Protection of Foreign Property

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

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT
PARIS 1967

The Organisation for Economic Co-operation and Development was set up under a Convention signed in Paris on 14th December 1960 by the Member countries of the Organisation for European Economic Co-operation and by Canada and the United States. This Convention provides that the O.E.C.D. shall promote policies designed:

- *to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the world economy;*
- *to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development;*
- *to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.*

The legal personality possessed by the Organisation for European Economic Co-operation continues in the O.E.C.D. which came into being on 30th September 1961.

The members of O.E.C.D. are Austria, Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

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.

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.

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, as 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 Note thereto.

(b) Within the jurisdiction of a Party, the provisions of the Convention apply to all property of nationals of the other Parties irrespective 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 whi 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 o each Party to control the acquisition of property and investment of capital by nationals of other Parties within its territory. The Conven tion is designed to safeguard property after its acquisition or invest- ments after they have been made.

(b) Nothing in the Convention should be construed as prohibiting Party from requiring divestiture of property obtained by inheritance b 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.

Article 2

OBSERVANCE OF UNDERTAKINGS

Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.

NOTES AND COMMENTS TO ARTICLE 2

1. Purpose of the Article

(a) Article 2 represents an application of the general principle of pacta sunt servanda - the maintenance of the pledged word. This principle is undoubtedly the basic norm of any system of law relating to agreements. It also applies to agreements between States and foreig nationals.

(b) If a Party should fail to observe an undertaking given in relati to property on the ground that that undertaking was contrary to its con tutional laws, it will be obliged to provide just compensation where re quired under this Convention. In giving an undertaking to a national of another Party relating to his investment or concession, a Party acts i the exercise of its sovereignty. At the same time, it is free to provid that, after a period, the terms of its undertaking might be altered or that the undertaking might altogether lapse; the undertaking itself migh be governed by its own national law. However, any right originating under such an undertaking gives rise to an international right that the Party of the national concerned or of his successor in title is entitled to protect.* The validity of this principle has not been challenged. Thus, the basis of the decisions of the Permanent Court of Internation Justice in the cases of the Serbian and Brazilian Loans was that States were not entitled unilaterally to modify or abrogate such agreements.**

2. Object of Protection : Property

The provisions of Article 2 apply to "property" in the widest sens of the term which includes, but is not limited to, investments (see Not 2 to Article 1 ; for a definition of "property", see Article 9 (c) of the Convention and the Notes thereto). On the other hand, it goes without saying that the special protection enjoyed by property under Article 2 owing to an undertaking given in relation thereto by a Party which mus carry it out, does not take the place of the general protection provided in Article 1 but is additional to the latter.

3. Nature of the Undertakings

(a) An undertaking may be embodied in a contract or in a conces- sion - it is not possible on legal grounds to draw a distinction between the two, and such an undertaking may represent a consensual or a

* See The Right Honourable Lord Shawcross, Q.C. : The Problems of Foreign Investment in In ternational Law, in Hague Recueil, 1961.

** (1929) Series A, Nos. 20/21. In his lecture (ibidem) Lord Shawcross quotes other authorities in support of this principle.

unilateral engagement on the part of the Party concerned. However, it must relate to the property concerned; it is not sufficient if the link is incidental. Such a link may be established either:

(i) owing to the form or specific terms in which the undertaking was couched which as such identify either the property or the recipient of the undertaking; or

(ii) owing to the fact that though the undertaking was originally couched in general terms (e.g. a general exchange licence), the national concerned - as can be proved or presumed - acted in reliance on it. In such cases, in accordance with the principles of international law, a situation must be protected in which a Party by its conduct had given rise to a legitimate expectation of the continuance of a particular state of affairs.

(b) The provisions of Article 2 do not apply, on the other hand, in respect of undertakings incidentally affecting the property of a foreign national. Thus the Article would apply to undertakings given e.g. in respect of transfers of earnings from an investment or taxation thereof (e.g. a tax holiday) or to a promise that there will be no expropriation for, for instance, ten years; but a promise of political rights for the national concerned would not be within its scope.

(c) Unless the undertaking expressly excludes it, it operates in favour of a lawful successor to the title to the property to which it relates.

(d) Undertakings given in relation to property of nationals of any other Party are not prejudiced by the provisions of Article 1 (b).

Article 3

TAKING OF PROPERTY

No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with:

(i) The measures are taken in the public interest and under due process of law;

(ii) The measures are not discriminatory; and

(iii) The measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the property affected, shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the national entitled thereto.

NOTES AND COMMENTS TO ARTICLE 3

A. REQUIREMENTS FOR A LAWFUL TAKING OF PROPERTY

1. Nature of Obligation and its Scope

(a) Article 3 acknowledges, by implication, the sovereign right of a State, under international law, to deprive owners, including alien of property which is within its territory in the pursuit of its political, social or economic ends. To deny such a right would be to attempt to interfere with its powers to regulate - by virtue of its independence ar autonomy, equally recognised by international law - its political and social existence*. The right is reconciled with the obligation of the State to respect and protect the property of aliens (see Note 1 to Article 1) by the existing requirements for its exercise - before all, the requirement to pay the alien compensation if his property is taken.

