascertain practice and to ascertain acceptance as law.

(9) While in the identification of a rule of customary international law the existence of a general practice is often the initial factor to be considered, and only then is an inquiry made into whether such general practice is accepted as law, this order of examination is not mandatory. Thus, the identification of a rule of customary international law may also begin with appraising a written text allegedly expressing a widespread legal conviction and then seeking to verify whether there is a general practice corresponding to it.

Part Three
A general practice

As stated in draft conclusion 2, above, the indispensable requirement for the identification of a rule of customary international law is that both a general practice and acceptance of such practice as law (*opinio juris*) be ascertained. Part Three offers more detailed guidance on the first of these two constituent elements of customary international law, "a general practice". Also known as the "material" or "objective" element,[688] it refers to those instances of conduct that (when accompanied by acceptance as law) are creative, or expressive, of customary international law. A number of factors must be considered in evaluating whether a general practice does in fact exist.

[686] See also paragraph (5) of the commentary to draft conclusion 9, below.

[687] *North Sea Continental Shelf* (see footnote 671 above), at p. 44, para. 76. In the *Lotus* case, the Permanent Court of International Justice likewise held that: "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged … it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty" (*The Case of the S.S. "Lotus"*, *P.C.I.J.*, *Series A*, No. 10 (1927), p. 28). See also draft conclusion 9, paragraph 2, below.

[688] Sometimes also referred to as *usus* (usage), but this may lead to confusion with "mere usage or habit", which is to be distinguished from customary international law: see draft conclusion 9, paragraph 2, below.

Conclusion 4
Requirement of practice

1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Commentary

(1) Draft conclusion 4 specifies whose practice is to be taken into account when determining the existence and content of rules of customary international law.

(2) Paragraph 1 makes clear that it is primarily the practice of States that is to be looked to in determining the existence and content of rules of customary international law: the material element of customary international law is indeed often referred to as "State practice".[689] Being the primary subjects of the international legal system and possessing a general competence, States play a pre-eminent role in the formation of customary international law, and it is principally their practice that has to be examined in identifying it. Indeed, in many cases, it will only be State practice that is relevant for determining the existence and content of rules of customary international law. As the International Court of Justice stated in *Military and Paramilitary Activities in and against Nicaragua*, in order "to consider what are the rules of customary international law applicable to the present dispute … it has to direct its attention to the practice and *opinio juris* of States".[690]

(3) The word "primarily" serves a dual purpose. In addition to emphasizing the primary role of State practice in the formation and expression of rules of customary international law, it serves to refer the reader to the other practice that contributes, in certain cases, to the formation, or expression, of rules of customary international law, which is the subject of paragraph 2.

(4) Paragraph 2 indicates that "[i]n certain cases", the practice of international organizations also contributes to the formation and expression of rules of customary international law.[691] While international organizations often serve as arenas or catalysts for the practice of States, the paragraph deals with practice that is attributed to international organizations themselves, not practice of States acting within or in relation to them (which is attributed to the States concerned).[692] In those cases where the practice of international organizations themselves is of relevance (as described below), references in the draft conclusions and commentaries to the practice of States should be read as including, *mutatis mutandis*, the practice of international organizations.

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689 State practice serves other important functions in public international law, including in relation to treaty interpretation, but these are not within the scope of the present draft conclusions.

690 *Military and Paramilitary Activities in and against Nicaragua* (see footnote 663 above), at p. 97, para. 183. In the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the Court similarly stated that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States …" (*Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 672 above), at p. 29, para. 27); and in the *Jurisdictional Immunities of the State* case, the Court again confirmed that it is "State practice from which customary international law is derived" (*Jurisdictional Immunities of the State* (see footnote 672 above), at p. 143, para. 101).

691 The term "international organizations" refers, in these draft conclusions, to organizations that are established by instruments governed by international law (usually treaties), and possess their own international legal personality. The term does not include non-governmental organizations.

692 See draft conclusions 6, 10 and 12, below, which refer, *inter alia*, to the practice, and acceptance as law, of States within international organizations.

(5) International organizations are not States.[693] They are entities established and empowered by States (or by States and/or other international organizations) to carry out certain functions, and to that end have international legal personality, that is, they have their own rights and obligations under international law. The practice of international organizations in international relations[694] (when accompanied by *opinio juris*) may count as practice that gives rise or attests to rules of customary international law, but only those rules (*a*) whose subject matter falls within the mandate of the organizations, and/or (*b*) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations may be parties). The words "in certain cases" in paragraph 2 indeed serve to indicate that the practice of international organizations will not be relevant to the identification of all rules of customary international law, and further that it may be the practice of only some, not all, international organizations that is relevant.

(6) Within this framework, the practice falling under paragraph 2 arises most clearly where member States have transferred exclusive competences to the international organization, so that the latter exercises some of the public powers of its member States and hence the practice of the organization may be equated with the practice of those States. This is the case, for example, for certain competences of the European Union. Practice within the scope of paragraph 2 may also arise where member States have not transferred exclusive competences, but have conferred competences upon the international organization that are functionally equivalent to powers exercised by States. Thus the practice of international organizations when concluding treaties, serving as treaty depositaries, in deploying military forces (for example, for peacekeeping), in administering territories, or in taking positions on the scope of the privileges and immunities of the organization and its officials, may contribute to the formation, or expression, of rules of customary international law in those areas.[695]

(7) At the same time, caution is required in assessing the weight of the practice of an international organization as part of a general practice. International organizations vary greatly, not just in their powers, but also in their membership and functions. As a general rule, the more directly a practice of an international organization is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law. Among other factors that may need to be considered in weighing the practice are: the nature of the organization; the nature of the organ whose conduct is under consideration; whether the conduct is *ultra vires* the organization or organ; and whether the conduct is consonant with that of the member States of the organization.

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693 See also the draft articles on the responsibility of international organizations adopted by the Commission in 2011, paragraph (7) of the general commentary: "International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ('principle of speciality'). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound" (*Yearbook ... 2011*, vol. II (Part Two), p. 47). See also *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 178 ("The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights").

694 "Established practice" of the organization (that is, practice forming part of the rules of the organization within the meaning of article 2, paragraph 1 (*j*), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations) is not within the scope of the present conclusions.

695 In this vein, the Standard Terms and Conditions for loan, guarantee and other financing agreements of the European Bank for Reconstruction and Development and the General Conditions for Sovereign-backed Loans of the Asian Infrastructure Investment Bank both recognize that the sources of public international law that may be applicable in the event of dispute between the Bank and a party to a financing agreement include, *inter alia*, "… forms of international custom, including the practice of states *and international financial institutions* of such generality, consistency and duration as to create legal obligations" (European Bank for Reconstruction and Development, Standard Terms and Conditions (1 December 2012), Sect. 8.04(b)(vi)(C); Asian Infrastructure Investment Bank, General Conditions for Sovereign-backed Loans (1 May 2016), Sect. 7.04(vii)(c) (emphasis added)).

(8) Paragraph 3 makes explicit that the conduct of entities other than States and international organizations — for example, non-governmental organizations (NGOs) and private individuals, but also transnational corporations and non-State armed groups — is neither creative nor expressive of customary international law. As such, their conduct does not contribute to the formation, or expression, of rules of customary international law, and may not serve as direct (primary) evidence of the existence and content of such rules. The paragraph recognizes, however, that such conduct may have an indirect role in the identification of customary international law, by stimulating or recording the practice and acceptance as law (*opinio juris*) of States and international organizations.[696] For example, the acts of private individuals may sometimes be relevant to the formation or expression of rules of customary international law, but only to the extent that States have endorsed or reacted to them.[697]

(9) Official statements of the International Committee of the Red Cross (ICRC), such as appeals for and memorandums on respect for international humanitarian law, may likewise play an important role in shaping the practice of States reacting to such statements; and publications of the ICRC may assist in identifying relevant practice. Such activities may thus contribute to the development and determination of customary international law, but they are not practice as such.[698]

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Commentary

(1) Although in their international relations States most frequently act through the executive branch, draft conclusion 5 explains that State practice consists of any conduct of the State, whatever the branch concerned and functions at issue. In accordance with the principle of the unity of the State, this includes the conduct of any organ of the State forming part of the State's organization and acting in that capacity, whether in exercise of executive, legislative, judicial or "other" functions, such as commercial activities or the giving of administrative guidance to the private sector.

(2) To qualify as State practice, the conduct in question must be "of the State". The conduct of any State organ is to be considered conduct of that State, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. An organ includes any person or entity that has that status in accordance with the internal law of the State; the conduct of a person or entity otherwise empowered by the law of the State to exercise elements of governmental authority is also conduct "of the State", provided the person or entity is acting in that capacity in the particular instance.[699]

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[696] In the latter capacity their output may fall within the ambit of draft conclusion 14, below. The Commission has considered a similar point with respect to practice by "non-State actors" under its topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties": see draft conclusion 5, paragraph 2, adopted on second reading under that topic (see chapter IV above).

[697] See, for example, *Dispute regarding Navigational and Related Rights* (footnote 683 above), at pp. 265–266, para. 141.

[698] This is without prejudice to the significance of acts of the ICRC in exercise of specific functions conferred upon it, in particular by the Geneva Conventions for the protection of war victims of 12 August 1949.

[699] See articles 4 and 5 of the articles on responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex. For the draft articles adopted by the Commission and the commentaries thereto, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

(3) The relevant practice of States is not limited to conduct *vis-à-vis* other States or other subjects of international law; conduct within the State, such as a State's treatment of its own nationals, may also relate to matters of international law.

(4) State practice may be that of a single State or of two or more States acting together. Examples of practice of the latter kind may include joint action by several States patrolling the high seas to combat piracy or cooperating in launching a satellite into orbit. Such joint action is to be distinguished from action by international organizations.[700]

(5) In order to contribute to the formation and identification of rules of customary international law, practice must be known to other States (whether or not it is publicly available).[701] Indeed, it is difficult to see how confidential conduct by a State could serve such a purpose unless and until it is known to other States.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

Commentary

(1) Draft conclusion 6 indicates the types of conduct that are covered under the term "practice", providing examples thereof and stating that no form of practice has *a priori* primacy over another in the identification of customary international law. It refers to forms of practice as empirically verifiable facts and avoids, for present purposes, a distinction between an act and its evidence.

(2) Given that States exercise their powers in various ways and do not confine themselves only to some types of acts, paragraph 1 provides that practice may take a wide range of forms. While some have argued that it is only what States "do" rather than what they "say" that may count as practice for purposes of identifying customary international law, it is now generally accepted that verbal conduct (whether written or oral) may also count as practice; indeed, practice may at times consist entirely of verbal acts, for example, diplomatic protests.

(3) Paragraph 1 further makes clear that inaction may count as practice. The words "under certain circumstances" seek to caution, however, that only deliberate abstention from acting may serve such a role: the State in question needs to be conscious of refraining from acting in a given situation, and it cannot simply be assumed that abstention from acting is deliberate. Examples of such omissions (sometimes referred to as "negative practice") may include abstaining from instituting criminal proceedings against foreign State officials; refraining from exercising protection in favour of certain naturalized persons; and abstaining from the use of force.[702]

(4) Paragraph 2 provides a list of forms of practice that are often found to be useful for the identification of customary international law. As the words "but are not limited to" emphasize, this is a non-exhaustive list: given the inevitability and pace of change, both political and technological, it would be impractical to draw up an exhaustive list of all the

[700] See also draft conclusion 4, paragraph 2, above, and the commentary thereto.

[701] In the case of particular customary international law, the practice must be known to at least one other State or group of States concerned (see draft conclusion 16, below).

[702] For illustrations, see *The Case of the S.S. "Lotus"* (footnote 687 above), at p. 28; *Nottebohm Case (second phase), Judgment of 6 April, 1955, I.C.J. Reports 1955*, p. 4, at p. 22; and *Jurisdictional Immunities of the State* (see footnote 672 above), at pp. 134–135, para. 77.

forms that practice might take.[703] The forms of practice listed are no more than examples, which, moreover, may overlap (for example, "diplomatic acts and correspondence" and "executive conduct").

(5) The order in which the forms of practice are listed in paragraph 2 is not intended to be significant. Each of the forms listed is to be interpreted broadly to reflect the multiple and diverse ways in which States act and react. The expression "executive conduct", for example, refers comprehensively to any form of executive act, including executive orders, decrees and other measures; official statements on the international plane or before a legislature; and claims before national or international courts and tribunals. The expression "legislative and administrative acts" similarly embraces the various forms of regulatory disposition effected by a public authority. The term "operational conduct 'on the ground'" includes law enforcement and seizure of property as well as battlefield or other military activity, such as the movement of troops or vessels, or deployment of certain weapons. The words "conduct in connection with treaties" cover acts related to the negotiation and conclusion of treaties, as well as their implementation; by concluding a treaty a State may be engaging in practice in the domain to which the treaty relates, such as maritime delimitation agreements or host country agreements. The reference to "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" likewise includes acts by States related to the negotiation, adoption and implementation of resolutions, decisions and other acts adopted within international organizations or at intergovernmental conferences, whatever their designation and whether or not they are legally binding. Whether any of these examples of forms of practice are in fact relevant in a particular case will depend on the specific rule under consideration and all the relevant circumstances.[704]

(6) Decisions of national courts at all levels may count as State practice[705] (though it is likely that greater weight will be given to the higher courts); decisions that have been overruled on the particular point are generally not considered relevant. The role of decisions of national courts as a form of State practice is to be distinguished from their potential role as a "subsidiary means" for the determination of rules of customary international law.[706]

(7) Paragraph 2 applies *mutatis mutandis* to the forms of practice of international organizations in those cases where, in accordance with draft conclusion 4, paragraph 2, above, such practice contributes to the formation, or expression, of rules of customary international law.

(8) Paragraph 3 clarifies that no form of practice has a higher probative value than others in the abstract. In particular cases, however, as explained in the commentaries to draft conclusions 3 and 7 above, it may be that different forms (or instances) of practice ought to be given different weight when they are assessed in context.

Conclusion 7
Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.

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[703] See also "Ways and means for making the evidence of customary international law more readily available", *Yearbook ... 1950*, vol. II (Part Two), p. 368, para. 31; and document A/CN.4/710: Ways and means for making the evidence of customary international law more readily available: memorandum by the Secretariat (2018).

[704] See paragraph (3) of the commentary to draft conclusion 3, above.

[705] See, for example, *Jurisdictional Immunities of the State* (footnote 672 above), at pp. 131–135, paras. 72–77; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 24, para. 58. The term "national courts" may also include courts with an international element operating within one or more domestic legal systems, such as courts or tribunals with mixed national and international composition.

[706] See draft conclusion 13, paragraph 2, below. Decisions of national courts may also serve as evidence of acceptance as law (*opinio juris*), on which see draft conclusion 10, paragraph 2, below.

Commentary

(1) Draft conclusion 7 concerns the assessment of the practice of a particular State in order to determine the position of that State as part of assessing the existence of a general practice (which is the subject of draft conclusion 8, below). As the two paragraphs of draft conclusion 7 make clear, it is necessary to take account of and assess as a whole all available practice of the State concerned on the matter in question, including its consistency.

(2) Paragraph 1 states, first, that in seeking to determine the position of a particular State on the matter in question, account is to be taken of all available practice of that State. This means that the practice examined should be exhaustive (having regard to its availability) and include the relevant practice of all of the State's organs and all relevant practice of a particular organ. The paragraph also makes it clear that relevant practice is to be assessed not in isolation but as a whole; only then can the actual position of the State be determined.

(3) The need to assess available practice "as a whole" is illustrated by the *Jurisdictional Immunities of the State* case, in which the International Court of Justice took note of the fact that although the Hellenic Supreme Court had decided in one case that, by virtue of the "territorial tort principle", State immunity under customary international law did not extend to the acts of armed forces during an armed conflict, a different position was adopted by the Greek Special Supreme Court; by the Government of Greece when refusing to enforce the Hellenic Supreme Court's judgment, and in defending this position before the European Court of Human Rights; and by the Hellenic Supreme Court itself in a later decision. Assessing such practice "as a whole" led the Court to conclude "that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument" that State immunity under customary international law does not extend to the acts of armed forces during an armed conflict.[707]

(4) Paragraph 2 refers explicitly to situations where there is or appears to be inconsistent practice of a particular State. As just indicated, this may be the case where different organs or branches within the State adopt different courses of conduct on the same matter or where the practice of one organ varies over time. If in such circumstances a State's practice as a whole is found to be inconsistent, that State's contribution to "a general practice" may be reduced.

(5) The words "may, depending on the circumstances" in paragraph 2 indicate that such assessment needs to be approached with caution, and the same conclusion would not necessarily be drawn in all cases. In the *Fisheries case*, for example, the International Court of Justice held that "too much importance need not be attached to the few uncertainties or contradictions, real or apparent … in Norwegian practice. They may be easily understood in the light of the variety of facts and conditions prevailing in the long period."[708] Thus, a difference in the practice of lower and higher organs of the same State is unlikely to result in less weight being given to the practice of the higher organ. Practice of organs of a central government will usually be more significant than that of constituent units of a federal State or political subdivisions of the State. The practice of the executive branch is often the most relevant on the international plane and thus has particular weight in connection with the identification of customary international law, though account may need to be taken of the constitutional position of the various organs in question.[709]

Conclusion 8
The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

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[707] *Jurisdictional Immunities of the State* (see footnote 672 above), at p. 134, para. 76, and p. 136, para. 83. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 663 above), at p. 98, para. 186.

[708] *Fisheries case, Judgment of 18 December 1951, I.C.J. Reports 1951*, p. 116, at p. 138.

[709] See, for example, *Jurisdictional Immunities of the State* (footnote 672 above), at p. 136, para. 83 (where the Court noted that "under Greek law" the view expressed by the Special Supreme Court prevailed over that of the Hellenic Supreme Court).

2. Provided that the practice is general, no particular duration is required.

Commentary

(1) Draft conclusion 8 concerns the requirement that the practice must be general; it seeks to capture the essence of this requirement and the inquiry that is needed in order to verify whether it has been met in a particular case.

(2) Paragraph 1 explains that the notion of generality, which refers to the aggregate of the instances in which the alleged rule of customary international law has been followed, embodies two requirements. First, the practice must be sufficiently widespread and representative. Second, the practice must exhibit consistency. In the words of the International Court of Justice in the *North Sea Continental Shelf* cases, the practice in question must be "both extensive and virtually uniform":[710] it must be a "settled practice".[711] As is explained below, no absolute standard can be given for either requirement; the threshold that needs to be attained for each has to be assessed taking account of context.[712] In each case, however, the practice should be of such a character as to make it possible to discern a virtually uniform usage. Contradictory or inconsistent practice is to be taken into account in evaluating whether such a conclusion may be reached.[713]

(3) The requirement that the practice be "widespread and representative" does not lend itself to exact formulations, as circumstances may vary greatly from one case to another (for example, the frequency with which circumstances calling for action arise).[714] As regards diplomatic relations, for example, in which all States regularly engage, a practice may have to be widely exhibited, while with respect to some other matters, the amount of practice may well be less. This is captured by the word "sufficiently", which implies that the necessary number and distribution of States taking part in the relevant practice (like the number of instances of practice) cannot be identified in the abstract. It is clear, however, that universal participation is not required: it is not necessary to show that all States have participated in the practice in question. The participating States should include those that had an opportunity or possibility of applying the alleged rule.[715] It is important that such States are representative, which needs to be assessed in light of all the circumstances, including the various interests at stake and/or the various geographical regions.

(4) Thus, in assessing generality, an indispensable factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or are most likely to be concerned with the alleged rule ("specially affected States") have participated in the practice.[716] While in many cases all or virtually all States will be equally affected, it would clearly be impractical to determine, for example, the existence and content of a rule of

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[710] *North Sea Continental Shelf* (see footnote 671 above), at p. 43, para. 74. A wide range of terms has been used to describe the requirement of generality, including by the International Court of Justice, without any real difference in meaning being implied.

[711] *Ibid*., at p. 44, para. 77.

[712] See also draft conclusion 3, above.

