

Chapter Two

INJURY TO NATIONALS OF OTHER STATES

Section

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§ 711. State Responsibility for Injury to Nationals of Other States

A state is responsible under international law for injury to a national of another state caused by an official act or omission that violates

- (a) a human right that, under § 701, a state is obligated to respect for all persons subject to its authority;
- (b) a personal right that, under international law, a state is obligated to respect for individuals of foreign nationality; or
- (c) a right to property or another economic interest that, under international law, a state is obligated to respect for persons, natural or juridical, of foreign nationality, as provided in § 712.

Comment:

a. *Human rights, "denial of justice," and injury.* This chapter deals with a state's responsibility for injury to nationals of other states. See Introductory Note to this Part. Any injury to an alien for which a state is responsible under this chapter has sometimes been characterized as a "denial of justice." More commonly the phrase "denial of justice" is used narrowly, to refer only to injury consisting of, or resulting from, denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civil. As regards natural persons, most injuries that in the past would have been characterized as "denials of justice" are now subsumed as human rights violations under clause (a). Clauses (b) and (c) include injuries that are not commonly recognized as violations of human rights but for

which a state is nonetheless responsible under international law when the victim is a foreign national. See Comment *e* and § 712.

As used in this chapter, "injury" means any loss, detriment, or damage to liberty, property, or other interest, of the kind that is generally protected by law under the major legal systems of the world. It includes loss, detriment, or damage resulting from violation of customary law or of an international agreement protecting rights or interests of the individual.

This chapter does not address claims based on the fact that a state exceeded its jurisdiction to prescribe, adjudicate, or enforce in relation to nationals of another state. See Part IV. However, under this section, a state may claim that a particular excess of jurisdiction caused injury to its national, for example, by violating the principle against foreign government compulsion (§ 441), by seizing a national's vessel on the high seas (§ 522), or by denying him elements of fair procedure in enforcement (§§ 431-32).

A state's responsibility under this section is for official acts or omissions, ordinarily not for those of private individuals. The principles governing state responsibility for the acts of its officials and others are set forth in § 207. Remedies for a state's failure to meet its responsibilities generally are considered in § 902. For the requirement of proximate causation, see § 207, Comment *e* and Reporters' Note 6. As to state responsibility for human rights violations, see § 702, Comment *b* and Reporters' Note 1.

This chapter sets forth general principles of international law governing state responsibility of one state to another, not rights or obligations a state may have under particular international agreements. For rights and remedies that a foreign national may have under an international agreement between states, or under the domestic law of one or more states, see § 712, Comments *a* and *h*, § 713, and § 906.

b. *International human rights as minimum standard.* Under international law, a state is responsible for injury to foreign nationals resulting from violations of their internationally recognized human rights, as well as for injury resulting from violation of other interests for which international law provides special protections to foreign nationals. Under clause (a), the state is responsible for injury due to violation of those rights which the state is obligated to respect for all persons subject to its authority, whether pursuant to international human rights agreements to which it is party or under the customary law of human rights (§ 702); aliens enjoy these rights equally with the state's own nationals. Clause (b) declares that, in respect of foreign nationals, a state is responsi-

ble also for injury due to violation of those internationally recognized human rights that may not fall under § 702 and would not be protected by international law as regards the state's own nationals in the absence of international agreement. Under clause (c), a state is responsible for injury to property and other economic interests of foreign nationals that may not be recognized as human rights, and that are protected for foreign juridical persons as well as for foreign individuals. See § 712. A foreign national may also enjoy other rights under special treaties, such as those of the European Economic Community; under the Convention or the Protocol relating to the Status of Refugees (see Reporters' Note 7); under a treaty of friendship, commerce, and navigation between the state of his nationality and the state in which he resides or is present; or under the domestic law of the state of his residence or of another state.

c. Obligation to respect human rights of foreign nationals as customary law. A state's responsibility to individuals of foreign nationality under customary law includes the obligation to respect the civil and political rights articulated in the principal international human rights instruments—the Universal Declaration and the International Covenant on Civil and Political Rights—as rights of human beings generally (see Introductory Note to this Part), but not political rights that are recognized as human rights only in relation to a person's country of citizenship, such as the right to vote and hold office, or the right to return to one's country (Universal Declaration, Articles 13(2), 21; Covenant on Civil and Political Rights, Articles 12(4), 25). See § 701, Reporters' Note 6. Thus, a state party to the Covenant on Civil and Political Rights is responsible for any violation of any of its provisions in relation to any human being subject to its jurisdiction, regardless of the individual's nationality; but every state, whether or not a party to the Covenant, is responsible for denying to nationals of another state any right specified in the Covenant that is guaranteed by rules of customary law relating to the protection of foreign nationals. Customary law also holds a state responsible for a "consistent pattern of gross violations" of human rights of any persons subject to its jurisdiction. § 702(g). As regards foreign nationals, however, a state is responsible even for a single violation of many of the civil and political rights proclaimed in the Universal Declaration (other than those applicable only to citizens), even if it is not "gross." See § 702, Comment *m*.

The Universal Declaration proclaims also certain economic, social, and cultural rights, later developed in the Covenant on Economic, Social and Cultural Rights. See Introductory Note to

this Part, and § 701, Reporters' Note 6. The traditional responsibility of states under customary law does not include the obligation to extend such rights to foreign nationals. See Reporters' Note 2. Customary law, however, requires that foreign nationals be accorded the equal protection of the laws and forbids unreasonable distinctions between aliens and nationals. Distinctions between aliens and nationals in regard to some economic, social or cultural rights may not be unreasonable. See Comments *f* and *g* and Reporters' Note 3.

This chapter generally deals with the rights of aliens admitted for residence. International law also recognizes many rights for aliens admitted temporarily or for special purposes, *e.g.*, migrant or guest workers, and some rights even for aliens unlawfully in the country. See Comment *i* and Reporters' Note 3.

d. Right to property as human right. Article 17 of the Universal Declaration of Human Rights declares:

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

There is lack of agreement on the scope of this right and permissible limitations on it, but the right of an individual to own some property and not to be deprived of it arbitrarily is recognized as a human right. See § 702, Comment *k*. Under this section, clause (a), therefore, a state is responsible for violation of that right with respect to an individual who is a national of a foreign state. Customary international law accords additional protection to the property and other economic interests of foreign nationals, as provided in clause (c) and in § 712. For limitations on the right of aliens to acquire property or bring it into the state, see § 712, Comment *i*, and § 722, Comment *g*.

e. Other injury to individuals of foreign nationality. A state is responsible under clause (b) for injury to some interests of individuals of foreign nationality that have not been recognized as human rights under the Universal Declaration of Human Rights or the principal covenants and conventions, or whose recognition as human rights is uncertain. For instance, a state is responsible for injury resulting to a foreign national or his property from the state's failure to provide reasonable police protection. A state does not guarantee the safety of an alien or of alien property, but it is responsible for injury when police protection falls below a minimum standard of reasonableness. What constitutes reasonable police protection depends on all the circumstances, including the state's available resources; ordinarily, the standard of police protection for

foreign nationals is unreasonable if it is less than is provided generally for the state's nationals. The state is responsible *a fortiori* for injuries resulting from private violence encouraged by government officials. A state is not responsible if a foreign national was warned not to court special danger in circumstances in which the authorities could not assure the person's safety and he assumed the risk.