(b) Thus, the Article restates** the five conditions which must be complied with in this connection according to recognised rules of international law : the measures in question must be taken (i) in the public interest ; (ii) under due process of law ; (iii) not be discriminatory; and, furthermore, (iv) just and effective compensation must b paid. Paragraph (iii) sets out the basic elements of the notion of "just compensation".

2. Relation to Article 2

Nothing in Article 3 relieves a Party which has given an undertaki in relation to property from the obligation imposed by Article 2.

3. Object of Protection : Property

Article 3 refers to property in general. This term is used in the Convention in the widest sense and includes contractual rights [see No 2 to Article 1 and Article 9 (c)].

4. Taking of Property

(a) In the case of <u>direct</u> deprivation ("expropriation" or "nationalisation") the loss of the property rights concerned is the <u>avowed</u>

* Sir Hersch Lauterpacht, Règles générales du Droit de la Paix. In Hague Recueil, 1937 (iv), pp. 95 et seq., and p. 346.

** See e.g. United States-German Treaty, Article V (4); United States-Italian Treaty, Articl V(2). Not all United States Bilateral Treaties refer, however, to "due process of law" as a requirement : see e.g. United States-Greek Treaty, Article 7(3).

object of the measure. By using the phrase "to deprive ... directly or indirectly ..." in the text of the Article it is, however, intended to bring within its compass any measures taken with the intent of wrongfully depriving the national concerned of the substance of his rights and resulting in such loss (e.g. prohibiting the national to sell his property or forcing him to do so at a fraction of the fair market price).

(b) Article 3 deals with deprivation of property. Protection against wrongful interference with its use by unreasonable or discriminatory measures is, in principle, provided in Article 1. Yet such interference might amount to indirect deprivation. Whether it does, will depend on its extent and duration. Though it may purport to be temporary, there comes a stage at which there is no immediate prospect that the owner will be able to resume the enjoyment of his property. Thus, in particular, Article 3 is meant to cover "creeping nationalisation", recently practised by certain States. Under it, measures otherwise lawful are applied in such a way as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation. As instances, may be quoted excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusal of access to raw materials or of essential export or import licences.

(c) The taking of property, within the meaning of the Article, must result in a loss of title or substance - otherwise a claim will not lie*.

5. Public Interest

In order to be in conformity with the rules of international law, the taking of property must be justified by public interest, i.e. the measures must be adopted in the interest of the State or any political subdivision thereof. Thus seizure undertaken ostensibly for public purposes but, in fact, to be used by persons connected therewith solely for private gain is unlawful and gives rise to a claim for damages **. On the other hand, provided the taking is in the public interest, it is immaterial whether the title in the property passes to the State or, as part of the design, to one of its nationals, the undertaking thus remaining in the "private sector".

6. The Notion of Due Process of Law

(a) In essence, the contents of the notion of due process of law make it akin to the requirements of the "Rule of Law", an Anglo-Saxon notion, or of the "Rechtsstaat", as understood in continental law. Used in an international agreement, the content of this notion is not exhausted by a reference to the national law of the Parties concerned***. The "due process of law" of each of them must correspond to the principles of international law.

* See B.A. Wortley, Expropriation in Public International Law, Cambridge, 1959, p. 139.

** Arbitral Award in the United States-Cuban claim, W. Fletcher Smith, (1929) Reports of International Arbitral Awards, Vol. II, pp. 915-918.

*** See R.R. Wilson, United States Commercial Treaties and International Law, New Orleans, La., 1960, p. 115.

(b) In view of the variety of national rules that give expression to the notion, its precise definition in terms of international law is difficult. On analysis, this term - which is used in some United States Bilateral Treaties* - implies that whenever a State seizes property, the measures taken must be free from arbitrariness. Safeguards existing in its Constitution or other laws or established by judicial precedent must be fully observed; administrative or judicial machinery used or available must correspond at least to the minimum standard required by international law. Thus, the term contains both substantive and procedural elements.

(c) One safeguard, specifically recognised in some bilateral agreements**, deserves special mention in view of its importance; the legality of the measures taken by the expropriating State and - wherever the constitutional rules of the State concerned permit it - the amount of compensation fixed should be subject to judicial review. This principle does not, of course, prejudice the form the judicial review should take, i.e. whether it should be carried out by ordinary or administrative Courts, as long as the independence of the Judge and the fundamentals of fair hearing are ensured - i.e. the rights to be heard, if possible, in public; to have advance knowledge of the rules governing the hearing; to adequate representations; etc.

(d) This analysis shows that, used in the context of an international agreement, the notion of "due process of law" means that the national of a Party may be deprived of his property by measures taken by another Party only subject to the safeguards and conditions provided for by national law and by the principles of international law.

7. "Discriminatory"

Under Article 1 (a) of the Convention "the management maintenance, use, enjoyment and disposal" of property shall not be impaired by discriminatory measures. The prohibition extends under Article 3 to the deprivation of property, this being the most incisive measure against an investment. Thus, measures of deprivation of this type are prohibited absolutely. If they are taken, there is - as in the case of a breach of any other condition set out in Article 3 - a duty of the Party to make "full reparation" under Article 5.

B. THE ELEMENTS OF JUST AND EFFECTIVE COMPENSATION

8. Just and Effective Compensation

Paragraph (iii) of Article 3 sets out the elements of "just compensation". The phrase appears in some United States Bilateral Treaties***. Other treaties of that group speak of "just and effective

* See footnote** p. 24.