[713] Divergences from the alleged rule may suggest that no rule exists or point, *inter alia*, to an admissible customary exception that has arisen; a change in a previous rule; a rule of particular customary international law; or the existence of one or more persistent objectors. It might also be relevant to consider when the inconsistent practice occurred, in particular whether it lay in the past, after which consistency prevailed.

[714] See also the judgment of 4 February 2016 of the Federal Court of Australia in *Ure v. The Commonwealth of Australia* [2016] FCAFC 8, para. 37 ("we would hesitate to say that it is impossible to demonstrate the existence of a rule of customary international [law] from a small number of instances of State practice. We would accept the less prescriptive proposition that as the number of instances of State practice decreases the task becomes more difficult").

[715] A relatively small number of States engaging in a certain practice might thus suffice if indeed such practice, as well as other States' inaction in response, is generally accepted as law (accompanied by *opinio juris*).

[716] The International Court of Justice has said that "an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform", *North Sea Continental Shelf* (see footnote 671 above), at p. 43, para. 74.

customary international law relating to navigation in maritime zones without taking into account the practice of relevant coastal States and flag States, or the existence and content of a rule on foreign investment without evaluating the practice of the capital-exporting States as well as that of the States in which investment is made. It should be made clear, however, that the term "specially affected States" should not be taken to refer to the relative power of States.

(5) The requirement that the practice be consistent means that where the relevant acts are divergent to the extent that no pattern of behaviour can be discerned, no general practice (and thus no corresponding rule of customary international law) can be said to exist. For example, in the *Fisheries case*, the International Court of Justice found that "although the ten-mile rule has been adopted by certain States … other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law".[717]

(6) In examining whether the practice is consistent it is of course important to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen so that such instances could indeed constitute reliable guides. The Permanent Court of International Justice referred in the *Lotus* case to "precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle [of customary international law] applicable to the particular case may appear".[718]

(7) At the same time, complete consistency in the practice of States is not required. The relevant practice needs to be virtually or substantially uniform, meaning that some inconsistencies and contradictions are not necessarily fatal to a finding of "a general practice". In *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice held that:

> [i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect … The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules ... .[719]

(8) When inconsistency takes the form of breaches of a rule, this, too, does not necessarily prevent a general practice from being established. This is particularly so when the State concerned denies the violation or expresses support for the rule. As the International Court of Justice has observed:

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[717] *Fisheries case* (see footnote 708 above), at p. 131. A chamber of the International Court of Justice held in the *Gulf of Maine* case that where the practice demonstrates "that each specific case is, in the final analysis, different from all the others …. This precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area* (see footnote 668 above), at p. 290, para. 81). See also, for example, *Colombian-Peruvian asylum case* (footnote 674 above), at p. 277 ("The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum … that it is not possible to discern in all this any constant and uniform usage … with regard to the alleged rule of unilateral and definitive qualification of the offence"); and *Interpretation of the air transport services agreement between the United States of America and Italy*, Advisory Opinion of 17 July 1965, United Nations, *Reports of International Arbitral Awards* (UNRIAA), vol. XVI (Sales No. E/F.69.V.1), pp. 75–108, at p. 100 ("It is correct that only a constant practice, observed in fact and without change can constitute a rule of customary international law").

[718] *The Case of the S.S. "Lotus"* (see footnote 687 above), at p. 21. See also *North Sea Continental Shelf* (footnote 671 above), at p. 45, para. 79; and *Prosecutor v. Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-A, Judgment (Appeals Chamber) of 28 May 2008*, Special Court for Sierra Leone, para. 406.

[719] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 663 above), at p. 98, para. 186.

instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[720]

(9) Paragraph 2 refers to the time element, making clear that a relatively short period in which a general practice is followed is not, in and of itself, an obstacle to determining that a corresponding rule of customary international law exists. While a long duration may result in more extensive practice, time immemorial or a considerable or fixed duration of a general practice is not a condition for the existence of a customary rule.[721] The International Court of Justice confirmed this in the *North Sea Continental Shelf* cases, holding that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law".[722] As this passage makes clear, however, some period of time must elapse for a general practice to emerge; there is no such thing as "instant custom".

Part Four
Accepted as law (*opinio juris*)

Establishing that a certain practice is followed consistently by a sufficiently widespread and representative number of States does not in itself suffice in order to identify a rule of customary international law. Part Four concerns the second constituent element of customary international law, sometimes referred to as the "subjective" or "psychological" element, which requires that in each case, it is also necessary to be satisfied that there exists among States an acceptance as law (*opinio juris*) as to the binding character of the practice in question.

Conclusion 9
Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Commentary

(1) Draft conclusion 9 seeks to encapsulate the nature and function of the second constituent element of customary international law, acceptance as law (*opinio juris*).

(2) Paragraph 1 explains that acceptance as law (*opinio juris*), as a constituent element of customary international law, refers to the requirement that the relevant practice must be undertaken with a sense of legal right or obligation, that is, it must be accompanied by a conviction that it is permitted, required or prohibited by customary international law.[723] It is thus crucial to establish, in each case, that States have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law: they must have pursued the practice as a matter of right, or submitted to it as a matter of obligation. As the International Court of Justice stressed in the *North Sea Continental Shelf* judgment:

[720] *Ibid*. See also, for example, *Prosecutor v. Sam Hinga Norman* (footnote 675 above), para. 51. The same is true when assessing a particular State's practice: see draft conclusion 7, above.

[721] In fields such as international space law or the law of the sea, for example, customary international law has sometimes developed rapidly.

[722] *North Sea Continental Shelf* (see footnote 671 above), at p. 43, para. 74.

[723] While acceptance of a certain practice as law (*opinio juris*) has often been described in terms of "a sense of legal obligation", draft conclusion 9 uses the broader language "a sense of legal right or obligation" as States have both rights and obligations under customary international law and they may act in the belief that they have a right or an obligation. The draft conclusion does not suggest that, where there is no prohibition, a State needs to point to a right to justify its action.

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[724]

(3) Acceptance as law (*opinio juris*) is to be distinguished from other, extralegal motives for action, such as comity, political expediency or convenience: if the practice in question is motivated solely by such other considerations, no rule of customary international law is to be identified. Thus in the *Asylum* case the International Court of Justice declined to recognize the existence of a rule of customary international law where the alleged instances of practice were not shown to be, *inter alia*:

> exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. … considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation.[725]

(4) Seeking to comply with a treaty obligation as a treaty obligation, much like seeking to comply with domestic law, is not acceptance as law for the purpose of identifying customary international law: practice undertaken with such intention does not, by itself, lead to an inference as to the existence of a rule of customary international law.[726] A State may well recognize that it is bound by a certain obligation by force of both customary international law and treaty, but this would need to be proved. On the other hand, when States act in conformity with a treaty provision by which they are not bound, or apply conventional provisions in their relations with non-parties to the treaty, this may evidence the existence of acceptance as law (*opinio juris*) in the absence of any explanation to the contrary.

(5) Acceptance as law (*opinio juris*) is to be sought with respect to both the States engaging in the relevant practice and those in a position to react to it, who must be shown to have understood the practice as being in accordance with customary international law.[727] It is not necessary to establish that all States have recognized (accepted as law) the alleged rule as a rule of customary international law; it is broad and representative acceptance, together with no or little objection, that is required.[728]

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[724] *North Sea Continental Shelf* (see footnote 671 above), at p. 44, para. 77; see also paragraph 76 (referring to the requirement that States "believed themselves to be applying a mandatory rule of customary international law"). The Court has also referred, *inter alia*, to "a practice illustrative of belief in a kind of general right for States" (*Military and Paramilitary Activities in and against Nicaragua* (see footnote 663 above), at p. 108, para. 206).

[725] *Colombian-Peruvian asylum case* (see footnote 674 above), at pp. 277 and 286. See also *The Case of the S.S. "Lotus"* (footnote 687 above), at p. 28 ("Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged … it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand … there are other circumstances calculated to show that the contrary is true"); and *Military and Paramilitary Activities in and against Nicaragua* (see footnote 663 above), at pp. 108–110, paras. 206–209.

[726] See, for example, *North Sea Continental Shelf* (footnote 671 above), at p. 43, para. 76. A particular difficulty may thus arise in ascertaining whether a rule of customary international law has emerged where a non-declaratory treaty has attracted virtually universal participation.

[727] See *Military and Paramilitary Activities in and against Nicaragua* (footnote 663 above), at p. 109, para. 207 ("Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'" (citing the *North Sea Continental Shelf* judgment)).

[728] Thus, where "the members of the international community are profoundly divided" on the question of whether a certain practice is accompanied by acceptance as law (*opinio juris*), no such acceptance as

(6) Paragraph 2 emphasizes that, without acceptance as law (*opinio juris*), a general practice may not be considered as creative, or expressive, of customary international law; it is mere usage or habit. In other words, practice that States consider themselves legally free either to follow or to disregard does not contribute to or reflect customary international law (unless the rule to be identified itself provides for such a choice).[729] Not all observed regularities of international conduct bear legal significance: diplomatic courtesies, for example, such as the provision of red carpets for visiting heads of State, are not accompanied by any sense of legal obligation and thus could not generate or attest to any legal duty or right to act accordingly.[730]

Conclusion 10
Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Commentary

(1) Draft conclusion 10 concerns the evidence from which acceptance of a given practice as law (*opinio juris*) may be ascertained. It reflects the fact that acceptance as law may be made known through various manifestations of State behaviour, which should be carefully assessed to determine whether, in any given case, they actually reflect a State's views on the current state of customary international law.

(2) Paragraph 1 sets forth the general proposition that acceptance as law (*opinio juris*) may be reflected in a wide variety of forms. States may express their recognition (or rejection) of the existence of a rule of customary international law in many ways. Such conduct indicative of acceptance as law supporting an alleged rule encompasses, as the subsequent paragraphs make clear, both statements and physical actions (as well as inaction) concerning the practice in question.

(3) Paragraph 2 provides a non-exhaustive list of forms of evidence of acceptance as law (*opinio juris*), including those most commonly resorted to for such purpose.[731] Such forms of

law could be said to exist: see *Legality of the Threat or Use of Nuclear Weapons* (footnote 675 above), at p. 254, para. 67.

729 In the *Right of Passage* case the International Court of Justice thus observed, with respect to the passage of armed forces and armed police, that "[t]he practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation" (*Case concerning Right of Passage over Indian Territory* (see footnote 675 above), at pp. 42–43). In the *Jurisdictional Immunities of the State* case, the International Court of Justice similarly held, in seeking to determine the content of a rule of customary international law, that, "[w]hile it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court" (*Jurisdictional Immunities of the State* (see footnote 672 above), at p. 123, para. 55).

730 The International Court of Justice observed that indeed "[t]here are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty" (*North Sea Continental Shelf* (see footnote 671 above), at p. 44, para. 77).

731 See also document A/CN.4/710: Ways and means for making the evidence of customary international law more readily available: memorandum by the Secretariat (2018).

evidence may also indicate lack of acceptance as law. There is some common ground between the forms of evidence of acceptance as law and the forms of State practice referred to in draft conclusion 6, paragraph 2 above;[732] in part, this reflects the fact that the two elements may at times be found in the same material (but, even then, their identification requires a separate exercise in each case[733]). In any event, statements are more likely to embody the legal conviction of the State, and may often be more usefully regarded as expressions of acceptance as law (or otherwise) rather than instances of practice.

(4) Among the forms of evidence of acceptance as law (*opinio juris*), an express public statement on behalf of a State that a given practice is permitted, prohibited or mandated under customary international law provides the clearest indication that the State has avoided or undertaken such practice (or recognized that it was rightfully undertaken or avoided by others) out of a sense of legal right or obligation. Similarly, the effect of practice in line with the supposed rule may be nullified by contemporaneous statements that no such rule exists.[734] Either way, such statements could be made, for example, in debates in multilateral settings; when introducing draft legislation before the legislature; as assertions made in written and oral pleadings before courts and tribunals; in protests characterizing the conduct of other States as unlawful; and in response to proposals for codification. They may be made individually or jointly with others.

(5) The other forms of evidence listed in paragraph 2 may also be of particular assistance in ascertaining the legal position of States in relation to certain practices. Among these, the term "official publications" covers documents published in the name of a State, such as military manuals and official maps, in which acceptance as law (*opinio juris*) may be found. Published opinions of government legal advisers may likewise shed light on a State's legal position, though not if the State declined to follow the advice. Diplomatic correspondence may include, for example, circular notes to diplomatic missions, such as those on privileges and immunities. National legislation, while it is most often the product of political choices, may be valuable as evidence of acceptance as law, particularly where it has been specified (for example, in connection with the passage of the legislation) that it is mandated under or gives effect to customary international law. Decisions of national courts may also contain such statements when pronouncing upon questions of international law.

(6) Multilateral drafting and diplomatic processes may afford valuable and accessible evidence as to the legal convictions of States with respect to the content of customary international law, hence the reference to "treaty provisions" and to "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference". Their potential utility in the identification of rules of customary international law is examined in greater detail in draft conclusions 11 and 12, below.

(7) Paragraph 2 applies *mutatis mutandis* to the forms of evidence of acceptance of law (*opinio juris*) of international organizations.

(8) Paragraph 3 provides that, under certain conditions, failure by States to react, within a reasonable time, may also, in the words of the International Court of Justice in the *Fisheries case*, "[bear] witness to the fact that they did not consider … [a certain practice undertaken by others] to be contrary to international law".[735] Tolerance of a certain practice may indeed

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[732] There are also differences between the lists, as they are intended to refer to the principal examples connected with each of the constituent elements.

[733] See draft conclusion 3, paragraph 2, above.

[734] At times the practice itself is accompanied by an express disavowal of legal obligation, such as when States pay compensation *ex gratia* for damage caused to foreign diplomatic property.

[735] *Fisheries case* (see footnote 708 above), at p. 139. See also *The Case of the S.S. "Lotus"* (footnote 687 above), at p. 29 ("the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international

serve as evidence of acceptance as law (*opinio juris*) when it represents concurrence in that practice. For such a lack of open objection or protest to have this probative value, however, two requirements must be satisfied in the circumstances of each case in order to ensure that such inaction does not derive from causes unrelated to the legality of the practice in question.[736] First, it is essential that a reaction to the practice in question would have been called for:[737] this may be the case, for example, where the practice is one that affects — usually unfavourably — the interests or rights of the State failing or refusing to act.[738] Second, the reference to a State being "in a position to react" means that the State concerned must have had knowledge of the practice (which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge), and that it must have had sufficient time and ability to act. Where a State did not or could not have been expected to know of a certain practice, or has not yet had a reasonable time to respond, inaction cannot be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law. A State may also provide other explanations for its inaction.

Part Five
Significance of certain materials for the identification of customary international law

(1) Various materials other than primary evidence of alleged instances of practice accepted as law (accompanied by *opinio juris*) may be consulted in the process of determining the existence and content of rules of customary international law. These commonly include written texts bearing on legal matters, in particular treaties, resolutions of international organizations and intergovernmental conferences, judicial decisions (of both international and national courts), and scholarly works. Such texts may assist in collecting, synthesizing or interpreting practice relevant to the identification of customary international law, and may offer precise formulations to frame and guide an inquiry into its two constituent elements. Part Five seeks to explain the potential significance of these materials, making clear that it is of critical importance to study carefully both the content of such materials and the context within which they were prepared.

(2) The output of the International Law Commission itself merits special consideration in the present context. As has been recognized by the International Court of Justice and other courts and tribunals,[739] a determination by the Commission affirming the existence and content of a rule of customary international law may have particular value, as may a conclusion by it that no such rule exists. This flows from the Commission's unique mandate,

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practice, that the French Government in the *Ortigia-Oncle-Joseph* case and the German Government in the *Ekbatana-West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law"); and *Priebke, Erich s/ solicitud de extradición, Case No. 16.063/94, Judgment of 2 November 1995*, Supreme Court of Justice of Argentina, Vote of Judge Gustavo A. Bossert, at p. 40, para. 90.

[736] See also, more generally, *North Sea Continental Shelf* (footnote 671 above), at p. 27, para. 33.

[737] The International Court of Justice has observed, in a different context, that "[t]he absence of reaction may well amount to acquiescence …. That is to say, silence may also speak, but only if the conduct of the other State calls for a response" (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 12, at pp. 50–51, para. 121). See also *Dispute regarding Navigational and Related Rights* (footnote 683 above), at pp. 265–266, para. 141 ("For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant").

[738] It may well be that a certain practice would be seen as affecting all or virtually all States.

[739] See, for example, *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 40, para. 51; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 56, para. 169; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, *Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment (Appeals Chamber) of 13 December 2004*, International Criminal Tribunal for Rwanda, para. 518; *Dubai-Sharjah Border Arbitration* (1981), *International Law Reports*, vol. 91, pp. 543–701, at p. 575; and 2 BvR 1506/03, German Federal Constitutional Court, Order of the Second Senate of 5 November 2003, para. 47.

as a subsidiary organ of the United Nations General Assembly, to promote the progressive development of international law and its codification;[740] the thoroughness of its procedures (including the consideration of extensive surveys of State practice and *opinio juris*); and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work). The weight to be given to the Commission's determinations depends, however, on various factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output.[741]

Conclusion 11
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(*a*) codified a rule of customary international law existing at the time when the treaty was concluded;

(*b*) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(*c*) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Commentary

(1) Draft conclusion 11 concerns the significance of treaties for the identification of customary international law. The draft conclusion does not address conduct in connection with treaties as a form of practice, a matter covered in draft conclusion 6 above, nor does it directly concern the treaty-making process or draft treaty provisions, which may themselves give rise to State practice and evidence of acceptance as law (*opinio juris*) as indicated in draft conclusions 6 and 10 above.

(2) While treaties are, as such, binding only on the parties thereto, they "may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them".[742] Their provisions (and the processes of their adoption and application) may shed light on the content of customary international law.[743] Clearly expressed treaty provisions may offer particularly convenient evidence as to the existence or content of rules of customary international law when they are found to be declaratory of such rules. Yet the words "may reflect" caution that, in and of themselves, treaties cannot create a rule of customary international law or conclusively attest to its existence or content.

(3) The number of parties to a treaty may be an important factor in determining whether particular rules set forth therein reflect customary international law; treaties that have

[740] See the statute of the International Law Commission (1947), adopted by the General Assembly in resolution 174 (II) of 21 November 1947.

[741] Once the General Assembly has taken action in relation to a final draft of the Commission, such as by annexing it to a resolution and commending it to States, the output of the Commission may also fall to be considered under draft conclusion 12, below.

[742] *Continental Shelf* (see footnote 672 above), at pp. 29–30, para. 27 ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them"). Article 38 of the 1969 Vienna Convention refers to the possibility of "a rule set forth in a treaty … becoming binding upon a third State as a customary rule of international law, recognized as such".

[743] See *Jurisdictional Immunities of the State* (footnote 672 above), at p. 128, para. 66; "Ways and means for making the evidence of customary international law more readily available", *Yearbook ... 1950*, vol. II (Part Two), p. 368, para. 29 ("not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law").

obtained near-universal acceptance may be seen as particularly indicative in this respect.[744] But treaties that are not yet in force or which have not yet attained widespread participation may also be influential in certain circumstances, particularly where they were adopted without opposition or by an overwhelming majority of States.[745] In any case, the attitude of States not party to a widely ratified treaty, both at the time of its conclusion and subsequently, will also be of relevance.