A state is also responsible if it fails to provide to an alien remedies for injury to person or property, whether inflicted by the state or by private persons in circumstances in which a remedy would be provided by the major legal systems of the world. That such remedy might not be available because under domestic law the state or an official is immune from suit does not diminish the state's responsibility under international law.

Clause (b) refers to individuals but the interests of a juridical person of foreign nationality also enjoy some protection, for instance, against denials of procedural justice; for a juridical person, such violations would normally result in economic injury and fall within clause (c) and § 712.

f. Discrimination between nationals and aliens. Internationally recognized human rights generally apply to aliens as to nationals. Comment *b*. Discrimination against aliens in matters that are not themselves human rights may nonetheless constitute a denial to the individual of the equal protection of the laws. Equal protection does not, however, preclude reasonable classifications and distinctions, and some distinctions between nationals and aliens are permissible. See § 712, Comment *i*; compare § 722. Whether and to what extent a state may treat nationals better than aliens in respect of economic and social rights is uncertain. See Comment *b*. Compare § 722, Reporters' Note 6.

g. Discrimination among aliens of different nationalities. The human rights of foreign nationals which a state is obligated to respect, clause (a), includes a right to the equal protection of the laws. Therefore, a state may not discriminate among aliens even in matters not related to their human rights when the distinction has no reasonable basis. Comment *f*. This section does not preclude a state from conferring special advantages on aliens of a particular nationality pursuant to treaty or domestic legislation, usually on conditions of reciprocity. See Comment *b*. Even where international law permits retaliation for violation by a state of its international obligations, see § 905, Comment *f*, a state may not retaliate against another state by violating the human rights of the latter's nationals, or by injuring them in other respects forbidden under clauses (b) and (c) of this section. See also § 712, Comment *f*.

Aliens admitted for limited times and special purposes—for example, migrant labor or guest workers—may be subjected to special regimes but may not be denied basic human rights. See Reporters' Note 3; compare § 722, Comment *j*.

h. Enemy aliens during war or other emergency. Under international law prior to 1945, enemy aliens in time of war could be expelled, interned, or otherwise restricted, and their property frozen or confiscated. The provisions of the United Nations Charter prohibiting the use of force (see § 905, Comment *g*) were apparently intended also to outlaw "war," thereby creating uncertainty as to whether there can now be a legal state of war under international law, and consequently raising questions as to the concept and status of "enemy alien." Compare § 336, Comment *d*, as to the effect of hostilities on international agreements.

Under contemporary international law, even a state engaged in lawful hostilities in self-defense pursuant to Article 51 of the United Nations Charter may not abridge certain rights of nationals of other states, even those of the aggressor state. The Covenant on Civil and Political Rights (Article 4) permits a state to take measures derogating from its obligations under the Covenant "in time of public emergency which threatens the life of the nation," but "only to the extent strictly required by the exigencies of the situation." Such measures must not be inconsistent with the state's other obligations under international law, and must not involve "discrimination solely on the ground of race, colour, sex, language, religion or social origin." No derogation is permitted from the articles protecting the right to life, freedom from torture and mistreatment, from slavery, and from the application of *ex post facto* law, or the provisions safeguarding the right to recognition as a person before the law, or freedom of conscience and religion. "To the extent strictly required by the exigencies of the situation," however, a state could lawfully seize or regulate property and detain or regulate the activities of persons, whether nationals or aliens. The derogations permissible in emergency under the Covenant are presumably permissible also under this section in relation to nationals of other states as a matter of customary law.

i. Different categories of aliens. The responsibility of a state under this section applies fully to foreign nationals admitted for residence in its territory. Persons admitted for temporary sojourn and limited purposes, *e.g.*, tourists, are also entitled to the protections of this section generally, but do not enjoy those rights commonly linked to residence, for example, the freedom to choose one's place of residence in a country or the right to work. Aliens admitted under special regimes, such as migrant or guest workers,

generally may not claim rights to residence or work beyond the terms of that admission. Some additional distinctions between resident aliens and others may also not be unreasonable and therefore not a denial of the equal protection of the laws. See Comments *c* and *g*. All aliens, even those unlawfully in the country, are entitled to the basic civil rights such as the right to life, freedom from slavery and from torture or arbitrary prolonged detention, and the right to fair trial. A person unlawfully in a country, however, is subject to the penalties provided by law for illegal entry or sojourn. See Reporters' Note 3. Compare the rights of such aliens under United States law, § 722, and Comment *k* thereto.

REPORTERS' NOTES

1. *Injury to aliens and human rights standards.* In the early decades of the 20th century, there was substantial agreement among the countries of Europe and North America on basic rules as to the protection to be afforded to foreign nationals. The countries of Latin America, most of which were recipients of foreign persons and capital, rejected these rules. See § 712, Reporters' Note 1. After the Second World War, with the emergence of many new importing states, and with the development of the law of human rights, opposition to special protection for aliens increased. It is generally accepted that states may invoke recognized international human rights standards on behalf of their nationals; attempts to invoke protections going beyond international human rights standards, as in clauses (b) and (c) of this section, might be resisted by some states.

2. *Rights of foreign nationals recognized under customary law.* Before the development of the contemporary law of human rights, states were held responsible for injury to aliens consisting of, or resulting from, various acts or omissions deemed to violate an international standard of justice or

other standards accepted in customary international law. See generally Roth, *The Minimum Standard of International Law Applied to Aliens* (1949); Freeman, *The International Responsibility of States for Denial of Justice* (1938) (cited here as "Freeman"). The law of responsibility for such injuries was largely developed by claims practice, by negotiation and agreement concerning liability and compensation, and by decisions of arbitral tribunals and claims commissions established pursuant to international agreement, notably, for the United States, the General Claims Convention of 1923 between the United States and Mexico, 43 Stat. 1730, 9 Bevans 935. (The opinions of the Commissioners under that Convention are cited here as "G.C.C."). See, e.g., Sohn and Buergenthal, *International Protection of Human Rights*, Chapters 1 and 2 (1973). Claims that have been made by or against the United States since the 19th century are summarized in 6 Moore, *Digest of International Law* 651-883 (1906) (cited here as "Moore, Digest") and in Moore, *History and Digest of International Arbitrations* (1898) (cited here as "Moore, Arbitrations"); 5 Hackworth, *Digest of International*

Law 526-657 (1943) (cited here as "Hackworth"); 2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 909-52 (2d ed. 1945); 8 Whiteman, *Digest of International Law* 697-906 (1967) (cited here as "Whiteman, Digest"); and in corresponding sections of the annual Digest of U.S. Practice in International Law. See also Whiteman, *Damages in International Law* (1937-43).