** See, for instance, German-Pakistan Treaty, Art. III (2) and German-Togoland Treaty, Art. 3(2).

*** United States-Japanese Treaty, Article VI(3); United States-German Treaty, Article V(4); United States-Netherlands Treaty, Article VI(4).

compensation"*. They provide that "just compensation" shall represent the equivalent of the property taken and shall be made in an effectively realisable form and without unnecessary delay. Adequate provision shall have been made, at the latest, by the time of the taking for the determination and the giving of the compensation**. The United Kingdom-Iranian Treaty provides for "prompt, adequate and effective compensation" for any measure of deprivation (Article 15). The German-Pakistan Treaty speaks of "compensation which shall represent the equivalent of the investments affected"; the German-Togoland Treaty, of compensation that must "correspond to the value of the expropriated investment"; in the case of each of these two Treaties compensation must be "actually realisable", "freely transferable" and paid without undue delay (Article 3).

9. "Just" Compensation

(a) The standard of "just" compensation, equivalent to "fair compensation" or "just price", has been accepted in a number of important decisions of international tribunals. It implies that compensation should represent - as Article 3 (iii) provides - the "genuine value of the property affected" at the moment of deprivation. As a rule, this will correspond to the fair market value of the property without reduction in that value due to the method by which the payment is calculated: to the manner in which it is made; or to any special tax or charges levied on it. Furthermore, the value must remain unaffected by artificial factors such as deterioration due to the prospect of the very seizure which ultimately occurs, similar seizures by the Party concerned or the general conduct of that Party towards property of aliens which makes such seizures likely.

(b) The determination of the "genuine value" must initially be referred to the national body to which is entrusted the task of assessing compensation unless the value of the property or the method of ascertaining it is stipulated in an undertaking within the meaning of Article 2. To the amount assessed should be added interest from the day of the taking to the day on which compensation is paid. In appropriate cases profitability is an elment in the computation of the value of the property.

10. Absence of Delay

Compensation must be paid "without undue delay". This does not affect the legality of procedures under which compensation is payable after the measures of deprivation have been taken. Yet Article 3 (iii) requires that measures constituting the taking of the property must be "accompanied" by provision for the payment of compensation - thereby emphasizing the close link, as regards time, between the deprivation, the assessment of compensation, and its receipt.

11. Effectiveness and Transferability

Compensation must be paid in a form which is of real practical use to the person entitled thereto, having regard to his particular situation

* United States-Ethiopian Treaty, Article VIII (2).

** See footnote ***, page 20.

(for example his occupation, residence, etc.) - that is to say, it must be "effective" for him. In some cases, compensation in non-transferable form may be effective in this sense - for example, in the case of a person permanently resident in the expropriating State at the time of expropriation who voluntarily continues to reside there thereafter, provided always that it is possible for him to re-invest the funds received by way of compensation in the country of his residence. In other cases, where the economic system with which the person concerned is primarily connected is that of a State other than the expropriating State, it may be necessary to pay compensation in a form transferable into the currency of that other State in order to make it effective for him. Article 3 (iii) accordingly provides that compensation shall be "transferable to the extent necessary to make it effective" for the person concerned. A transfer through the market, for instance in security sterling, would represent a proper discharge of the obligations contained in the Article provided it did not entail an undue reduction in the genuine value.

12. The Recipient of Compensation

(a) The recipient of the compensation, "the national entitled thereto", may be (i) the national [see Article 9 (a)] of a Party other than that from which it is due, who has been deprived of his property; or (ii) a national of such other Party who lawfully derives (e.g. by succession) his title to compensation from the national who lost his property. Voluntary assignments of claims need not be recognised if they are not so recognised under domestic law.

(b) From the point of view of the entitlement as such, the residence of the recipient is immaterial: he may reside in the territory of the Party which owes him compensation; in the territory of any other Party; or elsewhere - he is entitled to compensation.

Article 4

RECOMMENDATION ON TRANSFERS

Each Party recognises, with respect to property in its territory owned by a national of another Party, the principle of the freedom of transfer of the current income from, and proceeds upon liquidation of, such property, to such national of a Party as is entitled to them. While this Recommendation does not contain any obligation in this respect, each Party will endeavour to grant the necessary authorisations for such transfers to the country of the residence of that national and in the currency thereof.

NOTES AND COMMENTS TO ARTICLE 4

Recognising the principle that transfer of the current income from, and the proceeds of the liquidation of, foreign property should be free but without accepting any obligation in this respect, the Parties, in Article 4, declare that they will endeavour to give effect to this principle by authorising appropriate transfer operations. Thus the text has, as it expressly indicates, the nature of a recommendation. It follows that it contains no obligation suitable for implementation by an international tribunal. The text of the Recommendation cannot prejudice the application of any obligation assumed by a Party by virtue of this Convention or any other international agreement.

Article 5

BREACHES OF THE CONVENTION

Any breach of this Convention shall entail the obligation of the Party responsible therefor to make full reparation.

NOTES AND COMMENTS TO ARTICLE 5

1. Responsibility and Attribution

(a) To establish responsibility of a Party under Article 5 it must be shown that, in accordance with the general rules of international law, the breach is attributable to the Party against whom the complaint is made.