(4) Paragraph 1 sets out three circumstances in which rules set forth in a treaty may be found to reflect customary international law, distinguished by the time when the rule of customary international law was (or began to be) formed. The use of the term "rule set forth in a treaty" seeks to indicate that a rule may not necessarily be contained in a single treaty provision, but could be reflected by two or more provisions read together.[746] The words "if it is established that" make it clear that establishing whether a conventional rule does in fact correspond to an alleged rule of customary international law cannot be done just by looking at the text of the treaty: in each case the existence of the rule must be confirmed by practice (together with acceptance as law). It is important that States can be shown to engage in the practice not (solely) because of the treaty obligation, but out of a conviction that the rule embodied in the treaty is or has become a rule of customary international law.[747]

(5) Subparagraph (*a*) concerns the situation where it is established that a rule set forth in a treaty is declaratory of a pre-existing rule of customary international law.[748] In inquiring whether this is the case with respect to an alleged rule of customary international law, regard should first be had to the treaty text, which may contain an express statement on the matter.[749] The fact that reservations are expressly permitted to a treaty provision may suggest that the treaty provision does not reflect customary international law, but is not necessarily conclusive.[750] Such indications within the text, however, may be lacking, or may refer to the

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[744] See, for example, Eritrea-Ethiopia Claims Commission, *Partial Award: Prisoners of War, Ethiopia's Claim 4*, 1 July 2003, UNRIAA, vol. XXVI (Sales No. E/F.06.V.7), pp. 73–114, at pp. 86–87, para. 31 ("Certainly, there are important, modern authorities for the proposition that the Geneva Conventions of 1949 have largely become expressions of customary international law, and both Parties to this case agree. The mere fact that they have obtained nearly universal acceptance supports this conclusion" (footnote omitted)); and *Prosecutor v. Sam Hinga Norman* (see footnote 675 above) at paras. 17–20 (referring, *inter alia*, to the "huge acceptance, the highest acceptance of all international conventions" as indicating that the relevant provisions of the Convention on the Rights of the Child had come to reflect customary international law).

[745] See, for example, *Continental Shelf* (footnote 672 above), at p. 30, para. 27 ("it cannot be denied that the 1982 Convention [on the Law of the Sea — which was not then in force] is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law").

[746] It may also be the case that a single provision only partly reflects customary international law.

[747] In the *North Sea Continental Shelf* cases, this consideration led to the disqualification of several of the invoked instances of State practice (*North Sea Continental Shelf* (see footnote 671 above), at p. 43, para. 76).

[748] See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 663 above), at pp. 46–47, para. 87.

[749] In the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, *Treaties Series*, vol. 78, No. 1021, p. 277), for example, the Parties "*confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law" (art. 1) (emphasis added); and the 1958 Geneva Convention on the High Seas contains the following preambular paragraph: "*Desiring* to codify the rules of international law relating to the high seas" (*ibid*., vol. 450, No. 6465, at p. 82). A treaty may equally indicate that it embodies progressive development rather than codification; in the *Colombian-Peruvian asylum case*, for example, the International Court of Justice found that the preamble to the Montevideo Convention on Rights and duties of States of 1933 (League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19), which states that it modifies a previous convention (and the limited number of States that have ratified it), runs counter to the argument that the Convention "merely codified principles which were already recognized by … custom" (*Colombian-Peruvian asylum case* (see footnote 674 above), at p. 277).

[750] See also the Commission's Guide to Practice on Reservations to Treaties, guidelines 3.1.5.3 (Reservations to a provision reflecting a customary rule) and 4.4.2 (Absence of effect on rights and

treaty in general rather than to any specific rule contained therein;[751] in such case, resort may be had to the treaty's preparatory work (*travaux préparatoires*),[752] including any statements by States in the course of the drafting process that may disclose an intention to codify an existing rule of customary international law. If it is found that the negotiating States had indeed considered that the rule in question was a rule of customary international law, this would be evidence of acceptance as law (*opinio juris*), and would carry greater weight the larger the number of negotiating States. There would, however, still remain a need to consider whether sufficiently widespread and representative, as well as consistent, instances of the relevant practice supported the existence of a rule of customary international law (as distinct from a treaty obligation). This is both because the fact that the parties assert that the treaty is declaratory of existing law is no more than one piece of evidence to that effect, and because the rule of customary international law underlying a treaty text may have changed or been superseded since the conclusion of the treaty. In other words, relevant practice will need to confirm, or exist in conjunction with, the *opinio juris*.

(6) Subparagraph (*b*) concerns the case where it is established that a general practice that is accepted as law (accompanied by *opinio juris*) has crystallized around a treaty rule elaborated on the basis of only a limited amount of State practice. In other words, the treaty rule has consolidated and given further definition to a rule of customary international law that was only emerging at the time when the treaty was being drawn up, thereby later becoming reflective of it.[753] Here, too, establishing that this is indeed the case requires an evaluation of whether the treaty formulation has been accepted as law and does in fact find support in a general practice.[754]

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obligations under customary international law), *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1).

751 The 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws (League of Nations, *Treaty Series*, vol. CLXXIX, No. 4137, p. 89), for example, provides that: "The inclusion of the above-mentioned principles and rules in the Convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law" (art. 18). Sometimes a general reference is made to both codification and development: in the 1969 Vienna Convention, for example, the States parties express in the preamble their belief that "codification and progressive development of the law of treaties [are] achieved in the present Convention"; in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (General Assembly resolution 59/38 of 2 December 2004), the States parties consider in the preamble "that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law" and express their belief that the Convention "would contribute to the codification and development of international law and the harmonization of practice in this area". See also *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* and *Secretary of State for Foreign and Commonwealth Affairs* and *Libya v. Janah*, United Kingdom Supreme Court, [2017] UKSC 62 (18 October 2017), para. 32.

752 In examining in the *North Sea Continental Shelf* cases whether article 6 of the 1958 Convention on the Continental Shelf (United Nations, *Treaty Series*, vol. 499, No. 7302, p. 311) reflected customary international law when the Convention was drawn up, the International Court of Justice held that "[t]he status of the rule in the Convention therefore depends mainly on the processes that led the [International Law] Commission to propose it. These processes have already been reviewed in connection with the Danish-Netherlands contention of an *a priori* necessity for equidistance [in maritime delimitation], and the Court considers this review sufficient for present purposes also, in order to show that the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule" (*North Sea Continental Shelf* (see footnote 671 above), at p. 38, para. 62). See also *Jurisdictional Immunities of the State* (footnote 672 above), at pp. 138–139, para. 89.

753 Even where a treaty provision could not eventually be agreed, it remains possible that customary international law has later evolved "through the practice of States on the basis of the debates and near-agreements at the Conference [where a treaty was negotiated]": *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 191–192, para. 44.

754 See, for example, *Continental Shelf* (footnote 672 above), at p. 33, para. 34 ("It is in the Court's view incontestable that … the institution of the exclusive economic zone, with its rule on entitlement by

(7) Subparagraph (*c*) concerns the case where it is established that a rule set forth in a treaty has generated a new rule of customary international law.[755] This is a process that is not lightly to be regarded as having occurred. As the International Court of Justice explained in the *North Sea Continental Shelf* cases, for it to be established that a rule set forth in a treaty has produced the effect that a rule of customary international law has come into being:

> [i]t would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law. … [A]n indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[756]

In other words, a general practice accepted as law (accompanied by *opinio juris*) "in the sense of the provision invoked" must be observed. Given that the concordant behaviour of parties to the treaty among themselves could presumably be attributed to the treaty obligation, rather than to acceptance of the rule in question as binding under customary international law, the practice of such parties in relation to non-parties to the treaty, and of non-parties in relation to parties or among themselves, will have particular value.

(8) Paragraph 2 seeks to caution that the existence of similar provisions in a number of bilateral or other treaties, thus establishing similar rights and obligations for a possibly broad array of States, does not necessarily indicate that a rule of customary international law is reflected in such provisions. While it may indeed be the case that such repetition attests to the existence of a corresponding rule of customary international law (or has given rise to it), it "could equally show the contrary" in the sense that States enter into treaties because of the absence of any rule or in order to derogate from an existing but different rule of customary international law.[757] Again, an investigation into whether there are instances of practice accepted as law (accompanied by *opinio juris*) that support the written rule is required.

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reason of distance, is shown *by the practice of States* to have become a part of customary law" (emphasis added)).

755 As the International Court of Justice confirmed, "this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed" (*North Sea Continental Shelf* (see footnote 671 above), at p. 41, para. 71). One example frequently cited is the Hague Regulations annexed to the 1907 Fourth Hague Convention respecting the Laws and Customs of War on Land: although these were prepared, according to the Convention, "to revise the general laws and customs of war" existing at that time (and thus did not codify existing customary international law), they later came to be regarded as reflecting customary international law (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 172, para. 89).

756 *North Sea Continental Shelf* (see footnote 671 above), at pp. 41–43, paras. 72 and 74 (cautioning, at para. 71, that "this result is not lightly to be regarded as having been attained"). See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 663 above), at p. 98, para. 184 ("Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice").

757 See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 615, para. 90 ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary").

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Commentary

(1) Draft conclusion 12 concerns the role that resolutions adopted by international organizations or at intergovernmental conferences may play in the determination of rules of customary international law. It provides that, while such resolutions, of themselves, can neither constitute rules of customary international law nor serve as conclusive evidence of their existence and content, they may have value in providing evidence of existing or emerging law and may contribute to the development of a rule of customary international law.[758]

(2) As in draft conclusion 6, the word "resolution" refers to resolutions, decisions and other acts adopted by international organizations or at intergovernmental conferences, whatever their designation[759] and whether or not they are legally binding. Special attention should be paid in the present context to resolutions of the General Assembly, a plenary organ of the United Nations with virtually universal participation, that may offer important evidence of the collective opinion of its Members. Resolutions adopted by organs (or at conferences) with more limited membership may also be relevant, but their weight in identifying a rule of customary international law is likely to be less.

(3) Although resolutions of organs of international organizations (unlike resolutions of intergovermental conferences) emanate, strictly speaking, not from the States members but from the organization, in the context of the present draft conclusion what is relevant is that they may reflect the collective expression of the views of such States: when they purport (explicitly or implicitly) to touch upon legal matters, the resolutions may afford an insight into the attitudes of the member States towards such matters. Much of what has been said of treaties in relation to draft conclusion 11, above, applies to resolutions; however, unlike treaties, resolutions are normally not legally binding documents, and generally receive less legal review than treaty texts. Like treaties, resolutions cannot be a substitute for the task of ascertaining whether there is in fact a general practice that is accepted as law (accompanied by *opinio juris*).

(4) Paragraph 1 makes clear that resolutions adopted by international organizations or at intergovernmental conferences cannot independently constitute rules of customary international law. In other words, the mere adoption of a resolution (or a series of resolutions) purporting to lay down a rule of customary international law does not create such law: it has to be established that the rule set forth in the resolution does in fact correspond to a general practice that is accepted as law (accompanied by *opinio juris*). There is no "instant custom" arising from such resolutions on their own account.[760]

(5) Paragraph 2 states, first, that resolutions may nevertheless assist in the determination of rules of customary international law by providing evidence of their existence and content.

[758] See *Legality of the Threat or Use of Nuclear Weapons* (footnote 675 above), at pp. 254–255, para 70; *SEDCO Incorporated v. National Iranian Oil Company and Iran*, second interlocutory award, Award No. ITL 59-129-3 of 27 March 1986, *International Law Reports*, vol. 84, pp. 483–592, at p. 526.

[759] There is a wide range of designations, such as "declaration" or "declaration of principles".

[760] See also para. (9) of the commentary to draft conclusion 8, above.

The word "may" seeks to caution that not all resolutions serve such a role. As the International Court of Justice has observed, resolutions "even if they are not binding … can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".[761] This is particularly so when a resolution purports to be declaratory of an existing rule of customary international law, in which case it may serve as evidence of the acceptance as law of such a rule by those States supporting the resolution. In other words, "[t]he effect of consent to the text of such resolutions … may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution".[762] Conversely, negative votes, abstentions or disassociations from a consensus, along with general statements and explanations of positions, may be evidence that there is no acceptance as law.

(6) Because the attitude of States towards a given resolution (or a particular rule set forth in a resolution), expressed by vote or otherwise, is often motivated by political or other non-legal considerations, ascertaining acceptance as law (*opinio juris*) from such resolutions must be done "with all due caution".[763] This is denoted by the word "may". In each case, a careful assessment of various factors is required in order to verify whether indeed the States concerned intended to acknowledge the existence of a rule of customary international law. As the International Court of Justice indicated in *Legality of the Threat or Use of Nuclear Weapons*, "it is necessary to look at [the resolution's] content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."[764] The precise wording used is the starting point in seeking to evaluate the legal significance of a resolution; reference to international law, and the choice (or avoidance) of particular terms in the text, including the preambular as well as the operative language, may be significant.[765] Also relevant are the debates and negotiations leading up to the adoption of the resolution and especially explanations of vote and similar statements given immediately before or after adoption.[766] The degree of support for the resolution (as may be observed in the size of the majority and where there are negative votes or abstentions) is critical. Differences of opinion expressed on aspects of a resolution may indicate that no general acceptance as law (*opinio juris*) exists, at least on those aspects, and resolutions which attract negative votes or abstentions are unlikely to be regarded as reflecting customary international law.[767]

(7) Paragraph 2 further acknowledges that resolutions adopted by international organizations or at intergovernmental conferences, even when devoid of legal force of their own, may sometimes play an important role in the development of customary international law. This may be the case when, as with a treaty, a resolution (or a series of resolutions) provides inspiration and impetus for the growth of a general practice accepted as law (accompanied by *opinio juris*) conforming to its terms, or when it crystallizes an emerging rule.

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[761] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 675 above), at pp. 254–255, para. 70 (referring to General Assembly resolutions).

[762] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 663 above), at p. 100, para. 188. See also *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*, Final Award of 24 March 1982, *International Law Reports*, vol. 66, pp. 518–627, at pp. 601–602, para. 143.

[763] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 663 above), at p. 99, para. 188.

[764] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 675 above), at p. 255, para. 70.

[765] In resolution 96 (I) of 11 December 1946, for example, the General Assembly "*Affirm[ed]* that genocide is a crime under international law", language that suggests that the paragraph was intended to be declaratory of existing customary international law.

[766] In the General Assembly, explanations of vote are often given upon adoption by a main committee, in which case they are not usually repeated in plenary.

[767] See, for example, *Legality of the Threat or Use of Nuclear Weapons* (footnote 675 above), at p. 255, para. 71 ("several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons").

(8) Paragraph 3 makes it clear that provisions of resolutions adopted by an international organization or at an intergovernmental conference cannot in and of themselves serve as conclusive evidence of the existence and content of rules of customary international law. This follows from the indication that, for the existence of a rule to be demonstrated, the *opinio juris* of States, as may be evidenced by a resolution, must be borne out by practice; other evidence is thus required, in particular to show whether the alleged rule is in fact observed in the practice of States.[768] A provision of a resolution cannot be evidence of a rule of customary international law if practice is absent, different or inconsistent.

Conclusion 13
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Commentary

(1) Draft conclusion 13 concerns the role of decisions of courts and tribunals, both international and national, as an aid in the identification of rules of customary international law. It should be recalled that decisions of national courts may serve a dual role in the identification of customary international law. On the one hand, as the above draft conclusions 6 and 10 indicate, they may serve as practice as well as evidence of acceptance as law (*opinio juris*) of the forum State. Draft conclusion 13, on the other hand, indicates that such decisions may also serve as a subsidiary means (*moyen auxiliaire*) for the determination of rules of customary international law when they themselves examine the existence and content of such rules.

(2) Draft conclusion 13 follows closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, according to which, while decisions of the Court have no binding force except between the parties, judicial decisions are a subsidiary means for the determination of rules of international law, including rules of customary international law. The term “subsidiary means” denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law (as are treaties, customary international law and general principles of law). The use of the term “subsidiary means” does not, and is not intended to, suggest that such decisions are not important for the identification of customary international law.

(3) Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law. The value of such decisions varies greatly, however, depending both on the quality of the reasoning (including primarily the extent to which it results from a thorough examination of evidence of an alleged general practice accepted as law) and on the reception of the decision, in particular by States and in subsequent case law. Other considerations might, depending on the circumstances, include the nature of the court or tribunal; the size of the majority by which the decision was adopted; and the rules and the procedures applied by the court or tribunal. It needs to be borne in mind, moreover, that judicial pronouncements on customary international law do not freeze the law; rules of customary international law may have evolved since the date of a particular decision.

[768] See, for example, *KAING Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment*, Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber (3 February 2012), para. 194 (“The 1975 Declaration on Torture [resolution 3452 (XXX) of 9 December 1975, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] is a non-binding General Assembly resolution and thus more evidence is required to find that the definition of torture found therein reflected customary international law at the relevant time”).

(4) Paragraph 1 refers to "international courts and tribunals", a term intended to cover any international body exercising judicial powers that is called upon to consider rules of customary international law. Express mention is made of the International Court of Justice, the principal judicial organ of the United Nations whose Statute is an integral part of the Charter of the United Nations and whose members are elected by the General Assembly and Security Council, in recognition of the significance of its case law and its particular position as the only standing international court of general jurisdiction.[769] In addition to the predecessor of the International Court of Justice, the Permanent Court of International Justice, the term "international courts and tribunals" includes (but is not limited to) specialist and regional courts, such as the International Tribunal for the Law of the Sea, the International Criminal Court and other international criminal tribunals, regional human rights courts and the World Trade Organization Dispute Settlement Body. It also includes inter-State arbitral tribunals and other arbitral tribunals applying international law. The skills and the breadth of evidence usually at the disposal of international courts and tribunals may lend significant weight to their decisions, subject to the considerations mentioned in the preceding paragraph.

(5) For the purposes of this draft conclusion, the term "decisions" includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters. Separate and dissenting opinions may shed light on the decision and may discuss points not covered in the decision of the court or tribunal, but they need to be approached with caution since they reflect the viewpoint of the individual judge and may set out points not accepted by the court or tribunal.

(6) Paragraph 2 concerns decisions of national courts (also referred to as domestic or municipal courts).[770] The distinction between international and national courts is not always clear-cut; in these draft conclusions, the term "national courts" includes courts with an international composition operating within one or more domestic legal systems, such as "hybrid" courts and tribunals involving mixed national and international composition and jurisdiction.

(7) Some caution is called for when seeking to rely on decisions of national courts as a subsidiary means for the determination of rules of customary international law.[771] This is reflected in the different wording of paragraphs 1 and 2, in particular the use of the words "[r]egard may be had, as appropriate" in paragraph 2. National courts operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent. Their decisions may reflect a particular national perspective. Unlike most international courts, national courts may sometimes lack international law expertise and may have reached their decisions without the benefit of hearing argument advanced by States.[772]

Conclusion 14
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

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[769] Although there is no hierarchy of international courts and tribunals, decisions of the International Court of Justice are often regarded as authoritative by other courts and tribunals. See, for example, *Jones and Others v. the United Kingdom*, Application nos. 34356/06 and 40528/06, European Court of Human Rights, ECHR 2014, para. 198; *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment*, *ITLOS Reports 1999*, p. 10, at paras. 133–134; and *Japan — Taxes on Alcoholic Beverages*, WTO Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, sect. D.

[770] On decisions of national courts as a subsidiary means for the determination of rules of customary international law see, for example, *Mohammed and others v. Ministry of Defence*, United Kingdom Supreme Court, [2017] UKSC 2 (17 January 2017), paras. 149–151 (Lord Mance).

[771] See also *Minister of Justice and Constitutional Development v. Southern African Litigation Centre*, Supreme Court of Appeal of South Africa (2016) 3 SA 317 (SCA) (15 March 2016), para. 74.

[772] See also "Ways and means for making the evidence of customary international law more readily available", *Yearbook ... 1950*, vol. II (Part Two), p. 370, para. 53.

Commentary

(1) Draft conclusion 14 concerns the role of teachings (in French, *doctrine*) in the identification of rules of customary international law. Following closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, it provides that such works may be resorted to as a subsidiary means (*moyen auxiliaire*) for determining rules of customary international law, that is to say, when ascertaining whether there is a general practice that is accepted as law (accompanied by *opinio juris*). The term "teachings", often referred to as "writings", is to be understood in a broad sense; it includes teachings in non-written form, such as lectures and audiovisual materials.

(2) As with decisions of courts and tribunals, referred to above in draft conclusion 13, writings are not themselves a source of international law, but may offer guidance for the determination of the existence and content of rules of customary international law. This auxiliary role recognizes the value that teachings may have in collecting and assessing State practice; in identifying divergences in State practice and the possible absence or development of rules; and in evaluating the law.