This body of state practice and decision may be summarized as follows:

A. States have been held responsible for injury due to various actions that have since been accepted as violations of human rights in the Universal Declaration on Human Rights or the Covenant on Civil and Political Rights:

—*Denials of due process in criminal proceedings:*

—arbitrary arrest (*Levin, Nielsen, Opinions and Reports* 688) (1937)

—unlawful or prolonged detention or interrogation (*Roberts, G.C.C.* 100) (1927); (*Dyches, G.C.C.* 193) (1929)

—prolonged arbitrary imprisonment (*Turner, G.C.C.* 416) (1927)

—excessive bail (*Jones, 4 Moore, Arbitrations* 3253) (1880)

—delayed trial (*Chattin, G.C.C.* 422) (1927)

—unfair trial (*Cotesworth and Powell, 2 Moore, Arbitrations* 2050) (1875)

—being tried twice for the same offense (*Coles and Crosswell, 78 Brit. & For. State Papers* 1301) (1885)

—failure to render a decision (*Fabiani (France v. Venezuela), 5 Moore, Arbitrations* 4877) (1896)

—tribunal manipulated by the executive (*Idler v. Venezuela, 4 Moore, Arbitrations* 3491) (1886)

—denial of right to defend oneself and confront witnesses (*Havana Packet* (1881), in *LaFontaine, Pasicrisie Internationale, 1794-1900 (Histoire Documentaire des Arbitrages Internationaux)* 240) (1902) (cited here as "La Fontaine")

—conviction without diligent and competent counsel (*White, LaFontaine, 46*) (1863); (*Parrish, G.C.C.* 473) (1927)

—denial of an interpreter (*Bell and Sterling, 66 Brit. & For. State Papers* 315) (1874)

—denial to accused of communication with representatives of his government (*Farrell, G.C.C.* 157) (1931)

—*Arbitrary use of force by officials:*

—arbitrary or excessive use of force by state officials (*Trumbull, 4 Moore, Arbitrations* 3255) (1892)

—inhuman treatment (*Gahagan, 4 Moore, Arbitrations* 3240) (1842) (wrongfully arrested, loaded with irons, and thrown into dungeon without food)

—arbitrary molestation of the person; torture to elicit "confession" (compare *Chevreau v. United Kingdom* (1931), 27 *Am.J.Int'l L.* 153 (1933))

—*Other violations of recognized rights:* Claims were also made on behalf of aliens for other actions violating rights later recognized in the Universal Declaration, such as

freedom of speech, freedom of religion, freedom to travel within a country, and the right to marry. See, e.g., 8 Whiteman, Digest 402; L. of N. Doc C.26.M.21. 1929, II, 32; Freeman 511. There is some authority in international law to support such claims, but these freedoms might be restricted to resident aliens, and might be denied in time of national emergency.

There were also claims for injury due to denial to foreign nationals of benefits enjoyed by nationals, such as social security or aid to indigents or incompetents, or due to other discrimination between aliens and nationals or against aliens of particular nationality. See 3 Hackworth 650-52; 8 Whiteman, Digest 387. International law forbids some such discriminations, but others are permitted. See § 712, Comments *f* and *i*. Compare the corresponding jurisprudence under the "equal protection" clause of the Fourteenth Amendment to the United States Constitution, § 722.

There appears to be no record, however, of a state objecting to imprisonment of its nationals for debt, although that is prohibited by Article 11 of the Covenant on Civil and Political Rights. Some states may question whether they must accord alien men and women equal rights as to marriage, during marriage, and at its dissolution (Universal Declaration, Art. 16) when, for religious or traditional reasons, they do not grant such equality to their citizens.

B. State practice and arbitral decisions have supported state responsibility for several kinds of injury to aliens that have not been recognized as violations of human rights,

clause (b) of this section. They include:

—*Failure to protect foreign nationals.* The rule that developed out of the arbitral awards before World War II was that a state was responsible for injuries inflicted upon aliens by private individuals only if the state failed, by intention or neglect, to provide adequate police protection for those aliens. Comment *e*. See, e.g., *Noyes* (United States v. Panama), Hunt's Report 155 (1933). A state incurs no liability for injury to aliens by acts of revolutionary forces if the state is unable to protect the aliens from such injury. If the revolutionary forces succeed, the state may become liable for their actions during the struggle for power. See § 207, Comment *b*. A state has greater and more specific duties under customary law and under some international agreements to protect certain classes of aliens, such as diplomatic or consular personnel. The seizure of the United States Embassy and the taking of United States hostages in Iran in 1979-80 may have been initially the act of a mob which the authorities could not prevent, but was soon ratified and became state policy for which Iran was responsible. See Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), [1980] I.C.J. Rep. 3; § 207, Reporters' Note 4; § 464, Reporters' Note 6.

—*Failure to punish offenses against aliens.* There is support for a rule obligating a state to act vigorously and diligently to punish crimes against aliens. See, e.g., the decisions of the Mexican-American Claims Commission, e.g., *Kennedy*, G.C.C. 289 [1927] (imposition of in-

adequate penalty); *Mallen, id.* at 254 (1927) (failure to enforce penalty); *West, id.* at 404 (1927) (amnesty and pardon unduly granted); *Putnam, id.* at 222 (1927) (allowing prisoner to escape). It is argued that failure to punish shows contempt for the alien's state and increases the possibility of harm befalling other nationals of that state. For an argument against liability in such circumstances, see Art. 13 of the draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by Professors Sohn and Baxter, reprinted in 55 Am.J.Int'l L. 545 (1961), and in the volume by Garcia-Amador, Sohn, and Baxter cited in Reporters' Note 8.

—*Failure to provide aliens a legal remedy.* It is a wrong under international law for a state to deny a foreign national access to domestic courts. *Van Bokkelen*, 2 Moore, Arbitrations 1842 (1888). That is the central meaning of "denial of justice." See Comment *a*. Treaties of friendship, commerce, and navigation generally provide that each party shall give to nationals of the other party access to its courts on the same basis as to its own nationals. See treaties collected in Freeman, 123 n. 2. However, states reserve the right to deny access to their courts to corporations that have not registered or qualified to do business in the state, although they in fact do business within the jurisdiction.

United States law generally affords aliens access to courts even in the absence of international agreement, although in respect of some claims against the United States, the right is conditioned on reciprocity by the alien's country of national-

ity. See *Nippon Hodo Co. v. United States*, 152 Ct.Cl. 190, 285 F.2d 766 (1961) (giving effect to reciprocity provisions in 28 U.S.C. § 2052 as regards contract claims against the United States); 46 U.S.C. § 785 (reciprocity required in suits in admiralty against United States). Access to courts is extended even to illegal aliens. See, e.g., *Janusis v. Long*, 284 Mass. 403, 188 N.E. 228 (1933). See also the cases recognizing constitutional rights for illegal aliens, § 722, Reporters' Note 14.