(b) Questions concerning recognition by a Party of measures contrary to the provisions of the Convention shall be determined in accordance with such principles of international law as may apply.

2. "Full Reparation"

(a) Article 5 reaffirms the principle, contained in the very notion of an illegal act, that its chief consequence must be full reparation of the wrong done. "Reparation", stated the Permanent Court of International Justice, "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".* In practice, such reparation will generally take the form of damages.

(b) In cases in which full reparation takes the form of, or includes, the payment of damages, the payment must cover all loss (damnum emergens and lucrum cessans) flowing from the wrongful act and, where required, must be transferable.

* Chorzow Factory Case, (1928) Series A, No. 17, p. 47.

Article 6

DEROGATIONS

A Party may take measures in derogation of this Convention only if :

(i) involved in war, hostilities or other grave national emergency due to force majeure or provoked by unforeseen circumstances or threatening its essential security interests; or

(ii) taken pursuant to decisions of the Security Council of the United Nations or to recommendations of the Security Council or General Assembly of the United Nations relating to the maintenance or restoration of international peace and security.

Any such measures shall be limited in extent and duration to those strictly required by the exigencies of the situation.

NOTES AND COMMENTS TO ARTICLE 6

1. The Legal Nature of the Derogations

(a) Article 6 provides for two groups of cases in which a Party may be justified in derogating from the Convention. These derogation clauses are declaratory of existing rules of international law. The Article, however, deals only with "derogations" in the strict sense of the word, that is to say measures which in its absence would not otherwise be justifiable. No attempt is made here to provide for those cases of State action which, without being of a discriminatory character limit freedom of ownership or disposition of property but which are accepted as part of the normal governmental process. The imposition of taxation of a general and non-confiscatory character ; the forfeiture of goods smuggled through the customs ; the confiscation of obscene literature or dangerous drugs ; the payment of fines upon conviction for crime ; the enforcement of court judgments - these are all examples of measures which Parties are entitled to take and the legality of which, in relation to the Convention, is not dependent upon the invocation of a derogation clause.

(b) Contingencies in which measures taken in derogation of the Convention are justified are transient in character. Therefore, in conformity with existing international law, Article 6 requires the measures to be limited in extent and duration to those strictly required by the exigencies of the situation. Thus, the measures must be taken while a war or other hostilities last and cannot be continued after the cessation of hostilities (even though a peace treaty might not yet have been concluded). The Convention as such remains binding. Compliance with its terms must be resumed as soon as the emergency is over. "La force majeure disparue", says Rousseau, "l'obligation d'exécution reparaîtra - ce qui prouve bien que le traité subsiste".*

(c) Finally, the measures must be legitimate, i.e. in conformity with the existing rules of international law which Article 6 is not designed to supersede.

2. The Notion of "Public Emergency"

(a) In the event of war, multilateral treaties are suspended as regards their effect on relations between opposing belligerents. Even in relation to an ally, as between a belligerent and a neutral, or as between neutrals, legitimate measures of self-defence are

* Charles Rousseau, Principes Généraux du Droit International Public, Tome I, p. 573.

justified. This principle applies, more widely, in the event of other public emergencies*.

(b) The nature and degree of the emergency in which derogations are admissible are, however, qualified by the provisions of Article 6. Thus, the emergency must (A) be not only "grave" in itself but have "national" repercussions; and (B) (i) be due to force majeure; or (ii) be provoked by unforeseen circumstances; or (iii) threaten the essential security interests of the Party concerned. Civil war, riots or other widespread civil disturbances may clearly come within the first two of these three categories. So also may major emergencies arising from natural causes - such as storm damage, earthquakes, volcanic eruptions, etc. - with effects on a national scale.

(c) As regards the third category, the measures taken will normally relate to defence or aspects connected with the external relations of the Party concerned. On the other hand, they need not presuppose circumstances that are unforeseen or amount to force majeure. The derogation provided for corresponds to analogous provisions in the United States Bilateral Treaties**.

3. Maintenance of Peace

Article 103 of the United Nations Charter lays down that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. A similar principle underlies the provisions of Article 6 (ii) of the Convention. As compared with Article 103, they apply, of course, as between all the Parties to the Convention - whether they are Members of the United Nations or not. They are, however, limited to derogations designed to serve the maintenance of international peace and security - which Article 103 is not. Within this limitation, they apply equally to measures taken pursuant to decisions or to recommendations of the competent organs of the United Nations.

* "... Necessity may excuse the non-observation of international obligations ... the plea of necessity ... by definition implies the impossibility of proceeding by any other method than the one contrary to law", declared Judge Anzilotti in the Oscar Chinn Case (P.C.I.J. Series A/B No. 63, p. 114).

** See, for example, United States-Italian Treaty, Article XXIV; United States-Greece Treaty, Article XXIII; United States-Federal Germany Treaty, Article XXIV; United States-Nicaraguan Treaty, Article XXI; and also Norwegian-Japanese Treaty, Article XVI.

Article 7

DISPUTES

(a) Any dispute between Parties as to the interpretation or application of this Convention may be submitted by agreement between them either to an Arbitral Tribunal established in accordance with the provisions of the Annex to this Convention, which shall form an integral part thereof, or to any other international tribunal. If no agreement is reached for this purpose between the Parties within a period of sixty days from the date on which written notice of intention to institute proceedings is given, it is hereby agreed that an Arbitral Tribunal established in accordance with that Annex shall have jurisdiction.