(3) There is need for caution when drawing upon writings, since their value for determining the existence of a rule of customary international law varies: this is reflected in the words "may serve as". First, writers sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate its development (*lex ferenda*). In doing so, they do not always distinguish (or distinguish clearly) between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual viewpoints of their authors. Third, they differ greatly in quality. Assessing the authority of a given work is thus essential; the United States Supreme Court in the *Paquete Habana Case* referred to:

> the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[773]

(4) The term "publicists", which comes from the Statute of the International Court of Justice, covers all those whose writings may elucidate questions of international law. While most such writers will, in the nature of things, be specialists in public international law, others are not excluded. The reference to "the most highly qualified" publicists emphasizes that attention ought to be paid to the writings of those who are eminent in the field. In the final analysis, however, it is the quality of the particular writing that matters rather than the reputation of the author; among the factors to be considered in this regard are the approach adopted by the author to the identification of customary international law and the extent to which his or her text remains loyal to it. The reference to publicists "of the various nations" highlights the importance of having regard, so far as possible, to writings representative of the principal legal systems and regions of the world and in various languages when identifying customary international law.

(5) The output of international bodies engaged in the codification and development of international law may provide a useful resource in this regard.[774] Such collective bodies include the Institute of International Law (*Institut de droit international*) and the International Law Association, as well as international expert bodies in particular fields and from different regions. The value of each output needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the extent to which the output seeks to state existing law, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body, and the reception of the output by States and others.

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[773] *The Paquete Habana and The Lola*, US Supreme Court 175 US 677 (1900), at p. 700. See also *The Case of the S.S. "Lotus"* (footnote 687 above), at pp. 26 and 31.

[774] The special consideration to be given to the output of the International Law Commission is described in paragraph (2) of the general commentary to the present Part (Part Five) above.

Part Six
Persistent objector

Part Six comprises a single draft conclusion, on the persistent objector rule.

Conclusion 15
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

3. The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

Commentary

(1) Rules of customary international law, "by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour".[775] Nevertheless, when a State has persistently objected to an *emerging* rule of customary international law, and maintains its objection after the rule has crystallized, that rule is not opposable to it. This is sometimes referred to as the persistent objector "rule" or "doctrine" and not infrequently arises in connection with the identification of rules of customary international law. As the draft conclusion seeks to convey, the invocation of the persistent objector rule is subject to stringent requirements.

(2) The persistent objector is to be distinguished from a situation where the objection of a significant number of States to the emergence of a new rule of customary international law prevents its crystallization altogether (because there is no general practice accepted as law).[776]

(3) A State objecting to an emerging rule of customary international law by arguing against it or engaging in an alternative practice may adopt one or both of two stances: it may seek to prevent the rule from coming into being; or it may aim to ensure that, if it does emerge, the rule will not be opposable to it. An example would be the opposition of certain States to the then-emerging rule permitting the establishment of a maximum 12-mile territorial sea. Such States may have wished to consolidate a three-, four- or six-mile territorial sea as a general rule, but in any event were not prepared to have wider territorial seas enforced against them.[777] If a rule of customary international law is found to have emerged, it will be for the State concerned to establish the right to benefit from persistent objector status.

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[775] *North Sea Continental Shelf* (see footnote 671 above), at pp. 38–39, para. 63. This is true of rules of "general" customary international law, as opposed to "particular" customary international law (on which see draft conclusion 16, below).

[776] See, for example, *Entscheidungen des Bundesverfassungsgerichts* (German Federal Constitutional Court), vol. 46 (1978), Judgment of 13 December 1977, 2 BvM 1/76, No. 32, pp. 34–404, at pp. 388–389, para. 6 ("This concerns not merely action that a State can successfully uphold from the outset against application of an existing general rule of international law by way of perseverant protestation of rights (in the sense of the ruling of the International Court of Justice in the Norwegian *Fisheries case* …); instead, the existence of a corresponding general rule of international law cannot at present be assumed").

[777] In due course, and as part of an overall package on the law of the sea, States did not in fact maintain their objections. While the ability effectively to preserve a persistent objector status over time may sometimes prove difficult, this does not call into question the existence of the rule reflected in draft conclusion 15.

(4) The persistent objector rule is not infrequently invoked and recognized, both in international and domestic case law[778] as well as in other contexts.[779] While there are differing views, the persistent objector rule is widely accepted by States and writers as well as by scientific bodies engaged in international law.[780]

(5) Paragraph 1 makes it clear that the objection must have been made while the rule in question was in the process of formation. The timeliness of the objection is critical: the State must express its opposition before a given practice has crystallized into a rule of customary international law, and its position will be best assured if it did so at the earliest possible moment. While the line between objection and violation may not always be an easy one to draw, there is no such thing as a subsequent objector rule: once the rule has come into being, an objection will not avail a State wishing to exempt itself.

(6) If a State establishes itself as a persistent objector, the rule is not opposable to it for so long as it maintains the objection; the expression "not opposable" is used in order to reflect the exceptional position of the persistent objector. As the paragraph further indicates, once an objection is abandoned (as it may be at any time, expressly or otherwise), the State in question becomes bound by the rule.

(7) Paragraph 2 clarifies the stringent requirements that must be met for a State to establish and maintain persistent objector status *vis-à-vis* a rule of customary international law. In addition to being made before the practice crystallizes into a rule of law, the objection must be clearly expressed, meaning that non-acceptance of the emerging rule or the intention not to be bound by it must be unambiguous.[781] There is, however, no requirement that the objection be made in a particular form. A clear verbal objection, either in written or oral form, as opposed to physical action, will suffice to preserve the legal position of the objecting State.

(8) The requirement that the objection be made known to other States means that the objection must be communicated internationally; it cannot simply be voiced internally. It is for the objecting State to ensure that the objection is indeed made known to other States.

(9) The requirement that the objection be maintained persistently applies both before and after the rule of customary international law has emerged. Assessing whether this requirement has been met needs to be done in a pragmatic manner, bearing in mind the circumstances of each case. The requirement signifies, first, that the objection should be reiterated when the circumstances are such that a restatement is called for (that is, in circumstances where silence or inaction may reasonably lead to the conclusion that the State has given up its objection). It is clear, however, that States cannot be expected to react on

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[778] See, for example, the *Fisheries case* (footnote 708 above), at p. 131; *Michael Domingues v. United States*, Case No. 12.285 (2002), Inter-American Commission on Human Rights, Report No. 62/02, paras. 48 and 49; *Sabeh El Leil v. France* [GC], No. 34869/05, European Court of Human Rights, 29 June 2011, para. 54; WTO Panel Reports, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R and WT/DS293/R, adopted 21 November 2006, at p. 335, footnote 248; and *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals for the Ninth Circuit, 965 F.2d 699; 1992 U.S. App., at p. 715, para. 54.

[779] See, for example, the intervention by Turkey in 1982 at the Third United Nations Conference on the Law of the Sea, document A/CONF.62/SR.189, p. 76, para. 150 (available from http://legal.un.org/diplomaticconferences/lawofthesea-1982/Vol17.html); United States Department of Defense, *Law of War Manual*, Office of General Counsel, Washington D.C., December 2016, at pp. 29–34, sect. 1.8 (Customary international law), in particular at p. 30, para. 1.8 ("Customary international law is generally binding on all States, but States that have been persistent objectors to a customary international law rule during its development are not bound by that rule") and p. 34, para. 1.8.4.

[780] The Commission itself recently referred to the rule in its Guide to Practice on Reservations to Treaties, where it stated that "a reservation may be the means by which a 'persistent objector' manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a rule which cannot be invoked against it under general international law" (see paragraph (7) of the commentary to guideline 3.1.5.3, *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10/Add.1)).

[781] See, for example, *C v. Director of Immigration and another*, Hong Kong Court of Appeal, [2011] HKCA 159, CACV 132-137/2008 (2011), at para. 68 ("Evidence of objection must be clear").

every occasion, especially where their position is already well known. Second, such repeated objections must be consistent overall, that is, without significant contradictions.

(10) Paragraph 3 provides expressly that draft conclusion 15 is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*). The commentary to draft conclusion 1 already makes clear that all of the present draft conclusions are without prejudice to questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*), or questions concerning the *erga omnes* nature of certain obligations.[782]

Part Seven
Particular customary international law

Part Seven consists of a single draft conclusion, dealing with particular customary international law (sometimes referred to as "regional custom" or "special custom"). While rules of general customary international law are binding on all States, rules of particular customary international law apply among a limited number of States. Even though they are not frequently encountered, they can play a significant role in inter-State relations, accommodating differing interests and values peculiar to only some States.[783]

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.

Commentary

(1) That rules of customary international law that are not general in nature may exist is undisputed. The case law of the International Court of Justice confirms this, having referred, *inter alia*, to customary international law "particular to the Inter-American Legal system"[784] or "limited in its impact to the African continent as it has previously been to Spanish America",[785] "a local custom",[786] and customary international law "of a regional nature".[787] Cases where the identification of such rules was considered include the *Asylum* case[788] and the *Right of Passage* case.[789] The term "particular customary international law" refers to these rules in contrast to rules of customary international law of general application. It is used in preference to "particular custom" to emphasize that the draft conclusion is concerned with rules of law, not mere customs or usages; there may well be "local customs" among States that do not amount to rules of international law.[790]

(2) Draft conclusion 16 has been placed at the end of the set of draft conclusions since the preceding draft conclusions generally apply also in respect of the determination of rules of particular customary international law, except as otherwise provided in the present draft

[782] See paragraph (5) of the commentary to draft conclusion 1, above.
[783] It is not to be excluded that such rules may evolve, over time, into rules of general customary international law.
[784] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 663 above), at p. 105, para. 199.
[785] *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, para. 21.
[786] *Case concerning rights of nationals of the United States of America in Morocco* (see footnote 685 above), at p. 200; and *Case concerning Right of Passage over Indian Territory* (see footnote 675 above), at p. 39.
[787] *Dispute regarding Navigational and Related Rights* (see footnote 683 above), at p. 233, para. 34.
[788] *Colombian-Peruvian asylum case* (see footnote 674 above).
[789] *Case concerning Right of Passage over Indian Territory* (see footnote 675 above).
[790] See also draft conclusion 9, paragraph 2, above.

conclusion. In particular, the two-element approach applies, as described in the present commentary.[791]

(3) Paragraph 1, which is definitional in nature, explains that particular customary international law applies only among a limited number of States. It is to be distinguished from general customary international law, that is, customary international law that in principle applies to all States. A rule of particular customary international law itself thus creates neither obligations nor rights for third States.[792]

(4) Rules of particular customary international law may apply among various types of groupings of States. Reference is often made to customary rules of a regional nature, such as those "peculiar to Latin-American States" (the institution of diplomatic asylum commonly being cited).[793] Particular customary international law may cover a smaller geographical area, such as a sub-region, or even bind as few as two States. In the *Right of Passage* case the International Court of Justice explained that:

> It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.[794]

Cases in which assertions of such rules of particular customary international law have been examined have concerned, for example, a right of access to enclaves in foreign territory;[795] a co-ownership (condominium) of historic waters by three coastal States;[796] a right to subsistence fishing by nationals inhabiting a river bank serving as a border between two riparian States;[797] a right of cross-border/international transit free from immigration formalities;[798] and an obligation to reach agreement in administering the generation of power on a river constituting a border between two States.[799]

(5) While some geographical relationship usually exists between the States among which a rule of particular customary international law applies, that may not necessarily be the case. The expression "whether regional, local or other" is intended to acknowledge that although particular customary international law is mostly regional, subregional or local, there is no reason in principle why a rule of particular customary international law could not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest, whether established by treaty or otherwise.

(6) Paragraph 2 addresses the substantive requirements for identifying a rule of particular customary international law. In essence, determining whether such a rule exists consists of a search for a general practice prevailing among the States concerned that is accepted by them

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[791] The International Court of Justice has treated particular customary international law as falling within Article 38, paragraph 1 (b), of its Statute: see *Colombian-Peruvian asylum case* (footnote 674 above), at pp. 276–277.

[792] The position is similar to that set out in the provisions of the 1969 Vienna Convention concerning treaties and third States (Part III, sect. 4).

[793] *Colombian-Peruvian asylum case* (see footnote 674 above), at p. 276.

[794] *Case concerning Right of Passage over Indian Territory* (see footnote 675 above), at p. 39.

[795] *Ibid*., p. 6.

[796] See the claim by Honduras in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992*, p. 351, at p. 597, para. 399.

[797] *Dispute regarding Navigational and Related Rights* (see footnote 683 above), at pp. 265–266, paras. 140–144; see also Judge Sepúlveda-Amor's Separate Opinion, at pp. 278–282, paras. 20–36.

[798] *Nkondo v. Minister of Police and Another*, South African Supreme Court, 1980 (2) SA 894 (O), 7 March 1980, *International Law Reports*, vol. 82, pp. 358–375, at pp. 368–375 (Smuts J. holding that: "There was no evidence of long standing practice between the Republic of South Africa and Lesotho which had crystallized into a local customary right of transit free from immigration formalities" (at p. 359)).

[799] *Kraftwerk Reckingen AG v. Canton of Zurich and others*, Appeal Judgment, BGE 129 II 114, ILDC 346 (CH 2002), 10 October 2002, Switzerland, Federal Supreme Court [BGer]; Public Law Chamber II, para. 4.

as governing their relations *inter se*. The International Court of Justice in the *Asylum* case provided guidance on this matter, holding with respect to the argument by Colombia as to the existence of a "regional or local custom particular to Latin-American States" that:

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law".[800]

(7) The two-element approach requiring both a general practice and its acceptance as law (*opinio juris*) thus also applies in the case of identifying rules of particular customary international law. In the case of particular customary international law, however, the practice must be general in the sense that it is a consistent practice "among the States concerned", that is, all the States among which the rule in question applies. Each of these States must have accepted the practice as law among themselves. In this respect, the application of the two-element approach is stricter in the case of rules of particular customary international law.

[800] *Colombian-Peruvian asylum case* (see footnote 674 above), at pp. 276–277.

ANNEX 382

The Statute of the International Court of Justice

A Commentary

Second Edition

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Preface

Ninety years ago, in 1922, the Permanent Court of International Justice held its first sittings, initially to deal with preliminary matters, then to render its first advisory opinions. Since then, permanent international courts have become an important feature of international relations. And while their number has increased in recent times, the International Court of Justice, as the principal judicial organ of the United Nations and the Permanent Court's successor, has retained a unique position, symbolizing the international community's quest for justice administered according to law.

Six years have passed since the first edition of this *Commentary on the Statute of the International Court of Justice* was published. This period has been a busy time for the Court, whose caseload provides ample evidence of the confidence of States, and that of the main organs of the United Nations, which have referred to the Court an extremely broad range of international legal issues. In its judgments and advisory opinions rendered since 2006, the Court has been able to confirm and, at times, develop its jurisprudence both on substantive international law and with regard to its own jurisdiction and procedure. In particular, questions of evidence and proof have assumed prominence. Moreover, there has been debate about the scope of *res judicata*, about the relevance of decisions rendered by other bodies for the Court's understanding of international law, and about participation in advisory proceedings.

The second edition of this Commentary seeks to take account of these and other new developments. To that end, all contributions have been carefully updated. New cross-cutting sections on evidence and counter-claims have been included in order to allow for a fuller treatment of two increasingly relevant issues that cannot easily be discussed under one specific provision of the Court's Statute. On the other hand and for reasons of space, we have now omitted the full text of the Court's Statute and Rules. If necessary, both can easily be consulted on the Court's website.

As editors, we have been fortunate to count on the continued cooperation of the vast majority of contributors to the first edition, to whom we express our sincere gratitude. At the same time, we would like to renew our thanks, noted in the Preface to the first edition, to those authors who, for various reasons, have no longer been able to participate. Moreover, we most heartily welcome six new contributors who have kindly agreed to participate in the second edition of this Commentary. On the whole, we have continued to work along the editorial policy explained in further detail in the Preface to the first edition.

All in all, this work constitutes the combined work of, by now, 51 authors from diverse jurisdictions, among them academics as well as lawyers practising international law, and (current and former) judges and officers of the Court. In our view, this diversity should be seen as a strength reflecting the international character of the college of international lawyers following the work of the Court.

Just as the circle of contributors, so the composition of the 'editorial team' has undergone organic change. David Diehl and Maral Kashgar have been extremely diligent assistant editors of this second edition. The assistant editors of the first edition, Christian

which is not justified on special grounds taking precedence, is therefore incompatible with the regime established by the Convention.[864]

300 The indisputable reluctance of the Court to resort to general principles of law can be easily understood: they are difficult to handle[865] and it is a fact that the provision of Art. 38, para. 1 (c) 'conflicts with the voluntaristic point of view',[866] which certainly increases the risk that parties will be less inclined to accept the judgment.[867] Whatever the positivist view on the matter, customary rules of course do not flow from the will of States either. However, there are two important differences:

- First, the practice to be taken into account in order to establish the existence of custom is to be sought in the *international* sphere and States are (or should be) aware that what they do in this sphere might form part of such a practice; this is not so concerning general principles of law which must be discovered in domestic rules, clearly not envisaged as possible material sources of international norms—even if they are.
- Second, more clearly than custom, general principles of law are 'transitory' in the sense that their repeated use at the international level transforms them into custom and therefore makes it unnecessary to have recourse to the underlying general principles of law.

301 As Sir Humphrey Waldock explained, 'there will always be a tendency for a general principle of national law recognized in international law to crystallize into customary law'.[868] There are numerous examples of this phenomenon of 'transition'. To take a striking one: at the origin of modern arbitration, the *Kompetenz-Kompetenz* principle was but a general principle of law recognized by States *in foro domestico*; it was transposed into international law, not without difficulties, by the first arbitrators[869] and was then considered as a general principle of *international* law, quite frequently expressly set out in treaties, including the Statute of the Court itself (Art. 36, para. 6). Indeed, there is no need for the Court to refer to this principle as a general principle of law—which, however, did not prevent it from acknowledging that such provisions 'conform with rules generally laid down in statutes or laws issues for courts of justice'.[870] Similar remarks can be made concerning the principle of *res judicata* which, through repeated invocation by arbitrators and recognition of their awards by States, must be considered a general rule of public international law,[871] even if, here again, the underlying principle is sometimes recalled *ex abundante cautela*.

[864] *Certain German Interests case*, *supra*, fn. 125, PCIJ, Series A, No. 7, p. 22. For a similar reasoning *cf.* Judge Lauterpacht's separate opinion appended to the Court's advisory opinion on the *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*, ICJ Reports (1955), pp. 90, 118.

[865] *Cf. supra*, MN 250 *et seq.*

[866] *North Sea Continental Shelf case*, *supra*, fn. 115, Sep. Op. Ammoun, ICJ Reports (1969), pp. 100, 134–5.

[867] *Cf. supra*, MN 274–275.

[868] 'General Course on Public International Law', *Rec. des Cours* 106 (1962-II), pp. 1–251, p. 62.

[869] *Cf. e.g.* the *Betsey case* (Jay Treaty Arbitration, 19 November 1794, reproduced in Moore, *supra*, fn. 305, p. 179) or the *Alabama* arbitration (14 September 1872, reproduced *ibid.*, and also in de Lapradelle, A./Politis, N., *Recueil des arbitrages internationaux* [1932], vol. II, p. 910).

[870] *Effect of Awards case*, *supra*, fn. 136, ICJ Reports (1954), pp. 47, 52.