C. States have been deemed not responsible under international law for

—*Certain alleged procedural insufficiencies:*

—witness did not take oath (*Chattin, supra*)

—reasonable security for costs was required (Freeman 224, n. 5)

—court incorrectly but in good faith applied or interpreted the law (*Barron, Forbes, & Co. 3 Moore, Arbitrations 2525*) (1872)

—case dismissed for lack of jurisdiction (when another forum was available) (Freeman 227)

—"technical objections" or "minor irregularities" (Ralston, Venezuelan Arbitrations of 1903, 67-68)

—*Such restrictions on aliens as:*

—exclusion from public employment

—limiting access to certain professions and occupations

—denying access to public facilities or resources

—denying right to own or inherit certain property or interests in property

—requiring aliens to register or be otherwise identified

—deporting or expelling aliens pursuant to law

—requiring aliens to serve on juries or testify as witnesses or experts (Freeman 510).

3. *Human rights of various categories of aliens.* The language of the Universal Declaration, as of the principal international covenants, applies to all individuals; clauses intended to be limited to nationals so indicate. See Comment b. However, a study prepared by Baroness Elles, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, concludes that "the wording of international instruments as they relate to aliens is unclear and imprecise, 'nationality' not being included in the non-discrimination clauses." See International Provisions Protecting the Human Rights of Non-Citizens (U.N. Doc. E/CN.4/Sub. 2/392/Rev. 1) at 49. That argument is not persuasive as regards alien residents generally, but may be relevant to aliens admitted for special purposes, such as migrant or guest workers, who appear to have been the principal concern of the Report.

As regards economic and social rights in particular, the Elles Report, *supra*, states: "A realistic approach is however necessary. With the present wide disparities in economic and social development there is no reason to suppose that the progressive achievement of those standards implies equal and simultaneous progress for all individuals within the jurisdiction of the member State, including aliens." *Id.* at 7. On the other hand, when the International Covenant on Econom-

ic, Social and Cultural Rights wished to reserve a right to discriminate against aliens, it did so expressly. See Art. 2(3). ("Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.")

The Elles Report, *supra*, at 53, appended a "Draft Declaration on the Human Rights of Individuals who are not Citizens of the Country in which they Live." That declaration appears designed to clarify the status and rights of migrant or guest workers in particular. Article 4 of the draft declaration states that noncitizens shall enjoy "at least" specified rights, listing most, but not all, of the rights in the Universal Declaration. Other rights are mentioned in the Preamble and some in later articles of the draft. Not mentioned, in addition to rights of political participation, are the right to seek asylum and the right to a nationality. There is no specific mention of the right not to be held in slavery or servitude, but Article 8 of the Draft Declaration provides that the non-citizen shall enjoy "the right to just and favorable conditions of work, to equal pay for equal work, and to just and fair remuneration," as well as other economic and social benefits. See also U.N. Doc. A/C.3/38/11 (1983).

4. *Discrimination among aliens of different nationality.* The principles of state responsibility for injury to aliens, including non-discrimination, developed contemporaneously with a growing network of treaties of friendship, commerce,

and navigation which provided rights and benefits for nationals of the parties, including most favored nation treatment or even treatment equal to that of nationals. See Reporters' Note 6.

The United States objected to alleged discrimination against United States nationals by Cuba. See § 712, Reporters' Note 5. For United States measures against Iranian nationals in response to seizure of the United States embassy and personnel in 1979, see § 722, Reporters' Note 6.

5. *Enemy aliens and other "designated" aliens.* Since the adoption of the United Nations Charter, there has been little recorded treatment of foreign nationals as enemy aliens, or other discrimination against designated aliens. But see Reporters' Note 4. For the treatment of enemy aliens during the Second World War, see generally Domke, *Trading with the Enemy in World War II* (1943); also, Domke, *The Control of Alien Property* (1947). For the law of the United States, see § 722, Comment h.

6. *Special treaty rights of aliens of particular nationality.* The European Economic Community gives workers who are nationals of member states freedom of movement and protection against discrimination in employment, and gives to nationals of member states the right to establish themselves and conduct business in the states of the Community. Treaty of Rome Establishing the European Economic Community, 1957, Arts. 48-51, 298 U.N.T.S. 3, 11. Many states have networks of treaties of friendship, commerce, and navigation which give to nationals of the other state, generally on a reciprocal basis, such rights as freedom of travel, security of the person and of property, access

to courts and equality before the law, access to ports for vessels, most favored nation treatment for imports, and the right to engage in trade and employment. See generally Walker, "Modern Treaties of Friendship, Commerce and Navigation," 42 Minn.L. Rev. 805 (1958); Wilson, *United States Commercial Treaties and International Law* (1960); also American Bar Ass'n, *Commercial Treaty Index* (1976). See also, *e.g.*, *Asakura v. Seattle*, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041 (1924), and other cases cited in § 111, Reporters' Note 5; *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982).

7. *Refugees.* The Convention Relating to the Status of Refugees (1951) and the Protocol Relating to the Status of Refugees (1976) (see Introductory Note to this Part), give to refugees from political or religious persecution defined civil, economic, and social rights. States parties also undertake to accord to such refugees treatment no less favorable than that accorded to aliens generally, in some respects the most favorable treatment accorded to nationals of any foreign country, in other respects the treatment accorded to nationals. A refugee may not be expelled to territory where his life or freedom would be threatened ("*non-refoulement*") and refugees are accorded some protection against expulsion generally. The United States is a party to the Protocol, 19 U.S.T. 6223, T.I. A.S. No. 6577, 606 U.N.T.S. 267, which has been implemented by the Refugee Act of 1980, 8 U.S.C. § 1101. In *Yiu Sing Chun v. Sava*, 708 F.2d 869, 877 (2d Cir.1983), the court said:

a refugee who has a "well-founded fear of persecution" in his homeland has a protectable interest recognized by both treaty and statute, and his interest in not being returned may well enjoy some due process protection not available to an alien claiming only admission.

In 1981, President Reagan ordered the interdiction on the high seas of vessels suspected of bringing illegal aliens to the United States. See Proclamation 4865, Executive Order 12324, Sept. 29, 1981, 46 Fed.Reg. 48109 (1981). Whether the instructions and the proposed procedures would satisfy the obligations of the United States of "*non-refoulement*," under the Protocol, if any persons on board the vessels should qualify as refugees, has not been adjudicated. Compare *Haitian Refugee Center, Inc. v. Gracey*, 600 F.Supp. 1396 (D.D.C.1985), *affirmed on other grounds*, 809 F.2d 794 (D.C. Cir. 1987).

The rights of refugees under these instruments are given special "diplomatic protection" by the United Nations Office of the High Commissioner for Refugees. See, G.A. Res. 428(V), 5 U.N. GAOR Supp. No. 20, at 46, and the statute of the Office annexed thereto. For a collection of the resolutions relating to the Office,

see U.N. Doc. HCR/INF/48/Rev. 2 and Add. I-5 (1975-80).

For a discussion of possible human rights limitations on extradition, see Errera, "*L'extradition et la protection des droits individuels*," Rev. fr. Droit adm. 158 (mars-avr. 1985). See also § 476, Comment *h*.

A selective bibliography is provided in Jacobs, "*Political Asylum, Refuge and Sanctuary*," [1987] Rec. A.B. City N.Y. 561-72.