(b) A national of a Party claiming that he has been injured by measures in breach of this Convention may, without prejudice to any right or obligation he may have to resort to another tribunal, national or international, institute proceedings against any other Party responsible for such measures before the Arbitral Tribunal referred to in paragraph (a), provided that:

(i) the Party against which the claim is made has accepted the jurisdiction of that Arbitral Tribunal by a declaration which covers that claim ; and

(ii) the Party of which he is a national has indicated that it will not institute proceedings under paragraph (a) or, within six months of receiving a written request from its national for the institution of such proceedings, has not instituted them.

(c) The declaration referred to in paragraph (b)(i), whether general or particular, may be made or revoked at any time. In respect of claims arising out of or in connection with rights

acquired during the period of the validity of such declaration, it shall continue to apply for a period of five years after its revocation.

(d) At any time after the expiry of the period of six months referred to in paragraph (b)(ii), the Party concerned may institute proceedings in accordance with paragraph (a). In this case proceedings instituted in accordance with paragraph (b) shall be suspended until the proceedings instituted in accordance with paragraph (a) are terminated.

NOTES AND COMMENTS TO ARTICLE 7

1. Purpose of the Article

In the event of a dispute that arises under the Convention, the Parties thereto may, in accordance with existing practice, attempt to settle it by diplomatic means. However, in the case of an instrument dedicated to the creation of an atmosphere of confidence there is a vital need to make also provision for the effective adjudication of such disputes. This is particularly true in view of the nature of the provisions of the Convention, the generality of the terms employed therein, and the complexity of the facts that might have to be elucidated. Article 7 serves this purpose.

2. Machinery Provided

Article 7 provides that in the event of a dispute relating to the interpretation or application of the Convention:

(A) a Party may under paragraph (a):

(i) in agreement with the other Party, submit the dispute to an Arbitral Tribunal established ad hoc in accordance with the Annex to the Convention (the "A.T.") or to any other international tribunal; or

(ii) if no agreement is reached within sixty days, submit the dispute to the A.T.; and that

(B) under paragraph (b), a national of any Party, injured by measures in breach of the Convention, may submit the dispute to the A.T., provided that:

(i) the Party against which his claim is made has accepted its jurisdiction by a declaration which covers his claim; and that

(ii) the Party of which he himself is a national has not itself instituted proceedings within six months from being requested to do so.

Paragraph (a): DISPUTES BETWEEN THE PARTIES

3. Agreement on Jurisdiction

(a). Faced with the issue whether, in the absence of agreement between the Parties on the tribunal, there should be compulsory jurisdiction of the International Court of Justice (the "I.C.J.") or of the

A.T., the jurisdiction of the A.T. was ultimately preferred on the grounds, among others, that (i) the A.T. was a forum more appropriate for disputes, many of which were of a technical nature; (ii) the A.T. was easy to convene and a country in the process of economic development might feel reassured by the possibility of choosing one of its members; (iii) its decision was given in a shorter time and the procedure entailed less cost; and that (iv) countries in the process of economic development might prefer the A.T. because disputes could be determined there without much publicity. In the event of a dispute of major political importance, on the other hand, the Parties could, as is open to them with regard to any dispute, agree to submit it to the I.C.J. or any other international tribunal.

(b) Thus, the effect of the provisions of paragraph (a) is that :

A. no question of jurisdiction arises where the Parties agree to submit their dispute to the A.T., the I.C.J. or some other international tribunal, as provided for in that paragraph; and that

B. if there is no agreement reached, the Party alleging the breach of the Convention can initiate proceedings before the A.T. whose jurisdiction then becomes binding on the other Party.

4. Form of Agreement

Agreement between the Parties to the dispute concerning jurisdiction of the A.T. or another international tribunal may take the form of a special agreement relating to that dispute ("compromis"), to all disputes or to certain disputes arising under the Convention, or of unilateral declarations to that effect. Such agreement may also be inferred from certain acts of the Parties concerned. It would be for the tribunal to determine whether the Party had in fact agreed on its jurisdiction [see Paragraph 6 (a) of the Annex to the Convention].

The rules relating to the establishment of the A.T. and some basic rules of its procedure are contained in the Annex to the Convention (pp. 59 and 60).

5. Compulsory Jurisdiction of the Arbitral Tribunal

In order to institute proceedings before the A.T. by virtue of its compulsory jurisdiction, the Party concerned must be able to show that :

(i) it has given written notice of its intention to institute proceedings to the Party which it alleges is responsible for a breach of the Convention (as distinct from the notice instituting proceedings before the A.T. - see Paragraph 2 of the Annex to the Convention); and that

(ii) sixty days have elapsed since such notice was given without agreement on the tribunal for the dispute having been reached between the Parties.

Paragraph (b): CLAIMS BY NATIONALS

6. The Rule and its Limitations

(a) The notion that an individual may enjoy access directly to an international tribunal is not new. Not only was procedural capacity enjoyed by individuals in relation to the Central American Court of Justice and certain Mixed Arbitral Tribunals, but it is enjoyed today with regard to the Court of the European Communities, the European Commission of Human Rights and Administrative Tribunals of intergovernmental organisations.