[871] *Cf. e.g.* Nemer Caldeira Brant, L., *L'autorité de la chose jugée en droit international public* (2003), pp. 15–44. The Court characterized it as a principle of 'fundamental character': *cf. (Bosnia) Genocide case*, *supra*, fn. 93, ICJ Reports (2007), pp. 43, 90 (para. 115). In the judgment concerning the application to intervene of Honduras in the case concerning the *Territorial and Maritime Dispute case* (Nicaragua/

Anzilotti's dissent appended to the PCIJ judgment of 16 December 1927 in the 302
Chorzów Factory case is a good illustration:[872]

> As I have already observed, the Court's Statute, in Art. 59, clearly refers to a traditional and generally accepted theory in regard to the material limits of *res judicata*; it was only natural therefore to keep to the essential factors and fundamental data of that theory, failing any indication to the contrary, which I find nowhere, either in the Statute itself or in international law.
>
> In the second place, it appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to 'the general principles of law recognized by civilized nations', mentioned in N° 3 of Article 38 of the Statute, that case is assuredly the present one. Not without reason was the binding effect of *res judicata* expressly mentioned by the Committee of Jurists entrusted with the preparation of a plan for the establishment of a Permanent Court of International Justice, amongst the principles included in the above-mentioned article (Minutes, p. 335).[873]

It is an interesting demonstration: the general principle lying 'behind' Art. 59 is 303
invoked in order to reinforce a treaty law argument which could be perfectly self-sufficient. But this way of reasoning—which is not at all an isolated incident[874]—shows that general principles are well anchored in the 'legal conscience' of jurists and that, even when not a direct source of the rights and obligations at stake, they serve as a confirming element in the persuasiveness of legal reasoning. Moreover, there is no doubt that, when eclipsed by a customary or treaty norm flowing from them, they explain the particular strength of the said norm, which will be described as 'basic' or 'fundamental' or 'essential'.[875]

E. The Subsidiary Means for the Determination of Rules of Law

The positions taken by the members of the Committee of Jurists of 1920 on the 'subsidi- 304
ary means for the determination of rules of law', now appearing under Art. 38, para. 1 (d), were extremely confusing.[876] It may, however, be inferred from the—sometimes passionate—discussions among the members that the intention behind the final wording of this provision was that jurisprudence and doctrine were supposed to elucidate what the rules to be applied by the Court were, not to create them.[877]

Colombia), the Court recalled: 'It is a well-established and generally recognized principle of law that a judgment rendered by a judicial body has binding force between the parties to the dispute (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1954, p. 53)' (*supra*, fn. 508, Application by Honduras for Permission to Intervene, Judgment of 4 May 2011, available at <http://www.icj-cij.org>, para. 67).

[872] All the more so given that the rigid positivist views of Anzilotti did not predispose him to invoke general principles of law lightly.

[873] *Chorzów Factory case*, *supra*, fn. 307, PCIJ, Series A, No. 13, p. 27.

[874] *Cf.* the examples given in MN 299.

[875] *Cf. supra*, MN 259.

[876] *Cf.* the clear summary of these unclear discussions in von Stauffenberg, p. 277. The most troubling aspect is the contrast between the members of the Committee who insisted that doctrine and jurisprudence were purely subsidiary (such as Ricci-Busatti, Procès-Verbaux, *supra*, fn. 16, p. 332, or, but much less reluctant, Descamps, *ibid.*, p. 334 or p. 336) on the one hand, and those who peremptorily considered them as sources of law (Phillimore, *ibid.*, p. 333). The expression 'as subsidiary means for the determination of rules of law' was added *in extremis* by the Committee following a proposal by Descamps (*ibid.*, p. 605).

[877] For a concurring view *cf.* Shahabuddeen, p. 77.

305 Be that as it may, in itself, para. 1 (d) as finally adopted deserves less criticism than usually alleged—at least if read in French and in isolation from the introductory phrase of Art. 38. As noted by Manley Hudson, while the expression 'subsidiary means' could be 'thought to mean that these sources [*sic*] are to be subordinated to others mentioned in the article, *i.e.*, to be regarded only when sufficient guidance cannot be found in international conventions, international customs and general principles of law[,] the French word *auxiliaire* seems, however, to indicate that confirmation of rules found to exist may be sought by referring to jurisprudence and doctrine'.[878] In the fortunate words of Shabtai Rosenne,[879] the 'subsidiary means' of para. 1 (d) are 'the store-house from which the rules of heads (a), (b) and (c) can be extracted': in marked contrast to the sources listed in the previous sub-paragraphs, jurisprudence and doctrine are not sources *of law*—or, for that matter, of rights and obligations for the contesting States; they are *documentary* 'sources' indicating where the Court can find evidence of the existence of the rules it is bound to apply by virtue of the three other sub-paragraphs. Therefore, the phrasing of the *chapeau* of para. 1 is unfortunate: strictly speaking, the Court does not 'apply' those 'means', which are only tools which it is invited to use in order to investigate the three sources listed previously.

The appropriateness of placing doctrine and jurisprudence on the same footing has also been criticized.[880] Intellectually, this criticism is misplaced: in the abstract, both perform the same function; they are means of ascertaining that a given rule is of a legal character because it pertains to a formal source of law. However, concretely, they can certainly not be assimilated; while the doctrine has a discreet (but probably efficient) role to that end, the use of the jurisprudence by the Court goes, in fact, far beyond what the expression 'auxiliary means' implies.[881]

I. Judicial Decisions

306 The role of jurisprudence in the development of international law would deserve a book-length treatment[882] rather than the cursory analysis it will necessarily receive here. The present contribution will only very lightly touch upon two main questions: what are the 'judicial decisions' 'applied' by the Court? And what part do they play in the development of international law?

1. Jurisprudence, Not Particular Decisions

The reference to Art. 59 of the Statute in para. 1 (d) of Art. 38 sounds like a warning: 307
the Court is not bound by the common law rule of *stare decisis*, even if some judges of Anglo-Saxon origin seem to have somewhat ignored this guideline.[883] At the same time this reference clearly encourages the Court to take into account its own case law as a privileged means of determining the rules of law to be applied in a particular case.

In effect, the judicial decisions to which the Court refers first and foremost are, by far, 308
its own (and, concerning the present Court, those of its predecessor)—without making any distinction between its judgments and its advisory opinions which are clearly placed on an equal footing even though the latter do not qualify as 'decisions' properly speaking. The record of the PCIJ in this respect is quite impressive;[884] that of the ICJ no less so: already in its second judgment, in 1949, the Court referred 'to the views expressed by the Permanent Court of International Justice with regard to similar questions of interpretation' and quoted extracts of an advisory opinion and an order of the PCIJ.[885] It has, since then, constantly followed this practice, sometimes quoting extracts of its previous decisions, sometimes only citing them. It can be noted that, as its case law expands, the list of previous cases gets longer without discouraging the Court from expressly referring to all or many of them. Thus, just to give two recent examples, in *Kasikili/Sedudu*, it cited seven previous cases in order to make the rather obvious point that the subsequent practice of the parties is relevant to interpreting treaties,[886] and in only three printed pages of its 2004 *Wall* advisory opinion, the Court made no less than 28 cross-references to its previous decisions.[887]

It might be doubted whether this method adds much to the authority of the Court's 309
decisions,[888] but it certainly shows that, at least in some fields, the case law of the Court is fully documented and firmly established. The observation made more than 60 years ago with respect to the case law of the Permanent Court proves even more convincing today: 'Without exaggeration, the cumulation may be said to point toward "the harmonious development of the law" which was a desideratum with the draftsmen of the Statute in 1920.'[889] The persuasive force of the Court's case law is all the greater in that it is globally consistent. As the Court itself stressed, the justice it is called to render 'is not abstract justice but justice according to the rule of law; which is to say that its application

[878] Hudson, p. 603, *Cf.* also Shahabuddeen, p. 80.
[879] Rosenne, *Law and Practice*, vol. III, p. 1551.
[880] *Cf. e.g.* Fitzmaurice, in *Symbolae Verzijl*, pp. 153, 174–5.
[881] Jurisprudence and doctrine have rarely been studied together, but *cf.* Roucounas, E., 'Rapport entre "moyens auxiliaries" de détermination du droit international', *Thesaurus Acroasium* XIX (1992), pp. 259–86; as well as the general literature on the sources of international law, *supra*, fn. 460.
[882] Among the numerous studies devoted to the role of jurisprudence (and more specifically of the World Court) in international law *cf. e.g.* Abi-Saab, G., 'De la jurisprudence, quelques réflexions sur son rôle dans le développement du droit international' in *Mélanges Manuel Diez de Velasco* (1993), pp. 2–8; Cahier, P., 'Le rôle du juge dans l'élaboration du droit international', in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Makarczyk, J., ed., 1996), pp. 353–66; Condorelli, L., 'L'autorité de la décision des juridictions internationales permanentes' in *Les juridictions internationales permanentes. Colloque de Lyon* (Société française de droit international ed., 1987), pp. 277–313; Guillaume, G., in *Justice et juridictions internationales: IVe Rencontre internationale de la Faculté des Sciences juridiques, politiques et sociales de Tunis* (Zbidi/*et al.*, eds., 2000), pp. 175–92; Guillaume, G., 'The Use of Precedent by International Judges and Arbitrators', *Journal of International Dispute Settlement* 2 (2011), pp. 5–23 and in French in *JDI* 137 (3) (2010), pp. 685–703; Lauterpacht (1958), *supra*, fn. 776; Miller, N., 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', *Leiden JIL* 15 (2002), pp. 483–501; Roeben, V., 'Le précédent dans la jurisprudence de la C.I.J.', *GYIL* 32 (1989), pp. 382–407; Salerno, F. (ed.), *Il ruolo del giudice internazionale nell'evoluzione del diritto internazionale e communitario* (1995); Sereni, A.P., 'Opinions individuelles et dissidentes des juges des tribunaux internationaux', *RGDIP* 68 (1964), pp. 819–57.
[883] *Cf.* in particular *Anglo-Iranian Oil case*, Diss. Op. Read, ICJ Reports (1952), pp. 142, 143; as well as the advisory opinion of the PCIJ on the *Greco-Turkish Agreement case*, in which the Court decided 'following the precedent afforded by its Advisory Opinion No. 3'. However, the French authoritative text ('en s'inspirant du précédent fourni par son Avis no. 3') clarifies that the Court did not feel bound by said precedent (*supra*, fn. 501, PCIJ, Series B, No. 16, p. 15).
[884] *Cf.* the recollection of the relevant judgments and advisory opinions in Hudson, *PCIJ*, p. 627.
[885] *Corfu Channel case*, *supra*, fn. 125, ICJ Reports (1949), pp. 4, 24.
[886] *Kasikili/Sedudu case*, *supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1076 (para. 50).
[887] *Wall case*, *supra*, fn. 104, ICJ Reports (2004), pp. 135, 154–6.
[888] Even if it is indeed extremely useful to students of international law ...
[889] Hudson, *PCIJ*, p. 630. The author refers to the Records of the First Assembly of the League of Nations, Committees, I, p. 477. This passage concludes a concise and persuasive description of the 'cumulation of case law' by the Permanent Court (*ibid.*, pp. 628–9). *Cf.* also Lauterpacht (1958), *supra*, fn. 776, p. 18.

should display consistency and a degree of predictability'.[890] Even though it is not bound to apply the precedents, the Court is usually careful to avoid self-contradiction.

310 'Precedent plays an important, but not a controlling role.'[891] The judgment of 11 June 1998 on the preliminary objections of Nigeria in the *Land and Maritime Boundary case* faithfully reflects the Court's position in this respect:

> It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.[892]

In that case, the Court found that there was not such cause. Similarly, in the *(Croatian) Genocide case*, the Court noted:

> While some of the facts and the legal issues dealt with in those cases arise also in the present case, none of those decisions were given in proceedings between the two Parties to the present case (Croatia and Serbia), so that, as the Parties recognize, no question of *res judicata* arises (Article 59 of the Statute of the Court). To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.[893]

311 However, exactly as 'there are awards and awards, some destined to become ever brighter beacons, others to flicker and die near-instant deaths',[894] there are judgments and judgments. Central to the question is the persuasiveness of the legal reasoning:

> As it is evident from Articles 38 and 59 of the ICJ Statute, the international legal order does not recognize a legal obligation to abide by the essential reasoning by previously decided cases, dissimilar from what is considered one of the hallmarks of the common law. The law-making effect of a judicial decision, in particular its general and abstract dimension, hence rests not only on its *voluntas*, but also on its *ratio*: legal scholars, advisers, other courts, and certainly not least the deciding court itself at a later point in time must be convinced of the soundness—broadly defined—of a prior decision.[895]

312 Generally speaking: 'The Court very rarely finds it necessary to make generalizations, least of all in its decisions. Applying the law to the concrete case before it, the full import of its dicta can be ascertained only in the light of all the circumstances.'[896] Consequently, it should be a rather easy task to explain different solutions by reference to the different

[890] *Continental Shelf case* (Libya/Malta), *supra*, fn. 92, ICJ Reports (1985), pp. 13, 39 (para. 45). *Cf.* also *Jan Mayen case*, *supra*, fn. 92, ICJ Reports (1993), pp. 38, 64 (para. 58), but contrast Judge Schwebel's separate opinion, which puts into doubt the 'principled consistency' of the Court's decision with its earlier case law: 'the Court jettisons what its case-law, and the accepted customary law of the question, have provided' (*ibid.*, p. 118).

[891] Lauterpacht, Sir E., 'The Role of the International Judge', in *Liber amicorum Jean-Pierre Cot—Le procès international* (2010), p. 187.

[892] *Land and Maritime Boundary case*, *supra*, fn. 92, Preliminary Objections, ICJ Reports (1998), pp. 275, 292 (para. 28).

[893] *(Croatian) Genocide case*, *supra*, fn. 496, ICJ Reports (2008), pp. 412, 428 (para. 53); *cf.* also para. 54: 'It would require compelling reasons for the Court to depart from the conclusions reached in those previous decisions.'

[894] Paulsson, *supra*, fn. 192, p. 881.

[895] von Bogdandy, A., 'The Judge as Law-Maker: Thoughts on Bruno Simma's Declaration in the *Kosovo* Opinion', in Fastenrath, *supra*, fn. 564, p. 822.

[896] Rosenne, *Law and Practice*, vol. III, p. 1555.

circumstances of a case compared with a precedent which could be seen *prima facie* as rather similar or had been presented as such by the parties—and sometimes it is. However, in other cases it proves less obvious.

Thus, *e.g.*, in the separate opinion he appended to the Court's judgment on the pre- 313
liminary objections of Spain in *Barcelona Traction*, Judge Tanaka convincingly showed that the continuity of the Court's jurisprudence in that case, in the 1961 judgment on preliminary objections in the *Preah Vihear case* and the 1959 judgment in the *Case Concerning the Aerial Incident of 27th July, 1955* (Israel/Bulgaria) was nothing less than obvious.[897] More recently, the Court squarely assumed a clear contradiction in judgments concerning one and the same State, in one case as a defendant, in the others as the claimant: after having clearly recognized its jurisdiction in a case brought before it by Bosnia and Herzegovina against the former Yugoslavia on the basis of Art. IX of the Genocide Convention and reconfirmed this decision following the application for revision of Serbia and Montenegro,[898] the Court in eight similar judgments of 15 December 2004 found that it had 'no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999' against eight States Members of NATO on the basis of this same provision of the 1948 Convention.[899]

In support of its decision, the Court asserted that 'it cannot decline to entertain a case 314
simply ... because its judgment may have implications in another case'.[900] In a robustly argued joint declaration, seven judges strongly criticized this unusual position:

> The choice of the Court [between several possible grounds for its decision] has to be exercised in a manner that reflects its judicial function. That being so, there are three criteria that must guide the Court in selecting between possible options. First, in exercising its choice, it must ensure consistency with its own past case law in order to provide predictability. Consistency is the essence of judicial reasoning. This is especially true in different phases of the same case or with regard to closely related cases. Second, the principle of certitude will lead the Court to choose the ground which is most secure in law and to avoid a ground which is less safe and, indeed, perhaps doubtful. Third, as the principal judicial organ of the United Nations, the Court will, in making its selection among possible grounds, be mindful of the possible implications and consequences for the other pending cases.
>
> In that sense, we believe that paragraph 40 of the Judgment does not adequately reflect the proper role of the Court as a judicial institution. The Judgment thus goes back on decisions previously adopted by the Court.[901]

[897] *Barcelona Traction case*, *supra*, fn. 296, Preliminary Objections, Sep. Op. Tanaka, ICJ Reports (1964), pp. 65, 66–72. The Court may face the problem, as it did in the *Preah Vihear case* (*supra*, fn. 234, Preliminary Objections, ICJ Reports [1961], pp. 6, 27–8), or it can deal with it by paralipsis, as it did in its advisory opinion of 30 March 1950 (*Interpretation of Peace Treaties*, *supra*, fn. 108, ICJ Reports [1950], pp. 65 *et seq.*) where it did not take pains at explaining the consistency of the solution it gave to the issue of jurisdiction by comparison with that retained in *Eastern Carelia* (*cf.* Judge Azevedo's Sep. Op., *ibid.*, p. 81 and Judge Winiarski, Zoričić, and Krylov's Diss. Ops., respectively pp. 89–91, 102–4, and 108–11).

[898] *(Bosnian) Genocide case*, *supra*, fn. 93, Preliminary Objections, ICJ Reports (1996), pp. 595, 623 (para. 47 [2] [a]); and the application for revision of that decision, *Application for Revision of the Judgment of 11 July 1996 in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections* (Yugoslavia/Bosnia and Herzegovina), ICJ Reports (2003), pp. 3, 31 (paras. 70–71).

[899] *Legality of Use of Force* (Serbia and Montenegro/Belgium), *supra*, fn. 163, Preliminary Objections, ICJ Reports (2004), pp. 279, 328 (para. 129). The seven other judgments contain identical statements.

[900] *Ibid.*, para. 40.

[901] Joint Declaration, *ibid.*, paras. 3 and 13. *Cf.* also the embarrassed developments in the 2008 ICJ Judgment on the *(Croatian) Genocide case*, *supra*, fn. 496, ICJ Reports (2008), pp. 412, 428–9 (paras. 52–54).

ANNEX 383

IN THE MATTER OF AN UNCITRAL ARBITRATION

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between

NATIONAL GRID P.L.C.,
CLAIMANT

v.

ARGENTINE REPUBLIC,
RESPONDENT

AWARD

Date: November 3, 2008

RENDERED BY AN ARBITRAL TRIBUNAL COMPOSED OF

ALEJANDRO MIGUEL GARRO, ARBITRATOR
JUDD L. KESSLER, ARBITRATOR
ANDRÉS RIGO SUREDA, PRESIDENT

SECRETARY OF THE TRIBUNAL:
MERCEDES CORDIDO-FREYTES DE KUROWSKI

Seat of the arbitration: Washington, D.C.

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B. FAIR AND EQUITABLE TREATMENT

1. Positions of the Parties

156. The Claimant notes that Article 2(2) does not define specifically the protections provided and observes that this "omission reflects the widely accepted principle that the fair and equitable treatment standard cannot be summarized in a precise statement of [a] legal obligation."[45] The Claimant then goes on to argue that, based on recent case law, the fair and equitable treatment standard requires that investors be treated in accordance with their legitimate expectations including the maintenance of a stable and predictable investment environment. The Claimant asserts that "a state violates the fair and equitable treatment standard when it fails to respect the very assurances that it made to investors as an inducement to invest and on which investors relied."[46]

157. According to the Claimant, this standard does not require proving bad faith in the actions of the State and is separate from the customary international law minimum standard of treatment of aliens. The Claimant observes that, unlike other treaties, the Treaty does not refer to the international minimum standard of the treatment of aliens, and that, if the parties had wanted to equate these two concepts, they would have done so expressly. In any case, argues the Claimant, even if the minimum standard of treatment did apply, it would require that the Government respect the stability and predictability of the investment framework as held by the *CMS* and *Occidental* tribunals.

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[45] Statement of Claim, para. 290.

[46] *Ibid.*, para. 297.

158. The Claimant recalls the statement by Minister Cavallo on the occasion of the signature of the Treaty in London where he referred to the "legal certainty" provided by the Treaty.[47] Similarly, when the President of the Argentine Republic presented the Treaty to the Congress he stated that "through [bilateral investment treaties] states agree, while they are in force, to maintain certain investment regulations unchanged, in the hope of establishing a stable and confident climate to attract investment."[48]

159. The Claimant alleges that the Respondent breached this standard of protection when it destroyed the remuneration regime provided for in the Regulatory Framework. The stability of this regime was critical in the electricity transmission sector and an absolutely necessary condition for Transener to obtain the required long-term financing to improve, upgrade, maintain and expand the electricity transmission infrastructure. The Claimant affirms that it on the basis of the Respondent's promise of a stable investment environment that it decided initially to invest in the Argentine Republic and, later, to expand on the initial investment.