8. *Studies of state responsibility*. A study of state responsibility for injury to aliens, with draft articles, was prepared for the International Law Commission by its Special Rapporteur, F.V. Garcia-Amador, and considered by the Commission between 1956-1960. Beginning in 1962 the International Law Commission, with a new Special Rapporteur, Roberto Ago, dealt with state responsibility generally, not with its application in particular contexts. See [1980] 2 Y.B.Int'l L. Comm'n 26. Garcia-Amador's study, together with a draft convention prepared by Sohn and Baxter (essentially completed in 1961), are published as Garcia-Amador, Sohn and Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974).

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

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

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

(a) is not for a public purpose, or

(b) is discriminatory, or

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

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

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

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

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

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

Comment:

a. Responsibility under general principles of international law. This section sets forth the responsibility of a state under customary international law for certain economic injury to foreign nationals. A state may have additional obligations under international agreements to which it is party. The remedies available to a state whose national suffered injury, or to the injured person, are dealt with in § 713; see also § 906. As to remedies available to the injured person in the courts of the United States, see also § 907, §§ 451-60 (sovereign immunity) and §§ 443-44 (act of state).

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

A state is responsible under this section for injury to property and other economic interests of private persons who are foreign nationals. Injury by a state to property or economic interests of another state or state instrumentality is covered by general principles of state responsibility, § 206, Comment *e* and Reporters' Note 1. See also the principles of state responsibility to other states in

regard to particular matters, such as economic interests in the sea (Part V) or pollution of the environment (Part VI).

b. Expropriation of alien property under international law. Subsection (1) states the traditional rules of international law on expropriation of alien properties and takes essentially the same substantive positions as the previous Restatement, §§ 187-90. These rules have been challenged in recent years, but this Restatement reaffirms that they continue to be valid and effective principles of international law. In particular, international law requires that when foreign properties are expropriated there must be compensation and such compensation must be just. See Comments *c* and *d*.

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

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

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

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

—Provision for compensation must be based on value at the time of taking; as in United States domestic law, if compensation is

not paid at or before the time of taking but is delayed pending administrative, legislative, or judicial processes for fixing compensation, interest must be paid from the time of the taking.

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

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

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

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

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

Public Purpose

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

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

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

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

g. Expropriation or regulation. Subsection (1) applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation"). A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory. Depriving an

alien of control of his property, as by an order freezing his assets, might become a taking if it is long extended. A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory, Comment *f*, and is not designed to cause the alien to abandon the property to the state or sell it at a distress price. As under United States constitutional law, the line between "taking" and regulation is sometimes uncertain. See Reporters' Note 6.

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

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

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

i. Other economic injury. Under Subsection (1), a state is responsible for expropriation of alien property without just compensation even if property of nationals is treated similarly, but economic injuries that fall within Subsection (3) are generally unlawful because they involve discrimination or are otherwise arbitrary. An alien enterprise that has been lawfully established is protected by

international law against changes in the rules governing its operations that are discriminatory, Comment *f*, or are so completely without basis as to be arbitrary in the international sense, *i.e.*, unfair. In general, in the absence of international agreement to the contrary, a state may deny to foreign nationals the right to acquire property or to invest within the state. See § 711, Comment *d*. Compare § 722, Comments *f* and *g*.

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

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

REPORTERS' NOTES

1. *Status of international law on expropriation.* Subsection (1) restates the traditional principles of international law on expropriation. Early in this century these principles were settled law. See, *e.g.*, The Factory at Chorzow, P.C.I.J. ser. A,

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

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

After the Second World War, with the coming of many new states and the rise of the "Third World" to influence, opposition to the traditional view received widespread support. For the new majority of states, a people's right to dispose of its national resources became "economic self-determination," and was designated a "human right" and placed at the head of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. See § 701, Reporters' Note 6. In 1962, however, the United Nations General Assembly declared that in cases of expropriation of natural resources "the own-

er shall be paid appropriate compensation . . . in accordance with international law." G.A. Res. 1803, Permanent Sovereignty over Natural Resources, 17 U.N. GAOR, Supp. 17, at 15; the United States voted in favor of that resolution. See Reporters' Note 2. See Schwelb, "The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources," 49 A.B. A.J. 463 (1963).

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

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

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

come to rely on bilateral agreements, though Latin American states generally have not concluded such agreements. International arbitral tribunals have consistently applied the traditional rule as set forth in Subsection (1) but they have differed in their formulation of the standard of compensation to be applied. See Reporters' Note 2.

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

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

1193 at 1131. The Charter of Economic Rights and Duties of States also adopted "appropriate" compensation as the standard, but only as required by the law of the expropriating state, rejecting by implication any obligation of compensation under international law.

International tribunals have differed in their formulation of the standard of compensation to be applied, although their phraseology may be intended to have equivalent meaning. In *Libyan American Oil Co. v. Libyan Arab Republic*, (1977) 20 Int'l Leg.Mat. 1, 86 (1982), the arbitrator adopted "equitable compensation" with "the classical formula of 'prompt, adequate and effective compensation' remaining as a maximum and a practical guide." In *Kuwait v. American Independent Oil Co.* (1982), 21 Int'l Leg.Mat. 976, 1033 (1982), the arbitrators used "appropriate" compensation, "determined by means of an enquiry into all the circumstances." The Iran-United States Claims Tribunal in *American Int'l Group v. Islamic Rep. of Iran*, 4 Iran-U.S. C.T.R. 96, 105, 109 (1983), held as "a general principle of public international law" that foreign nationals are entitled to "the value of the property taken," and referred to the need to determine "the going concern or fair market value" of the property. Subsequently, in *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, 6 Iran-U.S. C.T.R. 219, 225 (1984), the Tribunal stated the Standard of Compensation to be "the full value" of the property of which the claimant was deprived. See also, *Sedco, Inc. v. National Iranian Oil Co.*, — Iran-U.S. C.T.R. —, 25 Int'l Leg.Mat. 629, 635 (1986) and *id.* at 636, 647 (separate opinion of Judge Brower). The Tri-

bunal has also applied the 1957 Treaty of Amity between Iran and the United States, 8 U.S.T. 900, T.I. A.S. No. 3853, calling for the payment of "just compensation" defined in part as "the full equivalent of the property taken". *Phelps Dodge Corp. v. Islamic Rep. of Iran*, 25 Int'l Leg. Mat. 619, 626-27 (1986). The network of bilateral agreements, Reporters' Note 1, uses different formulae, with a substantial number of them providing for all or some of the terms "prompt, adequate and effective" compensation. See generally Schachter, Reporters' Note 1.