(b) Under paragraph (b) of Article 7, nationals of the Parties may submit disputes under the Convention to the A.T. [as to the definition of a "national", see Article 9(a)] without prejudice, however, to a right that a national may have to resort to the tribunal of his State or to another international tribunal and without prejudice to obligations which may exist for him to exhaust local or other remedies. As regards such obligations, paragraph (b) implies that all appropriate legal remedies short of the process provided for in the Convention must be exhausted - local remedies or others (such as remedies under an agreement between a Party and a national of another Party which contains a provision for the submission of all disputes to arbitration).

(c) Otherwise, the right of a national to institute proceedings under paragraph (b) of Article 7 is subject only to the conditions set out in sub-paragraphs (i) and (ii) of that paragraph (see Note 7). After the institution of proceedings his claim may be espoused by his own State (see Note 8). Furthermore, the A.T. has powers to order security for costs or to dismiss the claim if the institution of proceedings appears frivolous or vexatious. [Paragraph 6(c) of the Annex to the Convention].

7. Acceptance of Jurisdiction

(a) Under paragraph (b), jurisdiction of the A.T. as regards claims by nationals of the Parties exists only if it has been accepted by the respondent Party. Acceptance is effected by a unilateral declaration.

(b) The use of the words "whether general or particular" in paragraph (c) indicates that the Parties are free to limit the scope of their declaration (i) in time; (ii) in substantive scope; and (iii) in the range of nationals who may benefit under it. Thus, a Party may limit its declaration to one specific claim. It may also, if it wishes, make it a pre-condition of a claim that the individual concerned should have first exhausted other possibilities of redress that may be open to him.

(c) The declaration may be revoked by the Party concerned at any time - unless the declaration itself states the contrary. The effect of the revocation is, however, not absolute. According to paragraph (c) of Article 7, jurisdiction of the A.T. continues to exist for five years in respect of claims arising out of, or in connection with, rights acquired while the declaration was valid.

8. The Right of Espousel

(a) The right of the national to submit a claim to the A.T. is, under paragraphs (b) and (d) of Article 7, subject to the general prin of international law that, as regards international process, the Stat the national concerned has the right of espousel, i.e. the right to pr sent his claim directly to the respondent Party or to bring it before international tribunal in accordance with the provisions of paragraph (a).

(b) This principle limits the right of the national concerned i two respects :

(i) He must, in the first place, request in writing the appropriate authorities of his own State to institute proce ings against the respondent Party and can only institut proceedings himself provided that his State, within a period of six months from the receipt of his request, h not instituted such proceedings or otherwise indicated that it will not institute them [paragraph (b) (ii)] ;

(ii) If, after the expiry of this period, his State, at any tin institutes proceedings in conformity with paragraph (a the proceedings instituted by him must be suspended b the A.T. until the former proceedings are terminated [paragraph (d)].

(c) Under these rules the State of the national concerned m espouse his claim at any time and submit it, in accordance with par graph (a), to the A.T. or - in agreement with the respondent Party to the I.C.J. or any other international tribunal. But it cannot, aft the expiry of the six months' period, prevent the national concerned from exercising his rights under paragraph (b), by advising him or A.T. that it is dealing with the claim on the diplomatic level.

GENERAL POINTS

9. Parallel Remedies

The Convention contains no specific provisions dealing with the possibility that more than one international remedy may be available in relation to any given factual situation. Any attempt to deal with this problem would involve a degree of detailed regulations disproportionate to the likelihood of its occurence. The difficulties which might arise out of overlapping claims by States and individuals can t a large extent be controlled by the terms of the declarations whi States make under paragraph (b) (i) of Article 7 [see Note 7 (b) above]. In addition, the A.T. is given in Paragraph 6 (b) (iii) of th Annex the power to stay proceedings - a power which it would be fr to exercise if proceedings involving substantially the same facts, parties and issues were pending before another international tribu or commission.

Article 8

OTHER INTERNATIONAL AGREEMENTS

Where a matter is covered both by the provisions of this Convention and any other international agreement nothing in this Convention shall prevent a national of one Party who holds property in the territory of another Party from benefiting by the provisions that are most favourable to him.

Article 9

DEFINITIONS

For the purposes of this Convention:

(a) "National" includes both natural persons and companies. It does not, however, include nationals of a Party who belong to any territory to which this Convention may be extended pursuant to Article 11 but has not been so extended.

(b) "Company" means any entity which, under the law of a Party, either is recognized as a legal person or, as an entity or through its members, has the capacity to dispose of property or to institute legal proceedings.

(c) "Property" means all property, rights and interests, whether held directly or indirectly, including the interest which a member of a company is deemed to have in the property of the company. However, no claim shall be made under this Convention in respect of the interest of a member of a company:

(i) if the company is a national of a Party other than the Party which has taken the measures affecting the property of the company; or

(ii) in the case of a company which is a national of a Party by whose measures its property is affected, if the interest of the member of the company does not arise out of and, at the time of such measures, does not represent either an investment of foreign funds made by him or his predecessor in title or an investment of compensation or damages paid in accordance with the provisions of this Convention.