160. The Claimant concludes by asserting that "the test of *fundamental* alterations of the investment framework against *legitimate* investor expectations in this situation results in the Respondent's liability for breach of this standard of treatment."[49] The Claimant adds that the Respondent also acted unfairly and inequitably in forcing Transener and Transba to renegotiate and waive claims on pain of rescission of their contracts.

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47 *Ibid.*, para. 300

48 *Ibid.*, para. 301. (Emphasis added by the Claimant.)

49 Reply, para. 444. (Emphasis added by the Claimant).

161. The Respondent denies that it breached Article 2(2) of the Treaty and argues that the standard embodied in the Treaty is the minimum standard of treatment of aliens under international law. The Respondent adduces case law to show that, even if the standard has evolved since *Neer*, the standard still has a high threshold as expressed, for instance, in *Genin*: "Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[50]

162. The Respondent affirms that the process of contract renegotiation was conducted in good faith with impartiality, consistency and transparency, while the Claimant's conduct showed anything but good faith when it presented irrational demands in the circumstances of the Argentine Republic thus evidencing the Claimant's true objective to get rid of the investment.

163. The Respondent argues that the "fair" and "equitable" standard does not require an absolute obligation to maintain a stable and foreseeable framework for the investment in accordance with the legitimate expectations of the investors. The concept of legitimate expectations does not have the reach in international law that the Claimant contends. The investor must be aware of the political and economic realities of the country in which it invests. Investors made investments in the Argentine Republic because there was an opportunity to obtain a rate of return higher that in other countries with more stable conditions.

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[50] *Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award of June 25, 2001 [hereinafter, *Genin v. Estonia*], para. 367 (Legal Authorities LA-103).

164. In any case, argues the Respondent, the Argentine Republic did not breach this standard of treatment even if judged in accordance with the expansive interpretation contended by the Claimant. There is no proof that the Respondent acted unjustly or inequitably before 2002 and even thereafter the authorities acted in good faith by initiating a process of renegotiation notwithstanding the investor's assumption of the economic risk of the Concession. Furthermore, the assessment of the Respondent's conduct must take into account all circumstances of the case.

165. On the breach of the just and equitable treatment standard, the Respondent considers that definition of this standard is too broad and would be surprising to the drafters of the Treaty. The Respondent refers to recent case law to support its contention that the threshold for breaching this standard remains high. The Respondent points out that, if this Tribunal were to find that the standard of protection provided in the Treaty goes beyond the minimum international standard, then it should apply the standard relying on objective criteria and taking into account all the circumstances of the case.

166. The Respondent questions Claimant's legitimate expectations in light of the excessive price Claimant paid for the shares of Citelec, its increase in said participation, the acquisition of Transba and the participation in the Fourth Line. As recognized by the Claimant, the Respondent argues that the respect of the legitimate expectations of an investor does not mean respecting all expectations of an investor but only those which are based on specific representations or clear commitments. The Respondent then argues that there is no proof of declarations

or clear commitments of the Respondent and that Claimant's legitimate expectations need to be considered in the context of a legal framework that did not provide Transener or Transba with absolute protection against the devaluation of the currency. The measures taken by the Respondent were in response to the economic crisis; it is illogical to suggest, first, that under international law the State has a right to adopt emergency measures and then, at the same time, to insist that investors not be prejudiced by such measures. The Respondent acted in a proportionate and reasonable manner in response to the crisis; a decision that such conduct breaches the standard of just and equitable treatment under those circumstances would constitute unjustified interference with a sovereign's legitimate regulatory authority and contrary to the "high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[51]

2. Considerations of the Tribunal

167. The Tribunal recalls that it has been established under the Treaty and is bound by the terms of the Treaty, which it must interpret in accordance with Article 31 of the Vienna Convention on the Law of Treaties. Hence, after first observing that there is no reference to the minimum standard of treatment under international law in the Treaty in contrast to the language of NAFTA, the Tribunal will proceed to examine the ordinary meaning of the terms "fair" and "equitable."

[51] *S.D. Myers, Inc. v. Canada* (UNCITRAL Arbitration), Partial Award of November 13, 2000 [hereinafter *S.D. Myers v. Canada*], para.272. Quoted in the Rejoinder, para. 567 (Legal Authorities LA RA-102).

ANNEX 384

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES (1976)

BETWEEN:

ELI LILLY AND COMPANY

Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

(Case No. UNCT/14/2)

GOVERNMENT OF CANADA

COUNTER MEMORIAL

January 27, 2015

Trade Law Bureau
Departments of Justice and of Foreign Affairs, Trade and Development
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
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CANADA

COUNTER MEMORIAL

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264. Claimant's protest regarding discrimination does not withstand scrutiny. Claimant argues that the principle beneficiaries of this approach are generic drug makers.[473] But among generic companies operating in Canada, half of the top 18 (based on sales) are not Canadian-owned .[474] Claimant also says that foreign brand-name drug makers are being discriminated against as a result of the Federal Courts interpretation of the law, but Canadian innovator companies including biopharmaceutical companies, are subject to the same rules as Claimant.[475] Finally, as set out in Part D above and described in Dr. Brisebois statement, Claimant's statistics regarding patent invalidation in the pharmaceutical industry are misleading: in reality, there have been only three invalidations based solely on utility, two of which are the subject of this arbitration. It is impossible to draw the sweeping conclusion at "discrimination" the Claimant advocates.

D. Claimant Has Not Established That "Legitimate Expectations" Are Protected by the Minimum Standard of Treatment under Customary International Law, or That It Had Any Legitimate Expectations to Begin With

265. Claimant also argues that its "legitimate expectations" were breached by the Canadian federal judiciary when it ruled that the atomoxetine and olanzapine patents were invalid under the *Patent Act.*[476] Claimant says that the doctrine of "legitimate expectations" is a rule of customary international law and asserts that Canada is liable under Article 1105 because (1) it reasonably expected the Federal Court to adopt a definition of utility that would have resulted in the validation of its patents, and (2) it expected Canada to conform to the PCT.

[473] Claimant's Memorial, para. 291.

[474] Claimant's Memorial, para. 291. Of the eighteen generic drug companies operating in Canada (based on sales), nine are Canadian-owned (Apotex, Pharmascience, Sanis Health Inc (Shoppers Drug Mart), Pro Doc (Jean Coutu), AA Pharma Inc., Riva, Jamp Pharma, Mint Pharma and Sterimax) and nine are foreign-owned (Teva, Actavis, Mylan, Ranbaxy, Sivem (Mckesson), Hospira, Taro Pharma, Aptalis and Pharma Partners (Fresnius Kabi).

[475] *See* Claimant's Memorial, para. 291, fn. 539.

[476] Claimant's Memorial, paras. 272-289.

266. Claimant's arguments are defective on multiple levels. First, Claimant has failed to prove that the theory of "legitimate expectations" has become a rule of customary international law that is protected by NAFTA Article 1105(1). Second, regardless of its status generally in international law, it is a doctrine which fundamentally cannot be applied to judgments of the domestic judiciary acting in an adjudicative function of domestic statutory interpretation. Third, even if the theory of legitimate expectations is now a rule of custom protected under Article 1105(1), and even if it were applicable to the judiciary, Claimant could not have reasonably had the expectations claimed. Rules regarding utility are long-standing in Canadian law and the grant of a patent is always contingent on future confirmation by the courts for compliance with Canadian law. Claimant could not have had a "legitimate expectation" of how a court would rule in the future in light of the law, facts, evidence and other considerations presented before the court at the time of challenge. To assert otherwise would give every disappointed litigant an automatic remedy in international law against any adverse domestic ruling that it "expected" to win.

1) Claimant has failed to prove that "legitimate expectations" is a rule of customary international law protected by NAFTA Article 1105(1)

a) Claimant has the burden of proving the existence of a rule of customary international law

267. It is axiomatic that in order to prove the existence of a rule of customary international law, two requirements must be met: substantial state practice and an understanding that such practice is required by law (*opinio juris sive necessitatis*).[477]

[477] United Nations, *Statute of the International Court of Justice*, 18 April 1946, Article. 38(1)(b) ("*ICJ Statute*") **(RL-034)** (providing that in making decisions in accordance with international law, the Court shall apply, *inter alia*, "international custom, as evidence of a general practice accepted as law."); *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, Judgment [1969] ICJ, p. 43 (**RL-035**) (it is an "indispensable requirement" to show that "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; -- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved"); *Case Concerning the Continental Shelf*, (*Libyan Arab Jamahiriyah v. Malta*) [1985] ICJ Rep., p. 29, para. 27 **(RL-036)** ("it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states…"); *Case of Nicaragua v. United States (Merits)*,

268. It is also unassailable that the burden of proving the existence of a rule of customary international law rests on the party that alleges it. The International Court of Justice wrote that "the Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party."[478] The *Cargill* tribunal confirmed that "where a custom is not clear, or is disputed, then it is for the party asserting the custom to establish the content of that custom."[479] Other NAFTA tribunals have affirmed the same.[480]

ICJ Rep. 14 (1986), p. 108, para. 207 **(RL-037)** ("For a new customary rule to be formed, not only must the acts concerned "amount to settled practice," but they must be accompanied by the *opinio juris sive necessitates*. Either the States taking such action or the other States in a position to react to it, must have behaved so that their conduct "is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."); *United Parcel Service of America Inc. v. Canada*, Award on Jurisdiction (UNCITRAL) 22 November 2002, ("*UPS Jurisdiction Award*"), para. 84 **(RL-038)**; *Glamis Award*, paras. 602-603 **(RL-006)**.

[478] *Case Concerning Rights of Nationals of the United States of America in Morocco* (*France v. United States*), [1952] ICJ Rep. 176, p. 200 **(RL-039)** (quoting Asylum (*Colom. v. Peru*), 1950 ICJ 266).

[479] *Cargill Award*, para. 271 **(RL-015)**. The Cargill tribunal continued: "The burden of establishing any new elements of this custom is on Claimant. The Tribunal acknowledges that the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted." *Cargill Award*, para. 273 **(RL-015)**.

[480] *ADF Award*, paras. 183-184 **(RL-005)** ("We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments […] any general requirement to accord "fair and equitable treatment" and "full protection and security" must be disciplined by being based upon State practice and juridical or arbitral caselaw or other sources of customary or general international law."); *UPS Jurisdiction Award*, para. 84 **(RL-038)** ("[R]elevant practice and the related understandings must still be assembled in support of a claimed rule of customary international law."); *Glamis Award*, paras. 601-603 **(RL-006)** ("If, as Claimant argues, the customary international law minimum standard of treatment has indeed moved to require something less than the "egregious," "outrageous," or "shocking" standard as elucidated by *Neer*, then the burden of establishing what the standard now requires is upon Claimant […] it is necessarily the Claimant's place to establish a change in custom"); *Mobil Decision on Liability* **(RL-007)**; *Apotex Award* **(RL-016)**. *See* also Nguyen, Quoc Dinh, Dallier & Pellet, *Droit International Public*, 6th ed., (LGDJ 1999), p. 330 **(R-329)** (burden on party "who relies on a custom to establish its existence and exact content.") ("c'est à [la partie] qui s'appuie sur une coutume d'en établir l'existence et la portée exacte."); Ian Brownlie, "Principles of Public International Law", Seventh Edition, 2008, p. 12 **(R-330)** ("In practice, the proponent of a custom has the burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings.").

b) Claimant fails to submit evidence of state practice and opinio juris

269. Claimant has submitted no evidence of state practice or *opinio juris* to support its assertion that the minimum standard of treatment of aliens in customary international law now includes a protection of an investor's "legitimate expectations." Claimant fails to demonstrate the practice of the three NAFTA Parties, let alone evidence of practice by any of the other 193 members of the United Nations sufficient to show that an investor's expectations are protected by customary international law.

270. Instead, Claimant relies almost exclusively on non-NAFTA arbitration awards interpreting autonomous "fair and equitable treatment" provisions in investment treaties and which do not require, as does NAFTA Article 1105(1), the application of the customary international law minimum standard of treatment of aliens. This same flawed approach to proving custom and the same arguments regarding legitimate expectations have been made and rejected before by the *Cargill*, *Glamis* and *Mobil* tribunals.[481] This Tribunal should do the same.

271. First, as a threshold evidentiary issue, arbitral awards cannot *create* customary international law – only states can create custom.[482] As Professor Lauterpacht wrote, "[d]ecisions of international courts are not a source of international law… [t]hey are not direct evidence of the practice of States or of what States conceive to be the law."[483] The

[481] Claimant in this case repeats most of the same arguments the claimant in *Mobil* made with respect to legitimate expectations. *See Mobil Decision on Liability*, paras. 111-113, 127-130 (**RL-007**). As described below, the tribunal did not endorse the Claimant's position.

[482] As noted in Statute of the Court, International Court of Justice, *ICJ Statute*, Article 38(1)(d) (**RL-034**), judicial decisions are a "subsidiary means for the determination of rules of law."

[483] Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, (London: Stevens, 1958), pp. 20-21 (**R-331**). *See* also Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge University Press, 1996), pp. 71-72 (**R-332**) ("The development of customary international law depends on state practice. It is difficult to regard a decision of the Court as being in itself an expression of State practice….A decision made by it is an expression not of the practice of the litigating States, but of the judicial view taken of the relations between them on the basis of legal principles which must necessarily exclude any customary law which has not yet crystallised. The decision may recognise the existence of a new customary law and in that limited sense it may no doubt be regarded as the final stage of development, but, by itself, it cannot create one. It lacks the element of repetitiveness so prominent a feature of the evolution of customary international law.").

Glamis tribunal endorsed the position of the United States on this point: "Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law."[484] While arbitral awards may contain valuable analysis of State practice and *opinio juris* in relation to a particular rule of custom, and can be considered accordingly,[485] they cannot by themselves substitute for actual evidence of state practice and *opinio juris* as the ICJ confirmed in *Diallou.*[486] Accordingly, Claimant cannot point to arbitral awards endorsing its theory of legitimate expectations as evidence of customary international law unless the awards themselves have examined evidence of state practice and *opinio juris*.

272. Second, the non-NAFTA arbitral decisions upon which Claimant relies to support its "legitimate expectations" argument were mostly interpreting autonomous stand-alone Fair and Equitable Treatment ("FET") clauses that were not specifically conditioned on the minimum standard of treatment of aliens under customary international law. Such awards are not relevant in the context of NAFTA Article 1105(1). The *Cargill* tribunal noted that such awards are only relevant "if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law

[484] *Glamis Award*, para. 605 **(RL-006)**. The *Cargill* tribunal also noted that "the awards of international Tribunals do not create customary international law but rather, at most, reflect customary international law." *Cargill Award*, para. 277 **(RL-015)**.

[485] The *Cargill* tribunal cautioned that "the evidentiary weight to be afforded [arbitral awards] … is greater if the conclusions therein are supported by evidence and analysis of custom." *Cargill Award*, para. 277 **(RL-015)**. The *Glamis* tribunal affirmed the same: "The Tribunal therefore holds that it may look solely to arbitral awards – including BIT awards – that seek to be understood by reference to the customary international law minimum standard of treatment, as opposed to any autonomous standard." *Glamis Award*, para. 611 **(RL-006)**.

[486] *See Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of The Congo*), Judgment on Preliminary Objections, ICJ, 24 May 2007, paras. 88-91 **(RL-041)**. In that case, the ICJ held that reliance on investor-state arbitration awards and foreign investment protection agreements could not substitute for evidence of state practice and *opinio juris* to show a change in the customary international law rules governing diplomatic protection. The ICJ found that the claimant had failed to prove the alleged rule of custom.

standard rather than autonomous treaty language."[487] As Professors Dolzer and Schreuer have written, "in the context of NAFTA, the three state parties decided that the standards of "fair and equitable treatment" and "full protection and security" must be understood to require host states to observe customary international law and *not more demanding autonomous treaty-based standards.*"[488]

273. A close reading of the awards relied on by Claimant shows that none of them, including *Biwater Gauff, Azurix, CMS, LG&E, Occidental, TECMED* and *Duke Energy*, examined actual state practice and *opinio juris* to establish that protection of an investor's legitimate expectations is now a rule of customary international law.[489] In fact, most of those tribunals expressly noted there was no need for them to do so because the applicable fair and equitable treatment provision was not limited to the customary

[487] *Cargill Award*, para. 278 **(RL-015)**. The *Cargill* tribunal said that "significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom." *Cargill Award*, para. 276 **(RL-015)**. The tribunal also considered the number of treaties which contain a provision that requires fair and equitable treatment but noted that States are beginning to renegotiate that provision. According to the tribunal, "[i]n such a fluid situation, the Tribunal does not believe it prudent to accord significant weight to even widespread adoption of such clauses." *Cargill Award*, para. 276 **(RL-015)**.

[488] Dolzer and Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008), p. 16 (emphasis added) **(R-327)**. *See* also, p. 126: "In contrast to the NAFTA practice, arbitral awards applying treaties that do not contain statements about the relationship of FET to customary international law have interpreted the relevant provisions in BITs autonomously on the basis of their respective wording."

[489] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID ARB/05/22, Award, 24 July 2008, ("*Biwater Gauff Award*"), para. 586 **(RL-043)**; *Azurix v. Argentine Republic*, ICSID ARB/01/12, Award, 14 July 2006, ("*Azurix Award*"), paras. 361, 363 **(RL-044)**; *Occidental Award*, paras. 180, 192 **(RL-033)**; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID ARB/01/8, Award, 12 May 2005, ("*CMS Award*"), para. 284 **(RL-047)**; *LG&E Liability*, para. 122 **(RL-030)**; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID ARB/04/19, Award, 18 August 2008, ("*Duke Energy Award*"), paras. 333-337 **(RL-048)**. *Occidental* is similarly unhelpful. In that case, the Tribunal noted that the question of whether the FET standard in the treaty was more demanding than the minimum standard of treatment under customary international law did not arise, so it had no need to undertake the analysis of state practice and *opinio juris* that Article 1105 requires. *Occidental Final Award*, para. 192 **(RL-033)** ("The question whether there could be a Treaty standard more demanding than a customary international law standard that has been painfully discussed in the context of NAFTA and other free trade agreements does not therefore arise in this case.") There was no reference to the minimum standard of treatment under customary international law in Article II (3)(a) of the US-Ecuador BIT, which was at issue in that case.

international law minimum standard of treatment of aliens.[490] This is why NAFTA tribunals like *Glamis, Cargill* and *Mobil* declined to endorse *TECMED* in the NAFTA context with respect to legitimate expectations. [491]

274. The FTC Note of Interpretation is clear: Article 1105 "[does] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." [492] Thus, without real evidence of state practice and *opinio juris* to show that the protection of legitimate expectations is now a rule of customary international law, the Claimant's assertion that it is must fail.[493]

[490] The *TECMED* tribunal stated that the FET standard in the applicable BIT was "autonomous" and did not undertake any examination of customary international law. *Technicas Medioambientales Tecmed, S.V. v. United Mexican States*, ICSID ARB(AF)/00/2, Award, 29 May 2003, ("*TECMED Award*"), paras. 155-156 **(RL-049)**. *See* also *Biwater Gauff Award*, paras. 591, 595 **(RL-043)** (noting there was no reference to the minimum standard of treatment under customary international law and concluded that the BIT's "autonomous standard" left it open to the Tribunal to determine the precise scope based on whether the Tribunal felt the conduct "is fair and equitable or unfair and inequitable."). None of the cases cited by the *Biwater Gauff* tribunal undertook an analysis of customary international law either. *See* for example *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ("*Saluka Partial Award*"), para. 294 **(RL-050)** ("[T]his Tribunal has to limit itself to the interpretation of the "fair and equitable treatment" standard as embodied in Article 3.1 of the Treaty. That Article omits any express reference to the customary minimum standard. The interpretation of Article 3.1 does not therefore share the difficulty that may arise under treaties (such as the NAFTA) which expressly tie the "fair and equitable" treatment standard to the customary minimum standard. Avoidance of these difficulties may even be regarded as the very purpose of the lack of a reference to an international standard in the Treaty. This clearly points to the autonomous character of a "fair and equitable treatment" standard such as the one laid down in Article 3.1 of the Treaty.").