The Executive Branch and the Congress of the United States have held resolutely to the view that international law requires compensation that is "prompt, adequate and effective." In the First Hickelooper Amendment, Congress referred to the obligation of states taking property of United States citizens as including "speedy compensation in convertible foreign exchange equivalent to the full value thereof, as required by international law." 22 U.S.C. § 2370(e)(1). That standard is presumably incorporated by reference in the Second Hickelooper Amendment, 22 U.S.C. § 2370(e)(2). See § 444, Comment c. United States representatives to international financial institutions are directed to oppose loans to countries that have expropriated property of United States citizens without prompt, adequate, and effective compensation, in the absence of certain exceptional circumstances. See *e.g.*, 22 U.S.C. §§ 283r, 285o, 290g-8. The benefits of the generalized system of tariff preferences for less-developed countries may be denied to countries that fail to com-

pensate in accordance with that standard. 19 U.S.C. § 2462(b)(4). The President and the State Department frequently reiterate the traditional formula in general policy statements. See, *e.g.*, 66 Dept.State Bull. 152-54 (1972); [1975] Digest of U.S. Practice in Int'l L. 488; [1978] *id.* 1226-27; 19 Weekly Comp.Pres.Docs. No. 36 (Sept. 12, 1983), at 1217.

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

The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined.

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

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

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

—*Time.* The First Hickenlooper Amendment, Reporters’ Note 2, requires the expropriating state to take appropriate steps to fix compensation within a reasonable time (six months). The payment is generally regarded as having been timely if compensation is tendered

at the time of the taking or if compensation plus interest from that time is paid at a later date. Compare *Kirby Forest Indus. v. United States*, 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), on remand 635 F.Supp. 705 (E.D.Tex.1986), holding that just compensation requires only that interest be paid from the date the government acquired title to land, not from the date on which condemnation proceedings were commenced.

—*Usable form.* Payment meets the requirement of just compensation if it is in a form that is usable by the alien. This includes deferred payments, as by bonds, provided that they bear interest realistically related to market rates. Compare the decision of the Constitutional Council of France that the provision in the Declaration of the Rights of Man and of the Citizen of 1789, incorporated into the French Constitution, which provides that property can be taken only “on condition of a just and prior indemnification,” was satisfied by compensation otherwise just but payable in negotiable interest bearing bonds to be paid on the average in 7½ years, *Jour. Off.* 17 Jan. 1982, at 299.

—*Exceptional circumstances.* Subsection (1) sets forth the elements constituting just compensation in the absence of exceptional circumstances. Compare *United States v. Commodities Trading Corp.*, quoted above; also suggestion in that case, 339 U.S. at 126, that “exceptional circumstances” might warrant different standard for compensation under the Fifth Amendment; *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 633, 81 S.Ct. 784, 790, 5 L.Ed. 2d 838 (1961) (“fair market value”

not “an absolute standard”). The limitations on the exception for “exceptional circumstances” set forth in Comment *d* derive from the previous Restatement § 188.

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

The land reform exception was accepted by some scholars in devel-

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

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

4. *Expropriation for public purpose.* In the controversy as to the current state of the international law on expropriation of alien property, Reporters’ Note 1, there has been little specific challenge to the traditional requirement that expropriation be for a public purpose. The public purpose requirement is included in the typical United States treaty of friendship, commerce, and navigation and was declared in the 1962 United Nations General As-

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

ment as to the public necessity for nationalization cannot be reviewed in the absence of manifest error.

5. *Discriminatory expropriation.* Discrimination has not been a prominent objection if the expropriating state paid compensation, but the expropriation of United States properties by Cuba was held to be in violation of international law because, *inter alia*, its purpose was to retaliate against United States nationals for acts of their Government, and was directed against United States nationals exclusively. *Banco Nacional de Cuba v. Farr*, 243 F.Supp. 957 (S.D.N.Y.1965), *affirmed*, 383 F.2d 166 (2d Cir.1967), *certiorari denied*, 390 U.S. 956, 88 S.Ct. 1038, 19 L.Ed.2d 1151 (1968). See also the arbitration in *Texas Overseas Petroleum Co. v. Libyan Arab Republic* (1977), 17 Int'l Leg. Mat. 1 (1978), in which investors referred to the Libyan statement that expropriation had been undertaken as a "cold slap in the insolent face" of the investors' government; and *BP Exploration Co. v. Libyan Arab Republic* (1974), 53 Int'l L. Rep. 297 (1979), in which the investor cited the Libyan statement that expropriation had been undertaken as retaliation for political action of the investor's government directed at a third state. For a finding that nationalizing one company but not another did not violate international law when there was no discrimination on the basis of the nationality of the two companies and there were "adequate reasons" for distinguishing between them, see the decision of the tribunal in the arbitration between Kuwait and the American Independent Oil Co. (1982), 21 Int'l Leg. Mat. 976, 1019-1020 (1982).

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

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

Americas: A Comparative Law Study 307 (1971).

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

One test suggested for determining whether regulation and taxation programs are intended to achieve expropriation is whether they are applied only to alien enterprises. In many instances,

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

A temporary deprivation of control, as by a freezing of assets under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701, is probably not a taking but may become one if deprivation is for an extended or indefinite period. See Comment *g*. See *Sardino v. Federal Res. Bank*, 361 F.2d 106, 111 (2d Cir.), *certiorari denied*, 385 U.S. 898, 87 S.Ct. 203, 17 L.Ed.2d 130 (1966). Thus, government appointment of an "intervenor" or "receiver" to manage the enterprise might constitute a taking. A temporary deprivation of an alien's control over his property may in some cases cause significant injury and give rise to a claim for damages. Compare *First English Evangelical Lutheran Church v. County of Los Angeles*, — U.S. —, 107 S.Ct. 2378 (1987) (requiring pay-

ment for temporary takings of property.) As to the freezing of the private assets of a foreign national in response to a violation of international law or agreement by the state of the alien's nationality, see § 905, Comment *b* and Reporters' Note 2.

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

8. "*Repudiation or breach of state contract with foreign national*." The term "repudiate" has been interpreted as meaning an outright disclaimer by the state of any liability under the contract. *Matter of Revere Copper & Brass Co. and Overseas Private Investment Corp.*, 14 Int'l Leg.Mat. 1321, 1345 (1978) (interpreting OPIC insurance policy); [1979] Digest of U.S. Practice in Int'l L. 1217 (interpreting Second Hickenlooper Amendment). The prevailing view is that, in principle, international law is not implicated if a state repudiates or breaches a commercial contract with a foreign national for commercial reasons as a private contractor might, *e.g.*, due

to inability of the state to pay or otherwise perform, or because performance has become uneconomical; or because of controversy about the contractor's performance. In such circumstances, the state is liable for damages under applicable law and remedies are usually available in some forum. It is a violation of international law if, in repudiating or breaching the contract, the state is acting essentially from governmental motives (akin to those that operate in cases of expropriation) rather than for commercial reasons, and fails to pay compensation or to accept an agreed dispute settlement procedure.

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

Some commentators consider "arbitrary" any unreasonable departure from principles recognized by the principal legal systems of the world in their law of government contracts. See *Sohn and Baxter*, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, Art. 12(a), 55 Am.J.Int'l L. 545 (1961). However, the propriety of governmental action affecting rights under state contracts has been uncertain under national law, too. See, for example, the cases applying the clause in the

United States Constitution forbidding States to impair the obligation of contracts (Article I, Section 10). Compare *El Paso v. Simmons*, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965), with *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

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

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

The rights of the alien may depend on the form of the concession or development contract. The rights of the investor may be greater if the contract includes a provision that it shall be governed by "general principles of the law of nations" or "principles of the law of

[the state party] not inconsistent with international law." Even if the contract provides that it shall be governed by local law, the contract is subject to the principles of Subsection (2).