NOTES AND COMMENTS TO ARTICLE 9

1. "National" : Physical Persons

(a) Paragraph (a) of Article 9 includes a reference both to phys cal persons and to "companies". According to the rules of interna- tional law the nationality of physical persons is, in general, determi by the national law of the State concerned*. A Party to the Conventi cannot, however, claim the protection of its national if he "belongs" a territory for whose international relations it is responsible where though it could have done so in accordance with Article 11, it did no by notification to the depositary of the Convention, extend the applica tion thereof to that territory. Thus, although under Section 4 of the British Nationality Act, 1948, every person born within the United Kingdom and Colonies after 1st January, 1949, shall be, as a rule, citizen of the United Kingdom and Colonies (as well as a "British subject" and a "Commonwealth citizen"), a person born in a colony o the United Kingdom and residing there will not enjoy protection unde the Convention unless the British Government extends its application to that colony.

(b) It is nationality that confers the right to diplomatic protecti (see Note 3 to Article 1). Thus, as a rule it will be for the Party th intervenes on behalf of the claimant, or for the claimant himself, to show that he is its national in conformity with its law. Conflicts ma however, arise in cases of dual nationality. The respondent Party may, for instance, contend that the claimant is, or has been, its ow national as well and invoke the rule that a State is ordinarily not enti to the protection of its nationals who are also nationals of another Sta as against the latter**. Where recent naturalisation by the Party wh seeks to protect its national is involved, the conflict will be resolved the rule that the person concerned must be not only its national when diplomatic protection is exercised, but also at the time of the injury In the case of other conflicts preference will have to be given - in accordance with the principle recognized by the International Cou

* See The Permanent Court of International Justice in the Tunis and Morocco Nationali Decrees Case : "In the present state of international law, questions of nationality are ... in principle ... solely within the jurisdiction of a State" (P.C.I.J., Series B, No. 4, p. 24); also Sir Hersch Lauterpacht : "It is not for international law but for municipal law to determine wh is, and who is not, to be considered a subject" (Oppenheim-Lauterpacht, International Law, V 8th Ed., p. 643).

** See Strupp - Schlochauer, Wörterbuch des Völkerrechts, Vol. I, p. 381; see also The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws, Article

*** Sir Hersch Lauterpacht, The Development of International Law by the International C London, 1958, p. 183 ; for exceptions to this rule, see ibidem, p. 352 and Andrew Martin, Private Property Rights, and Interests in the Paris Peace Treaties, in (1947) B.Y.I.L., Vol. 24 p. 286.

of Justice * - "to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved". One may speak generally of "the antipathy of international law to plural nationality" **.

2. "National" : Companies

(a) The definition of "national" in paragraph (a) also includes "companies", a term which - in accordance with paragraph (b) - comprises all entities which, under the law of a Party, have legal personality or at least the capacity to dispose of property or to institute legal proceedings. It is immaterial in this respect whether such capacity arises because the law in question attributes it to the entity as such or because such capacity is attributed by the law to its members. The object of the provision is to bring within the protection of the Convention not only joint stock companies but various kinds of consortia, partnerships and other entities recognized by the national laws of the Parties and active in the field of foreign investment. In particular, it is intended to cover partnerships under English law and the Offene Handelsgesellschaft, the Gesellschaft des Buergerlichen Gesetzbuches, and the Gesamthandsgemeinschaften under German law.

(b) In ascribing nationality to companies the Convention does not define the connecting factors that entitle a Party to take up, or a company to claim, protection under it. Such factors will have to be determined in accordance with international judicial and treaty practice ***.

3. "Property"

(a) The definition of this term in paragraph (c), which is in conformity with international judicial practice, shows that it is meant to be used in its widest sense which includes, but is not limited to, investments. To come within the provisions of the Convention, property must be lawfully acquired [see Note 2 (b) to Article 1].

(b) The definition includes - subject to the two exceptions set out under (i) and (ii) in paragraph (c) - the interest which a member of a company is deemed to have in its property. The term "member" is used in preference to "shareholder", as in some legal systems the latter applies only in relation to joint stock companies, but not to other commercial entities (e.g. a "société à responsabilité limitée") which should also come within the definition. It should be noted that a "company" within the meaning of paragraphs (a) and (b) may be a "member" in another company.

* Nottebohm Case (2nd phase), quoted in Hambro II, No. 138, pp. 193-195 ; see also The Hague Convention of 1930, Article 5.

** Clive Parry, Nationality and Citizenship Laws of the Commonwealth, London, 1957, p. 26.

*** See R.L. Bindschedler, La protection de la propriété privée en droit international public, in Hague Recueil, 1956 (ii), p. 179, as to the tests applied in the post-war compensation treaties, see I. Foighel, Nationalisation, London, 1957, pp. 110-111.

(c) Sub-paragraph (ii) of Article 9 (c) is included for the purp of limiting the right of protection of foreign shareholders to those c where the interest of the foreign shareholder arises out of an inves ment of foreign capital in the economy of the State. If, for any rea the original investment of foreign funds is liquidated and the proce of the sale of the shares are remitted abroad, then the shares lose protection of the sub-paragraph until such time as they may once a be acquired by the investment of foreign funds.

Article 10

RATIFICATION

This Convention shall be subject to ratification by the signatory States. Instruments of ratification shall be deposited with the [depositary Organisation / depositary Government], which shall notify the (other) signatory States and all acceding States of each deposit.