[491] *Glamis Award*, para. 610 **(RL-006)**; *Cargill Award*, paras. 280, 286 **(RL-015)**; *Mobil Decision on Liability*, paras. 113, 148-151 **(RL-007)**.

[492] *FTC Notes of Interpretation*, para. 2 **(RL-009)**. *See Mondev Award*, para. 122 **(RL-004)** ("The FTC interpretation makes it clear that in Article 1105(1) the terms "fair and equitable treatment" and "full protection and security" are, in the view of the NAFTA Parties, references to existing elements of the customary international law standard and are not intended to add novel elements to that standard.). *See* also *UPS Jurisdiction Award*, para. 97 **(RL-038)** ("[W]e agree in any event that the obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard."); *Loewen Award*, para. 128 **(RL-013)** ("'fair and equitable treatment' and 'full protection and security' are not free-standing obligations. They constitute obligations only to the extent that they are recognized by customary international law."); *Glamis Award*, para. 609 **(RL-006)** ("Claimant has agreed with this distinction between customary international law and autonomous treaty standards but argues that, with respect to this particular standard, BIT jurisprudence has 'converged with customary international law in this area.' The Tribunal finds this to be an over-statement.").

[493] The Article 1105 claims in *UPS, ADF, Glamis,* and *Apotex* all failed in part on the ground that the Investor had not fulfilled its burden to establish state practice and *opinio juris*. *UPS Jurisdiction Award*, para. 86 **(RL-038)** ("…UPS has not attempted to establish that that state practice reflects an understanding

c) Mere failure to fulfil an investor's "expectations" does not breach the minimum standard of treatment protected in Article 1105(1)

275. Previous NAFTA tribunals have already expressed the view that mere failure to meet an investor's expectations does not breach Article 1105(1). While the unjustified repudiation of specific representations made to the investor in order to induce an investor can be a factor in assessing whether the minimum standard of treatment has been breached, the open-ended insurance policy against regulatory change Claimant advocates has not be endorsed.

276. The *Waste Management II* tribunal said that the breach of representations made by the host State to the investor and which were reasonably relied on by the investor may be "relevant" as to whether the NAFTA party acted in a way that was "grossly unfair, unjust or idiosyncratic" or exhibited "a complete lack of transparency and candour in an administrative process."[494] Similarly, the *Thunderbird* tribunal considered expectations of the investor as part of the "context" of the measure but found that the impugned actions would still have to rise to a level that amounted to a "gross denial of justice or manifest arbitrariness falling below acceptable international standards."[495] The *Glamis* tribunal considered it possible that the repudiation of specific assurances or commitments to the investor to induce an investment could be a factor in deciding whether a measure is sufficiently egregious so as to fall below the minimum standard of treatment but took "no position on the type or nature of repudiations measures that would be necessary to violate international obligations."[496]

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of the existence of a generally owed international legal obligation"); *ADF Award*, para. 183 (deciding that claimant had not proven that customary international law includes an "a general and autonomous requirement…to accord fair and equitable treatment and full protection and security to foreign investments" simply by pointing to bilateral investment treaties which contain such provisions); *Glamis Award*, para. 627 (**RL-006**) ("The Tribunal holds that Claimant has not met its burden of proving that something other than the fundamentals of the *Neer* standard apply today"); *Apotex Award* (**RL-016**).

[494] *Waste Management II*, para. 98 (**RL-014**).

[495] *Thunderbird Award*, paras. 147, 194 (**RL-003**).

[496] *Glamis Award*, paras. 620, 627 (**RL-006**). In fact, the *Glamis* tribunal decided that a legal opinion issued by the United States Department of the Interior (known as the "M-opinion") which eventually led

277. The *Mobil* tribunal concluded that the repudiation by a State of its "clear and explicit representations" made to induce an investment and which were objectively and reasonably relied upon by the investor is a "relevant factor" in determining whether there has been a breach of Article 1105, but only when it amounts to "egregious behaviour."[497] The *Mobil* tribunal stated:

> [Article 1105] does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change, whether to a significant or modest extent. Article 1105 may protect an investor from changes that give rise to an unstable legal and business environment but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, other otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies change and rules change. These are facts of life with which investors and all legal and natural persons have to live with.[498]

278. Canada's position has always been that mere failure to fulfil "expectations," however characterized, does not automatically fall below the customary international law standard of treatment required by NAFTA Article 1105.[499] The United States has taken the same view on several occasions that "states may amend or modify their regulations to achieve legitimate public welfare objectives and will not incur liability

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to the rejection of the claimant's mining project did not breach customary international law even though it was a dramatic change to the legal interpretation of long-standing rules upon which Claimant had relied to make its investment. *See id.*, paras. 136-147, and 758-772. *See* also *Mobil Decision on Liability*, para. 147 (**RL-007**).

[497] *Mobil Decision on Liability*, paras. 152-153 (**RL-007**).

[498] *Mobil Decision on Liability*, para. 153 (emphasis added) (**RL-007**).

[499] *See Mobil Decision on Liability*, paras. 133-134 (**RL-007**) quoting Canada's position.

under customary international law merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector." [500]

279. Claimant, on the other hand, does not even believe it necessary that Canada make specific representations or promises to it before its "legitimate expectations" can arise and be guaranteed under NAFTA Article 1105 because that is too "narrow" a standard and "not found in customary international law."[501] Claimant disputes the findings of the *Mobil* and *Glamis* tribunals, both of which have the opposite position as what Claimant argues here.[502]

280. This is an illogical and revisionist statement. It is illogical because the theory of legitimate expectations has not been proven to be a rule of customary international law in the first place, so disputing one element of a rule which is not actually a rule does nothing to assist Claimant. It is revisionist because the requirement that an investor's legitimate expectations must be based on specific promises or representations to the investor is by no means a "narrow standard" – it is *the* standard. The *Mobil* and *Glamis* tribunals were not the only NAFTA tribunals to make this conclusion: *Metalclad*, *Waste Management II, International Thunderbird* and *Grand River* all considered it essential evidence as to whether the respondent NAFTA Party had made specific assurances to the investor that were later repudiated.[503]

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[500] *Mesa Power Group LLC v. Government of Canada*, Submission of the United States of America, 25 July 2014, para. 8 (**RL-051**). The United States has expressed the same position in non-NAFTA arbitrations. *See* for example, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, 23 November 2012, para. 6 (**RL-052**). This is consistent with what the United States argued in the *Glamis Award* arbitration, arguments which the tribunal in that case accepted. *See Glamis Award*, paras. 575-582, 618-622 (**RL-006**).

[501] Claimant's Memorial, para. 284.

[502] *Mobil Decision on Liability*, para. 152 (**RL-007**) (there must be "(i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and (ii) were by reference to an objective standard, reasonably relied on by the investor, and (iii) were subsequently repudiated by the NAFTA host state" in order to be "relevant" in assessing whether the impugned behavior was "arbitrary, grossly unfair, unjust or idiosyncratic."); *Glamis Award*, paras. 620, 621 (**RL-006**).

[503] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ("Metalclad Award"), para. 89 (**RL-053**) ("Metalclad was entitled to rely on the

281. Even non-NAFTA arbitral tribunals interpreting autonomous fair and equitable treatment provisions have insisted on more rigorous criteria than what Claimant advocates. For example, the tribunal in *EDF v. Romania* stated:

> The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would neither be legitimate nor reasonable.[504]

282. Accordingly, legitimate expectations must, first, be based on objective rather than subjective, expectations of the investor.[505] Second, there must have been a specific assurance or promise by the State to induce the investment which was relied on by the

representations of federal officials and to believe that it was entitled to continue its construction of the landfill. In following the advice of these officials, and filing the municipal permit application on November 15, 1994, Metalclad was merely acting prudently and in the full expectation that the permit will be granted."); *Waste Management II*, para. 98 **(RL-014)** ("In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."); *Thunderbird Award*, paras. 146-148 **(RL-003)** (concept of legitimate expectations involves reliance on the specific assurances provided by government officials but concluding that the Mexican SEGOB did not generate such expectations through its *Oficio* relating to gambling machines). *See* also *Grand River Award*, para. 141 **(RL-010)** ("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.").

[504] *EDF Award*, para. 217 (emphasis added) **(RL-008)**. *See* also *id.* para. 218 **(RL-008)** (citing *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID ARB/05/8, Award, 11 September 2007, para. 332 **(RL-040)**: "It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment."),

[505] *Mobil Decision on Liability*, para. 152 **(RL-007)**; *EDF Award*, para. 219 **(RL-008)** ("Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case, due regard being paid to the host State's power to regulate its economic life in the public interest."); *Glamis Award*, para. 627 **(RL-006)** ("Creation by the state of objective expectations in order to induce investment…").

investor.[506] Third, the relevant expectations must be those existing at the time the investor decided to make the investment.[507] Finally, to assess the reasonableness of an investor's expectations, "all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State" need to be taken into account.[508]

283. In summary, while NAFTA tribunals have considered the repudiation of legitimate expectations of foreign investors by officials of the executive or legislative branch of government, assuming they reasonably existed at the time the investment was made and were based on specific representations to induce the investment, as relevant in determining whether the measure in question was egregious enough to breach customary international law, no NAFTA tribunal has found that the mere failure to fulfil an investigator's expectations constituted in and of itself a breach of the minimum standard of treatment under Article 1105(1). Something more is required.

[506] *Mobil Decision on Liability*, para. 152 **(RL-007)**; *Glamis Award*, para. 620 **(RL-006)** ("Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. Instead, Article 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations."); *Waste Management II*, para. 98 **(RL-014)** (noting the relevance of a "breach of representations made by the host State which were reasonably relied on by the claimant."); *EDF Award*, para. 217 **(RL-008)** ("Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate or reasonable.")

[507] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID ARB/03/29, Award, 27 August 2009 ("*Bayindir Award*"), paras. 190-191 **(RL-054)** ("Several awards have stressed that the expectations to be taken into account are those existing at the time when the investor made the decision to invest. There is no reason not to follow this view here."); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID ARB/04/19, Award, 18 August 2008, ("*Duke Energy Award*"), para. 340 **(RL-048)**.

[508] *Duke Energy Award*, para. 340 **(RL-048)**, cited with approval in *Bayindir Award*, para. 192 **(RL-054)**. *See* also *Saluka Partial Award*, para. 304 **(RL-050)** ("This Tribunal would observe, however, that while it subscribes to the general thrust of these and similar statements, it may be that, if their terms were to be taken too literally, they would impose upon host States' obligations which would be inappropriate and unrealistic. Moreover, the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness *in light of the circumstances.*").

2) The theory of "legitimate expectations" does not apply to the adjudicative role of the judiciary

284. The debate regarding the current status of the "legitimate expectations" theory in international law is ultimately irrelevant in the context of the current dispute.

285. The doctrine of legitimate expectations as advocated by Claimant is fundamentally inapplicable with respect to the rulings of domestic courts acting in their *bona fide* role of interpreting and applying domestic law. As described above, it is well-settled that the judgments of domestic courts interpreting domestic law can only be considered in violation of customary international law if there has been a denial of justice. There is no authority to suggest that this rule can be circumvented by arguing that an investor's legitimate expectations were breached because a domestic court set out a new interpretation of a domestic law, regardless of how significant that new interpretation might be or interpreted the evidence in a way Claimant did not expect.[509]

286. Indeed, not a single arbitral award cited by Claimant applying the doctrine of legitimate expectations deals exclusively with the judgments of domestic courts exercising their adjudicative role of interpreting and applying domestic law. All of the precedents relied upon by Claimant focus on measures taken by the respondent State's executive, legislative or bureaucratic branches, not solely its judiciary.[510] None endorse or even lends support to Claimant's position.

287. To the contrary, the tribunal in *Jan de Nul v. Egypt* rejected the claimant's argument that Egyptian court rulings be assessed in the broader context of the fair and equitable treatment provision in the applicable treaty, including the protection of its legitimate expectations.[511] The tribunal affirmed that when a judgment of a domestic

[509] To the contrary, as the *Mondev* Tribunal explained, even if Supreme Judicial Court of Massachusetts had "made new law" in its judgments, this would fall "well within the interstitial scope of law-making exercised by courts such as those of the United States." *Mondev Award*, para. 137 (**RL-004**).

[510] *See* for example *TECMED* (deals with citations of Mexican environmental authorities); *Occidental* (tax authorities); *Duke Energy* (which involved, *inter alia*, a state owned entity and customs).

[511] *Jan de Nul Award*, paras. 176-178 and 191 (**RL-028**). The fair and equitable provision in the Egypt-Belgium treaty did not contain a reference to the minimum standard of treatment of aliens in customary

court is the object of the complaint, "the relevant standards to trigger State responsibility for the [judicial proceedings] are the standards of denial of justice…holding otherwise would allow to circumvent the standards of denial of justice."[512]

288. International law simply does not recognize the doctrine of legitimate expectations as applying to judgments of domestic courts, not only because of the special adjudicative of the judiciary and the great deference afforded to domestic courts in interpreting and applying domestic law, but because judges do not – and cannot – make promises or representations to a foreign investor. Courts interpret and apply the law as it exists and in light of the evidence presented. No investor, domestic or foreign, can have the reasonable expectation that it will always prevail in litigation or that a court's interpretation of the law will never evolve. It is the very essence of the judicial process to develop principles of law through incremental decisions based on the facts, parties and rules presented before them, especially in a jurisdiction like Canada where judicial decision-making is inherently evolutionary.

289. It would be an unprecedented and radical expansion of the theory of legitimate expectations if the long-standing customary rules regarding denial of justice were cast aside and an obligation was imposed on a State's domestic courts to ensure that their interpretation of domestic law and adjudication of evidence presented to them do not violate the expectations of foreign investors.

3) Canada did not frustrate Claimant's "legitimate expectations"

290. Even if it were true that the doctrine of legitimate expectations is now a stand-alone rule of customary international law, and even if it were theoretically possible to apply the doctrine to domestic court rulings in the absence of a denial of justice, Claimant would still fail in its attempt to hold Canada liable under NAFTA Article

international law, making the tribunal's reasoning that denial of justice is the only remedy against a domestic court ruling all the more compelling.

[512] *Jan de Nul Award*, para. 191 **(RL-028)**. The *Jan de Nul* tribunal went on to endorse the views of *Loewen* and *Mondev* tribunals with respect to denial of justice and concluded that the Egyptian courts had not breached those rules. *Id.*, paras. 192-193 **(RL-028)**.

1105(1). The Federal Court did nothing to violate any expectation Claimant could reasonably have held.

291. Claimant says that it "could not have reasonably expected that Canada would promulgate the unique promise utility doctrine, which has no basis in Canada's statutory patent law…"[513] As a basis for such allegations, Claimant relies on witness statements from its employees who testify that they did not know of any reason why their patents would be invalid for lack of utility. [514]

292. The expert opinion of Mr. Dimock and Part C above establish that there is no merit to such allegations. The "promise of the patent" is merely an articulation of the long-standing utility requirement in Canadian law that the patent must do what the patent says that the invention will do. This is completely consistent with the Supreme Court of Canada's reasoning in *Consolboard* (and prior case law and academic literature). [515] This is not a "heightened" or "new" requirement: patent applicants are free to define what their invention will do, Canadian patent law merely requires that the patent actually do what is claimed. These are long-standing rules of Canadian patent law which, when applied to Claimant's patents for atomoxetine and olanzapine in light of the facts and expert testimony, revealed that they were latently defective as at the time of filing. Claimant's subjective view of how it would like the law to be interpreted is not a "legitimate expectation" – it is a mere viewpoint with which the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada disagree.

293. As for the recollections of Claimant's employees, (Messrs. Stringer, Armitage, Postlethwaith and Ms. Nobles), none of them offer evidence that they had any real understanding of Canadian patent law at the time and none of them even testified in support of the atomoxetine and olanzapine patents before the Federal Court – their

[513] Claimant's Memorial, para. 279.

[514] Stringer Statement, para. 25; Armitage Statement, para. 8, 12, and 16; Noble Statement, para. 23; Poitlethewait Statement, paras. 22, 29.

[515] Dimock Report, para. 56.

testimony would have had no value in determining whether the patents were valid under the *Patent Act* or not, and their testimony has no value in this arbitration either.

294. More to the point is that Canada made no promise or assurance to the Claimant with respect to its patents. As described at Part B above, the grant of a patent by the Patent Office is only presumptively valid and always subject to final determination by the Federal Court based on the evidence presented to the court. It is for this reason Claimant's argument regarding a patent being a "bundle of legally enforceable rights" which it relied on to make further investment decisions is deficient.[516] The grant of a patent monopoly is not unconditional – it requires the patentee to uphold the patent bargain by proving, if challenged before the Federal Court at any time within those twenty years of exclusivity, that it actually had sufficient evidence at the time the patent was filed to prove it was not engaged in mere speculation.

295. Claimant also says it could not have expected that Canada would have developed a utility doctrine in violation of NAFTA Chapter Seventeen.[517] As set out in detail below, there is no violation of NAFTA Chapter Seventeen. But even if there was, this would still not establish a violation of the minimum standard of treatment in customary international law – the FTC Note of Interpretation makes it clear that a breach of another provision of NAFTA does not equate to a breach of Article 1105(1).[518] Furthermore, it cannot be a reasonable expectation of any investor that the courts will not evolve in its interpretation of the law. The evolution of the court's interpretation of patent law is neither unusual nor undesirable.[519] As the *Mondev* tribunal explained, judicial "law-

[516] Claimant's Memorial, paras. 286-287.

[517] Claimant's Memorial, para. 279.

[518] *FTC Notes of Interpretation*, s. 2(3) (July 31, 2001) (**RL-009**).

[519] Indeed, as Professor Holbrook's expert opinion on United States patent law demonstrates, Claimant and other investors in the United States are well-accustomed to evolutionary, sometimes radical, changes in the patent law regime as U.S. Federal Courts are faced with new circumstances. Holbrook Report, paras. 62-75.

making" in this fashion is reasonable and, in the absence of a denial of justice, cannot be challenged under Article 1105. [520]

296. Claimant also says it expected that its PCT application for atomoxetine would be sufficient to meet Canada's requirements relating to the disclosure of utility. Claimant also argues that it did not expect Canada, a PCT contracting state, to impose "additional and retroactive disclosure" requirements beyond those provided for in the PCT. [521]

297. These are frivolous assertions. First, Claimant cannot ground its "legitimate expectations" in the PCT when it did not even file both patents at issue in this proceeding under that treaty – its olanzapine patent was not a PCT application but was filed directly with the Patent Office. Second, Claimant cannot have had a "legitimate expectation" that Canada would not "impose additional disclosure obligations beyond those contained" in the PCT,[522] when the PCT is strictly a procedural treaty which expressly provides that it does not prescribe substantive patent law obligations.[523] Third, Claimant could not have had expected that mere compliance with the PCT's bare "form and contents" requirements would mean its patent automatically complied with Canada's substantive disclosure requirements.[524] No patentee could have such an expectation in any jurisdiction, let alone Canada – the PCT only sets out general requirements regarding the categories of information and the format that must be

[520] *Mondev Award*, paras. 133, 136-137 (**RL-004**).

[521] Claimant's Memorial, para. 28.

[522] Claimant's Memorial, para. 280.

[523] *PCT,* Article 27(5) ("Nothing in this Treaty and the Regulations is intended to be construed as prescribing anything that would limit the freedom of each Contracting State to prescribe such substantive conditions of patentability as it desires […]") (**R-037**). Indeed, the courts in Canada have already considered this issue with regards to Canada's utility-related disclosure requirement and have disagreed with Claimant's argument. In *Eli Lilly Canada Inc. v. Apotex Inc.*, 2009 FCA 97, para. 19 (**R-354**), the court found that "The appellant further argues that requiring the complete disclosure of the factual basis underlying the sound prediction is inconsistent with the Patent Cooperation Treaty, 1970, 28 U.F.T. 7647 (Treaty). However, this Treaty specifically contemplates the supremacy of national law in setting the rules for substantive conditions of patentability (*see* article 27(5) of the Treaty). We are concerned here with substantive conditions of patentability."