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

Breaches of development or concession contracts are similar to, and often allied with, expropriations, Subsection (1), and international law tends to treat the two similarly. The law of the United States does so, too. The First Hickenlooper Amendment, Reporters' Note 2, made both such breaches and expro-

priations cause for the termination of aid. See § 444, Comment c. Legislation authorizing investment guarantees by the Overseas Private Investment Corporation (see § 713, Reporters' Note 7) defines "expropriation" to include "any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor . . . where such abrogation, repudiation, or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project." 22 U.S.C. § 2198(b).

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

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

(b) A state, having borrowed money abroad, fails to meet an installment of interest when it falls due. Such cases are typically adjusted by direct negotiation between the state and the lenders, with an international institution such as the International Monetary Fund acting as intermediary. The bond or loan agreement fre-

quently contains a waiver of the state's immunity to suit in the courts of other states. See § 467, Reporters' Notes 3 and 4. In such cases, issues of state responsibility under international law or of international remedy rarely arise in modern practice. See *Case of Certain Norwegian Loans (France v. Norway)*, [1957] I.C.J. Rep. 9, where the issue was raised but the Court decided it had no jurisdiction.

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

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

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

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

11. "Arbitrary" economic injury. "Arbitrary" in Subsection (3) is used in a sense analogous to its use in connection with repudiation of contracts, Reporters' Note 8. It re-

fers to an act that is unfair and unreasonable, and inflicts serious injury to established rights of foreign nationals, though falling short of an act that would constitute an expropriation under Comment *g*.

12. *Economic injury and rights under international agreements.* Particularly among the developed countries, there is a network of bilateral international agreements that provide for extensive rights for the nationals of one state party within the territory of the other. These include the right to establish oneself in business or to invest in enterprises controlled by others, subject to the right of the host state to exclude aliens from certain "sensitive" businesses such as communications, air transport, banking, and natural resources. Once such enterprises are established, they are generally entitled to the same treatment as nationals of the host state, subject to narrow exceptions. Within the European Economic Community, extensive rights of establishment have been conferred upon nationals of the member states, and the Commission was authorized to develop a timetable for the removal of remaining restrictions on entry. In 1976, the member states of the Organization for Economic Cooperation and Development signed a Declaration on International Investment and Multinational Enterprises, 75 Dep't

State Bull. 83, which stated that each member state should afford enterprises owned or controlled by nationals of other member states treatment "no less favourable than that accorded in like situations to domestic enterprises." Whether a treaty gives private persons rights and remedies under the national law of the parties depends on interpretation of the treaty and on the domestic law of the state where the right or remedy is sought to be asserted. See § 111, Reporters' Note 4; § 713(2) and Comment *h* to that section; § 906.

13. *Previous Restatement.* The previous Restatement dealt with economic injuries to aliens in §§ 184-96. The subject is treated here in fewer sections, and is sometimes distributed differently among black letter, Comment, and Reporters' Notes, but without major change in substance. Thus, the standard of "just compensation" for a taking of property of a foreign national, §§ 187-90 in the previous Restatement, is dealt with here in Subsection (1), Comment *d*, and Reporters' Notes 2 and 3. Breach by a state of a contract with a foreign national, § 193 in the previous Restatement, is treated here in Subsection (2), Comment *h* and Reporters' Notes 8-10. Remedies for economic injury to foreign nationals are made more explicit in this Restatement, in § 713; see also § 906.

§ 713. Remedies for Injury to Nationals of Other States

(1) A state whose national has suffered injury under § 711 or § 712 has, as against the state responsible for the injury, the remedies generally available between states for violation of customary law, § 902, as well as any special remedies provided by any international agreement applicable between the two states.

(2) A person of foreign nationality injured by a violation of § 711 or § 712 may pursue any remedy provided by

- (a) international agreement between the person's state of nationality and the state responsible for the injury;
- (b) the law of the state responsible for the injury,
- (c) the law of another state, or
- (d) agreement between the person injured and the state responsible for the injury.

Comments:

a. Remedies under international law. A state whose national has suffered injury under § 711 or § 712 may resort to any of the remedies usually available to a state that has been the victim of a breach of international law, including international claims procedures and other diplomatic measures or permissible international responses. See § 902. The offended state may also invoke any special measures applicable by agreement between the two states, including arbitration or adjudication. Treaties of friendship, commerce, and navigation and other bilateral agreements commonly provide for resort to the International Court of Justice or to arbitration to resolve a claim that rights protected under the agreement have been violated. See §§ 903-904. In the case of economic rights guaranteed to nationals of member states of the European Communities, the special remedies provided by the treaties creating the Communities are available. The European Communities agreements provide for special remedies for violation by one member state of the rights of nationals of other Community members. See Comment *h*.

In principle, the responsibility of a state under §§ 711 and 712 is to the state of the alien's nationality and gives that state a claim against the offending state. The claim derives from injury to an individual, but once espoused it is the state's claim, and can be waived by the state. However, the derivative character of the claim has practical consequences: for example, damages are often measured by the damage to the individual, not by the loss to the state or the affront to its honor. The derivative character of the claim is reflected also in the traditional rule that the accused state can reject an international claim if the individual victim has not exhausted domestic remedies, Comment *f*, or if the individual has reached a voluntary settlement with the respondent state, Comment *g*. See also § 902.

b. Diplomatic protection. A state has the right to afford its nationals diplomatic protection against violation by another state of obligations under §§ 711 and 712. A state is entitled to communicate with a national arrested or charged with crime, to provide him assistance, and to have a representative present at his trial. A state may also intercede to assure other human rights of its nationals, their personal safety, or their property or other interests protected by §§ 711 and 712. Formal diplomatic espousal usually awaits exhaustion of local remedies (Comment *f*), but governments often intercede informally without regard to the person's domestic remedies.

For the special international protection available to refugees, see § 711, Reporters' Note 7.

c. Protection of persons of multiple nationality. Except as otherwise agreed by the parties, a state may refuse a claim or intercession by another state on behalf of an individual who is that state's national if the victim is (a) also a national of the responding state, or (b) also a national of a third state, and the responding state treats the person as a national of that state for the matter in question. However, the responding state may not refuse the claim or intercession if the nationality of the claimant state is "dominant", *i.e.*, if the individual has stronger links to that state, such as extended residence or sojourn or ties of family or property in that state. See § 211, Comment *f* and Reporters' Note 1; § 212, Reporters' Note 3.