Article 11

TERRITORIAL APPLICATION

Any State may at the time of signature, ratification or accession to this Convention or at any time thereafter declare by notification given to the [depositary Organisation/depositary Government] that the Convention shall extend to any of the territories for whose international relations it is responsible, and the Convention shall, from the date of the receipt of the notification or the date on which the Convention takes effect for the notifying State - whichever is the later - extend to the territories named therein.

Article 12

COMING INTO FORCE

(a) This Convention shall come into force on the date of the deposit of the Xth instrument of ratification or accession.

(b) The Convention shall thereafter take effect for each ratifying or acceding State on the date of the deposit of its instrument of ratification or accession.

(c) Any measure taken by a Party before the date of the coming into force of this Convention for it shall not be affected by the Convention as such. The provisions of this Convention shall apply to measures taken after such date, whether in pursuance of legislative or administrative authority existing before such date or otherwise.

NOTES AND COMMENTS TO ARTICLE 12

The provisions of the Convention apply to property irrespective o whether it was acquired before or after the date on which the Convention comes into force as regards the Party concerned (see Note 2 to Article 1). In this respect paragraph (c) of Article 12 is designed to clarify two questions. In the first place, paragraph (c) renders it clear that the provisions of the Convention do not apply to measures relating to such property taken by a Party before the Convention come into force with regard to it, though, of course, existing rules of customary international law and other relevant treaties will continue to apply to such measures. Secondly, paragraph (c) deals with the question of application of the Convention to measures taken after the date on which the Convention has come into force. Such measures wi be covered by the Convention, even where the legislative or administative authority on which they are based originated before the date on which the Convention comes into force.

Article 13

TERMINATION

Any Party may terminate the application of this Convention to itself or to any territory to which it has extended the Convention by notification pursuant to Article 11 by giving notice to this effect to the [depositary Organisation/depositary Government] which shall notify the (other) Parties thereof. The termination shall take effect one year after such notice has been received by the [depositary Organisation/depositary Government]. In respect of property acquired or investments made before the date on which the termination takes effect, the provisions of Articles 1 to 12 of this Convention shall continue to apply for a further period of 15 years from that date.

Article 14

SIGNATURE AND ACCESSION

(pro memoria)

FINAL CLAUSE

(pro memoria)

ANNEX RELATING TO THE STATUTE OF THE ARBITRAL TRIBUNAL

1. The Arbitral Tribunal referred to in Article 7 of the Convention shall consist of three persons appointed as follows : one arbitrator shall be appointed by each party to the arbitration proceedings and a third arbitrator, who shall also act as Chairman of the Tribunal (hereinafter sometimes called the "Chairman of the Tribunal"), shall be appointed by agreement of the parties.

2. Arbitration proceedings shall be instituted upon notice by the party instituting such proceedings (whether a Party to the Convention or a national of a Party to the Convention, as the case may be) to the other party. Such notice shall contain a statement setting forth in summary form the grounds of the claim, the nature of the relief sought, and the name of the arbitrator appointed by the party instituting such proceedings. Within 30 days after the giving of such notice, the respondent party shall notify the party instituting proceedings of the name of the arbitrator appointed by the respondent party.

3. If, within 60 days after the giving of notice instituting the arbitration proceedings, the parties shall not have agreed upon a Chairman of the Tribunal, either party may request the President of the International Court of Justice, or if he is unable to act, the Vice-President of the International Court of Justice, to make the appointment. If either of the parties shall fail to appoint an arbitrator, such arbitrator shall be appointed by the Chairman of the Tribunal.

4. In case any arbitrator appointed as provided in this Annex shall resign, die, or otherwise become unable to act, a successor arbitrator shall be appointed in the same manner as herein prescribed for the appointment of the original arbitrator and his successor shall have all the powers and duties of the original arbitrator.

5. The Arbitral Tribunal shall convene at such times and places as shall be fixed by the Chairman of the Tribunal. Thereafter, the Tribunal shall determine where and when it shall sit.

6. (a) The Arbitral Tribunal shall decide all questions relating to its competence and shall, taking into consideration any agreement of the parties, determine its procedure and all questions relating to costs.

(b) In particular, the Arbitral Tribunal may:

(i) permit intervention by a Party which considers that it has an interest of a legal nature which may be affected by the decision in the case ;

(ii) consolidate pending proceedings with the agreement, where necessary, of any other Arbitral Tribunal esta lished in accordance with this Annex ; and

(iii) provided that no objection is made by any Party to su proceedings, stay proceedings if other proceedings a ing out of the same facts and raising substantially the same issues are pending before any other internation Tribunal or Commission.

(c) The Arbitral Tribunal may also, in the case of proceedings instituted by a national of a Party to the Convention and upon prelim ary application by the respondent :

(i) order that national to give security for costs ; or

(ii) dismiss the claim if, from the statements made by th national to the Tribunal, the institution of the proceed appears frivolous or vexatious.

(d) Decisions of the Arbitral Tribunal may be made by a majo vote.

7. The Arbitral Tribunal shall afford to all parties a fair hearing. may render an award on the default of a party. Any award shall be rendered in writing, signed by the majority of the Arbitral Tribunal, and delivered publicly. A signed counterpart of the award shall be transmitted to each party. Any such award shall be final. Each pa to the proceedings shall comply with any such award rendered by the Arbitral Tribunal.