[524] Claimant's Memorial, para. 280.

included in a PCT patent application.[525] It is well-known by users of the PCT system that applications filed under the PCT must, in addition to fulfilling "form and contents" requirements, always fulfil the substantive patentability criteria relevant to jurisdictions in which they might seek patent protection.[526] Claimant's self-serving view of the PCT is not a proper interpretation of that instrument.

298. Claimant knew (or should have known if it had read the case-law and treatises referred to in Mr. Dimock's expert report) what Canadian patent law required in order for its patents to be valid. There were extensive warnings in the jurisprudence and literature that promises in the patent had to be met, that utility had to be established at the filing date, and the basis for mere predictions of utility had to be disclosed in the patent.[527] Claimant knew (or should have known) that the legal requirements could make it difficult to defend the validity of its patent if it were challenged in the future. It also knew (or should have known) that the legal meaning of patentability standards is constantly being clarified and elaborated through court decisions. In any legal system (especially in a common law jurisdiction), this can produce an evolution in the law as broad legal terms are applied in new and different factual contexts over time. Indeed, Claimant's own annual public report filings contain warning statements that "there is no assurance that the patents we are seeking will be granted or *that the patents we have been granted would be found valid if challenged.*"[528]

[525] Reed Report, para. 33 and Gillen Report, para. 56, both citing *PCT* Article 3 (**R-037**).

[526] Reed Report, paras 44-45. See *WIPO PCT Applicant's Guide*, at paras 5.094 to 5.095 ('The Description'). http://www.wipo.int/pct/en/appguide/text.jsp?page=ip05.html#_5.094 (**R-042**).With regards to the content of the description in a PCT application, the *Applicant's Guide* explicitly warns applicants that "The details required for the disclosure of the invention so that it can be carried out by a person skilled in the art depend on the practice of national Offices. It is therefore recommended that due account be taken of national practice (for instance in Japan and the United States of America) where the description is drafted. The need to amend the description during the national phase (*see* para. 5.111 below) may thus be avoided." (emphasis added)

[527] Dimock Report, paras. 147-152.

[528] *See* for example, Eli Lilly Annual Report, Fiscal Year 1999 (**R-303**)("Patents, Trademarks and Other Intellectual Property Rights. Intellectual property protection is, in the aggregate, material to our ability to successfully commercialize our life sciences innovations. We own, have applied for, or are licensed under, a substantial number of patents, both in the United States and in other countries, relating to products,

299. In light of the circumstances of this dispute, the only legitimate expectation Claimant could have had is that it would receive a fair hearing from the Federal Court in the case of a challenge to its patents. That is exactly what it got.

V. EXPROPRIATION

A. Summary of Canada's Position on NAFTA Article 1110

300. Claimant alleges that the court decisions determining that its patents were invalid amounted to an expropriation because "no special rules attach to claims of expropriation based on judicial measures."[529] This assertion drastically oversimplifies the expropriation analysis. Claimant's position overlooks the unique and essential role played by domestic courts in declaring entitlements under domestic property law, which are in fact the starting point of the analysis under the international law of expropriation.

301. The first step in the expropriation analysis is to determine whether there was a property interest capable of expropriation. NAFTA Article 1110(1) protects investments against expropriation, and the definition of "investment" under NAFTA encompasses a range of property interests, including "real estate or other property, tangible or intangible". While NAFTA protects these categories of property interests, the legal source of these entitlements is domestic law. Nothing in NAFTA determines whether an asserted property right actually exists at domestic law, or the nature and scope of such rights.

302. Therefore, at the outset of the expropriation analysis, it is necessary to look to domestic law to determine whether there was in fact a property interest capable of expropriation that is protected by NAFTA Article 1110(1). The body of domestic law that must be considered includes domestic court rulings on the validity of asserted

product uses, formulations, and manufacturing processes. There is no assurance that the patents we are seeking will be granted or that the patents we have been granted would be found valid if challenged. Moreover, patents relating to particular products, uses, formulations, or processes do not preclude other manufacturers from employing alternative processes or from successfully marketing alternative products that might successfully compete with our patented products.") (emphasis added).

[529] Claimant's Memorial, para. 179.

ANNEX 385

IN THE MATTER OF AN ARBITRATION UNDER THE DOMINICAN REPUBLIC - CENTRAL AMERICA – UNITED STATES FREE TRADE AGREEMENT AND THE 2010 UNCITRAL RULES OF ARBITRATION

Between:

DAVID R. AVEN, SAMUEL D. AVEN, CAROLYN J. PARK, ERIC A. PARK, JEFFREY S. SHIOLENO, DAVID A. JANNEY AND ROGER RAGUSO

Claimants

- and -

THE REPUBLIC OF COSTA RICA

Respondent

RESPONDENT'S POST-HEARING BRIEF

Submitted on behalf of the Respondent by:

MINISTERIO DE COMERCIO EXTERIOR DE COSTA RICA
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March 13, 2017

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VII. CLAIMANTS HAVE BROUGHT CLAIMS NOT SUPPORTED UNDER ARTICLE 10.5 OF THE TREATY

A. The standards of protection that Respondent allegedly breached are not provided in Article 10.5 DR-CAFTA

727. During these proceedings, Claimants have asserted various claims under *"customary international law doctrines recalled in DR-CAFTA Article 10.5."*[434] In particular, they allege that Respondent's conduct entails: (i) a breach to provide protection and security; (ii) a frustration of their legitimate expectations under the standard of fair and equitable treatment; (iii) a breach of due process; (iv) what they now call abuse of authority, bad faith; and (v) *abuse de droit*, arbitrariness.[435]

728. Regarding Claimants' allegation that Respondent has violated the standard of providing protection and security to the investors, Respondent has already explained that because the breach was never raised as a claim in the Request for Arbitration, the Tribunal must dismiss such claim as inadmissible.[436]

729. In relation to the remaining claims raised under Article 10.5 of DR-CAFTA, Claimants have failed to demonstrate that they involve a breach of a standard encompassed in the Treaty. Therefore, none of Claimants' claims allegedly brought under Article 10.5 DR-CAFTA is supported by the protections afforded by the Treaty.

730. Article 10.5 provides:

> **"Article 10.5: Minimum Standard of Treatment**
>
> 1. Each Party shall **accord to covered investments treatment in accordance with customary international law**, **including fair and equitable treatment and full protection and security**.
>
> 2. For greater certainty, paragraph 1 prescribes **the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.** The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

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434 Claimants' Closing Statement Demonstrative, Day 6, slide 4.
435 Claimants' Closing Statement Demonstrative, Day 6, slide 4.
436 See, Section VI.B.

> 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article." (emphasis added)

731. A careful analysis of the text shows that neither the concept of legitimate expectations, arbitrariness, due process nor abuse of authority are standards of protection that DR-CAFTA Parties envisaged to be part of the Treaty.

732. In this regard, the United States of America in its submission as a non-disputing Party –filed immediately before the commencement of the Hearing– has shed light on the extent of the protection that DR-CAFTA Parties intended to provide to investors pursuant to Article 10.5.

733. Article 10.5(1) requires that each Party *"accord to covered investment treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."* In order to avoid any misunderstanding, DR-CAFTA Parties included a clarification in the second paragraph of Article 10.5 on the meaning of *"treatment in accordance with customary international law."* In this regard, the Parties expressly agreed that that is "the **minimum** standard of treatment to be afforded to covered investments." In addition, they agreed that the concepts of "fair and equitable treatment" and "full protection and security" do not imply treatment **in addition to or beyond** that which is required by the standard, and most importantly, they **do not create additional substantive rights.**

734. Investment tribunals have extensively discussed the minimum standard of treatment with the aim of determining which its threshold is. The United States has clearly pointed out that tribunals interpreted *"minimum"* as *"[a] floor below which treatment of foreign investors must not fall."*[437] Arbitral decisions support this conclusion. In effect, in *Glamis Gold v United States*, the tribunal concluded that:

> "The customary international minimum standard of treatment is just that, a minimum standard. It meant to serve a floor, an absolute bottom, below which conduct is not accepted by the international community."[438]

735. The "floor" below which treatment of foreign investors must not fall has to be analyzed in light of customary international law, as required by Article 10.5 of DR-CAFTA. Therefore, it is relevant to determine what is the content of customary international law in the protection of a minimum standard. As explained in Respondent's Opening Statement:

> "Customary international law is not a redundant term. It forms the backbone of Chapter 10 for a very specific reason."[439]

---

[437] United States of America submission as a non-disputing party, Attachment, Submission of the United States of America in *Spence International Investments LLC, Berkowitz et al v The Republic of Costa Rica*, ICSID Case No UNCT/13/2, para.12.

[438] **RLA-38**, *Glamis Gold Ltd v United States of America,* NAFTA/UNCITRAL, Award, June 8, 2009, para.615.

> "Customary international law holds this Tribunal to judge Costa Rica by reference to a **very limited and minimum standard of treatment**." [440] (emphasis added)

736. The United States made it clear that only few areas have been sufficiently crystallized as to be considered a minimum standard of treatment.[441] DR-CAFTA Parties seemed to have identified those areas because they have expressly included the obligation to provide "fair and equitable treatment" (Article 10.5.2(a)) on the one hand, and "full protection and security" (Article 10.5.2(b)) on the other. The former includes the obligation, as provided in the text of the Treaty, not to deny justice.

737. Furthermore, DR-CAFTA Parties included in Annex 10-B an understanding of what they consider customary international law rules covered by Article 10.5 of the Treaty, requiring general and consistent practice of States and *opinion iuris; i.e.* practice that they follow from a sense of legal obligation. Thus, *"the annex provides important guidance for assessing whether an alleged norm has been sufficiently demonstrated to be an element of customary international law"*.[442]

738. In this sense, the Tribunal must analyze whether the claims alleged by Claimants can be deemed part of the customary international law **minimum** standard of treatment, and therefore, be considered within Article 10.5 DR-CAFTA. We would urge the Tribunal not to lose sight of this restrictive standard, which is expressly linked to the standard of customary international law.[443]

739. Even if it was Claimants burden to prove the existence of a rule of customary international law, [444] Claimants have failed to do so. Respondent's position is that there is not a customary rule of international law which proves that the standards of protection that Claimants have raised (legitimate expectations, arbitrariness, due process and abuse of authority) have the status of a rule of customary international law. Consequently, Respondent's international responsibility cannot arise simply because it has not assumed those alleged obligations under the commitments imposed by DR-CAFTA.

740. Respondent will now address each of Claimants' unsupported claims allegedly covered by the scope of Article 10.5.

---

439 Respondent's Opening Statement, Day 1 Transcript, 166:11-13.
440 Respondent's Opening Statement, Day 1 Transcript, 163:1-3.
441 United States of America submission as a non-disputing party, Attachment, Submission of the United States of America in *Spence International Investments LLC, Berkowitz et al v The Republic of Costa Rica*, ICSID Case No UNCT/13/2, para.13.
442 Id., para.15.
443 Respondent's Opening Statement, Day 1 Transcript, 294:12-16.
444 **RLA-38,** *Glamis Gold Ltd v United States of America,* NAFTA/UNCITRAL, Award, June 8, 2009, paras. 601-602.

1. Legitimate expectations are not encompassed under the fair and equitable treatment standard of protection

741. Legitimate expectations cannot be considered under the umbrella of FET protection, taking into account the ordinary meaning of FET:

> "The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms "fair and equitable..." Therefore, prima facie, such a conception of fair and equitable treatment is at odds with the rule of interpretation of international customary law expressed in Article 31.1 of the Vienna Convention on the Law of Treaties (VCLT) […]."[445]

742. Furthermore, as the United States points out, "legitimate expectations" are not a component element of "fair and equitable treatment" under customary international law that give rise to an independent state obligation:

> "[…] an investor may develop its own expectations about the legal regime governing its investments, but those expectations impose no obligations on the State under the minimum standard of treatment. The United States is aware of no general and consistent State practice and *opinion iuris* establishing an obligation under the minimum standard of treatment not to frustrate investor's expectations; instead, something more is required than mere interference with those expectations."[446]

743. This powerful statement not only forms part of the United States' view on the test that the Tribunal should follow, but this view is also shared by other DR-CAFTA Parties. For instance, in *RDC v Guatemala*, El Salvador appeared as a non-disputing Party and pointed out that:

> "[…] the requirement to provide 'Fair and Equitable Treatment' under CAFTA Article 10.5 does not include obligations of transparency, reasonableness, refraining from mere arbitrariness, or not frustrating investor's legitimate expectations."[447]

744. The same understanding was followed by The Republic of Honduras:

> "However, because the focus should be on the conduct of the State, the Republic of Honduras does not consider it valid or necessary to refer to investor's expectations in order to decide whether there has been a violation of the minimum standard of treatment."[448]

745. The Dominican Republic also held that:

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445 **RLA-172**, *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken, para. 3.

446 Id., p. 18.

447 **RLA-164**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No ARB/07/23, Submission of El Salvador as a Non-Disputing Party, January 1, 2012, para. 7. This opinion was also reiterated in **RLA-165**, *Teco Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No ARB/12/23, Submission of El Salvador as a Non-Disputing Party, October 5, 2012, para. 16.

448 **RLA-166**, *Railroad Development Corporation v. Republic* of *Guatemala*, ICSID Case No ARB/07/23, Submission of the Republic of Honduras as a Non-Disputing Party, January 1, 2012, para. 10. This opinion was also reiterated in **RLA-170**, *Teco Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No ARB/12/23, Submission of the Republic of Honduras as a Non-Disputing Party October 5, 2012, para. 10.

> "Given that the focus should be on the practice and conduct of the State, the Dominican Republic also notes that it is wrong to include the investor's expectations of the treatment they expect to receive based on what has been offered, in deciding whether the State has complied with the minimum standard of treatment."[449]

746. Therefore, it cannot be denied that among DR-CAFTA Parties, the understanding is that "legitimate expectations" cannot be considered part of the minimum standard of treatment, and then, the Tribunal should not consider it as a standard provided in Article 10.5 DR-CAFTA. As it has been held:

> "[i]t is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law."[450]

747. In sum, since the minimum standard of treatment provided under customary international law does not encompass the legitimate expectations, there is no support for a claim of violation of legitimate expectations under Article 10.5 of DR-CAFTA.

2. The prohibition against arbitrariness and abuse of authority

748. As stated in Respondent's Rejoinder Memorial, DR-CAFTA does not contain any express provision on prohibition of arbitrary measures or abuse of authority.[451] In effect, this has been recognized by Claimants in footnote 329 of their Memorial.[452] Thus, the analysis that the Tribunal must follow is whether the **minimum** standard of customary international law prohibits arbitrary measures and abuse of authority.

749. The analysis should then start in the context of the minimum standard of treatment. Arbitral tribunals have considered that the minimum standard of treatment was breached when they found an egregious and shocking conduct on the part of the State:

> "[I]t must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise […] To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow that an act was unjustified, or unreasonable, or arbitrary that, that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication."[453]

> "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law ...It is a wilful disregard of due process

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449 **RLA-171**, *Teco Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No ARB/12/23, Submission of the Dominican Republic as a Non-Disputing Party October 5, 2012, para. 10.

450 **RLA-167**, *Mobile Investments Canada Inc & Murphy Oil Corp v Canada*, NAFTA/ICSID Case No ARB(AF)/07/4, Decision on Liability and Principles of Quantum, May 22, 2012, para. 153.

451 Respondent's Rejoinder Memorial, paras. 925-933.

452 Claimants' Memorial, para. 307 and fn. 329.

453 **RLA-42**, *Elettronica Sicula S.P.A.* (ELSI) (United States of America v. Italy), International Court of Justice (I.C.J.), July 20, 1989, para. 124

> of law, **an act which shocks, or at least surprises, a sense of judicial property**."[454]

750. Therefore, in the absence of egregious and shocking conduct that can be deemed part of the minimum standard of treatment that host States must apply to foreign investments, Claimants' case must fail. As it will be demonstrated below,[455] the conduct that Claimants purport as arbitrary and allegedly entailing an abuse of authority does not meet the standard to constitute a breach of the minimum standard of treatment. Consequently, the prohibition of arbitrariness and abuse of authority are not within the minimum standard of treatment and therefore, they are not standards of protection envisaged in DR-CAFTA.

3. Due process is not an independent standard according to DR-CAFTA

751. DR-CAFTA frames the obligation of due process alongside the promise not to deny justice. In accordance with international law, no claim for denial of justice can be levelled in the absence of domestic proceedings having been exhausted, or proven to have been futile. Therefore, and in light of the plain text of the Treaty, due process is not an independent obligation of the host State, and therefore, is not a standard of protection provided in DR-CAFTA, *unless* the lack of due process could be considered a denial of justice.

752. Article 10.5.2 (a) of DR-CAFTA expressly includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings as part of the "fair and equitable treatment" that the host State has committed to comply with. In particular, the Treaty provides that:

> "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."

753. Following Article 31 of the VCLT –certainly encouraged by Claimants– an interpretation based on the plain text of the treaty indicates that the obligation not to deny justice is just an element of FET and any breach of this obligation is to be analysed in accordance with the principle of due process. Thus, the provision envisages that due process is not a standard *per se* under Article 10.5.2(a) but a factor that the adjudicator must take into account when analysing a denial of justice claim.[456]

754. As stated in Respondent's Opening Statement:

> "It should not trouble any members of the Tribunal for too long to immediately discern that the drafters of DR CAFTA had a very specific objective when considering the scope and application of FET. Consistent with the restrictive interpretation of FET is the minimum standard of treatment; FET is focused on the denial the justice. But more than this, the denial of justice and the principle of due process are explicitly and inextricably connected. Therefore, the

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454 Id., para. 128.
455 See, Sections VIII.B.3 and VIII.C.
456 Respondent's Rejoinder Memorial, para.874. See also paras.870-878.

> standard of due process is a reference point when determining a denial of justice. It is not an independent standard."[457]

755. Although due process can be considered as one of the basic principles governing the administration of justice, it cannot be considered itself a source of obligation in light of the plain text of the Treaty.

756. Furthermore, as in the case of prohibition of arbitrariness and abuse of authority, due process can only be considered included in the minimum standard of treatment when the conduct that allegedly breaches such standard can be deemed as **egregious and shocking** under the "*ELSI* test."

757. As it will be demonstrated below,[458] the actions that Claimants purport as violations of due process do not meet the standard to constitute a breach of the minimum standard of treatment. Thus, due process is not within the minimum standard of treatment and therefore, it could not be considered a standard of protection envisaged in DR-CAFTA.

4. Conclusion

758. In sum, an analysis of the plain text of Article 10.5 evinces that neither the concept of legitimate expectations, arbitrariness, due process nor abuse of authority are standards of protection that DR-CAFTA Parties envisioned to be part of the Treaty. In addition, customary international law minimum standard of treatment has proven not to be of any assistance for Claimants to incorporate those claims.

759. In addition, no rule of customary international law allows Claimants' inclusion of the protection of investment-backed legitimate expectations as an obligation under the minimum standard of treatment.

760. Finally, the minimum standard of treatment imposes a high threshold to allege that arbitrariness, due process and abuse of authority are protected under such standard and capable of serving as a basis for international liability of Costa Rica under the Treaty. In any case, Claimants have not shown any egregious or shocking conduct on the part of Costa Rican agencies that could lead the Tribunal to find a violation of the minimum standard of treatment.

B. Claimants' efforts to extend the protection contained in Article 10.5 DR-CAFTA are fruitless

761. In its Closing Statement, Claimants addressed the extent of the protection contained in Article 10.5 of DR-CAFTA. In particular, Claimants consider that the standards of protection they have alleged in the present case are within the text of Article 10.5 or

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457 Respondent's Opening Statement, Day 1 Transcript, 295:13-22; 296:1-2.
458 See, Section VIII.B.2.