For protection of subsidiaries of multinational companies, see Comment *e*.

d. Stateless persons. Since responsibility under §§ 711 and 712 is to the state of nationality, the principles stated in these sections provide no protection for persons who have no nationality; and the responsibility of the offending state to the state of nationality ceases if the alien has voluntarily given up that nationality or has lost or been deprived of it under the law of that state. However, the human rights of an alien who has no nationality are protected under general human rights law (Chapter 1 of this Part), which applies to all persons subject to a state's jurisdiction, regardless of nationality. Stateless persons may also have status, rights, and protections under the Convention relating to the Status of Stateless Persons (see Introductory Note to this Part), or as refugees, § 711, Reporters' Note 7.

e. Protection of corporations. Section 711(c) and § 712 apply to all persons of foreign nationality, natural as well as juridical, but since most foreign investment is in corporate form, the protec-

tions of those provisions are invoked largely by corporations. Under the rule stated in § 213, a corporation has the nationality of the state of its incorporation and that state is entitled to provide the company diplomatic protection. If the state of a corporation's nationality is not effectively representing the corporation, or if the injury was aimed at and incurred by shareholders of a particular nationality, the state of the shareholders' nationality has sometimes proceeded on their behalf. See § 213, Comment *d* and Reporters' Notes 2 and 3.

Much foreign investment is carried on through subsidiaries of multinational enterprises, the subsidiary being incorporated in the state where it is active. The United States and other capital exporting states, as the states of nationality of the parent corporation, have protested and made international claims when the property of a local subsidiary is expropriated or when the subsidiary sustains other economic injury in violation of § 712. The legal justification asserted for protection by the state of nationality of the parent varies. In some cases it is asserted that as a result of the expropriation or other injury the subsidiary has in fact ceased to exist so that the loss is that of the parent company. In other cases the argument is made that the expropriation or other act was aimed at the parent company or at the state of the parent's nationality. For issues arising out of regulation of multinational enterprises, see § 414, Comment *a*.

f. Exhaustion of remedies. Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged. There is no need to exhaust local remedies when the claim is for injury for which the respondent state firmly denies responsibility, for example a claim for injury due to the shooting down of a foreign commercial aircraft where the respondent state contends that the act was justified under international law. When a person has obtained a favorable decision in a domestic court, but that decision has not been complied with, no further remedies need be exhausted. For exhaustion of remedies for violations of human rights, see § 703, Comment *d*.

g. Waiver and "Calvo" clauses. A state's claim against another state for injury to its nationals fails if, after the injury, the person waives the claim or otherwise reaches a settlement with the respondent state.

Some states have attempted to immunize themselves against responsibility for an injury to an alien under §§ 711 and 712 by a "Calvo law," providing that an alien who acquires or invests in

property waives the protection of his state of nationality, or by a "Calvo clause" in a contract with the state whereby the alien expressly waives such protection. The United States regards companies that sign such clauses or submit to such laws as waiving rights that are not theirs to waive, since, in principle, the injury is to the state, Comment *a*. In the view of the United States, such "waiver" by the private party does not preclude a claim by the state for denial of justice (§ 711), unjust enrichment, or on any other basis not depending on contract. See Reporters' Note 6.

h. Remedies provided to injured persons by international agreement. Under treaties of friendship, commerce, and navigation, nationals of one state party are generally assured access to the courts of the other state party on the same terms as nationals. In the European Economic Community, a national of a member state aggrieved by a violation of the agreement creating the community, may in appropriate cases obtain a resolution of the dispute by the European Court of Justice.

i. Remedies for injured persons under state law. The law of many states provides foreign nationals some remedy for many of the injuries resulting from violations of §§ 711 and 712. Often, these remedies are provided by the ordinary civil courts or a regular administrative tribunal; in some cases an exceptional body is established. As regards state contracts with foreign nationals, remedies before established tribunals are generally adequate to satisfy the requirements of § 712(2)(b). A special body may also be satisfactory unless it lacks the independence necessary to assure that the remedy is adequate. Inadequacy of remedy may also constitute a separate wrong of denial of justice. See § 711, Comment *a*; also § 712(2)(b).

Remedies are sometimes available in the injured person's home state. Thus, courts in the United States may exercise jurisdiction over claims against a foreign state arising out of certain commercial activities (§ 453(2)); over many claims in tort, if the injury occurred in the United States (§ 454, Comment *e*); and over some claims to property taken in violation of international law (§ 455(3)). Such remedies, however, may be subject to limitations such as the act of state doctrine. See §§ 443, 444. Many other countries also provide such remedies in principle, although in practice a state's courts frequently grant relief to investors of the state's nationality, less frequently to nationals of other countries.

j. Remedies for foreign investors by special arrangement. Various devices have been used, by agreement with the host state, to provide additional security to foreign investors and contractors. In contracts between a state and nationals of other states, it is

sometimes provided that the contract shall be governed by the law of another state. Often there is provision for arbitration under procedures developed for international trade in general, *e.g.*, those of the International Chamber of Commerce, and such arbitral awards are enforceable in state courts under the 1958 Convention on the Enforcement of Foreign Arbitral Awards, Reporters' Note 4. Development (concession) agreements often provide for special arbitral procedures designed to immunize the contract from unilateral state action. The United States (through the Overseas Private Investment Corporation (OPIC)) and other capital exporting countries afford their nationals opportunity to buy insurance against expropriation of their investments in certain countries. In 1985, the governors of the World Bank launched a proposal for a Multilateral Investment Guarantee Agency (MIGA), but it was not yet in effect in 1987. See Reporters' Note 7. Special remedies are provided by the International Centre for the Settlement of Investment Disputes (ICSID): a state that is party to the agreement creating ICSID may include in its contracts with foreign nationals a clause referring disputes to ICSID, and an award by an ICSID arbitration will be enforced in the courts of member states. See Reporters' Note 4.

k. Compensation as remedy for unlawful expropriation or for repudiation of contract. The reparation for any taking in violation of § 712(1) is generally monetary compensation. An expropriation unlawful because of lack of just compensation gives rise to a claim for damages. A taking that is unlawful only because it was discriminatory or not for a public purpose, but was accompanied by just compensation, might bring only nominal damages. See § 712, Comment *f*. Restoration of ownership to the original owner is virtually unknown in expropriation cases. See Reporters' Note 7. In the United States, the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), apparently contemplated that if property taken without compensation is brought into the United States, a court might allow the former owner to recover the property. See § 444.

For unlawful repudiation of contract, generally the remedy is monetary compensation. An arbitrator's award declaring that there has been an unlawful repudiation will generally be accompanied by an award of money damages (or followed by a money settlement).

REPORTERS' NOTES

1. *Remedies under international law.* The remedies for violations of §§ 711-12 include the diplomatic measures and international claims procedures available generally to a state claiming any breach of the international obligation by another state, § 902. See Comment *b*.

For a survey of United States actions to obtain reparation for economic injury to its nationals, see Kearney, "Diplomatic Protection of United States Foreign Investments," in *International Project Finance*, [1975] Fordham Corp. Law Inst. 243. Claims under §§ 711-12 may also go to arbitration or adjudication if the states involved have agreed, or agree *ad hoc*, to such resolution. In several cases, resort to the International Court of Justice to vindicate claims of economic injury to nationals failed on jurisdictional grounds. See *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, [1952] I.C.J. Rep. 89; *Nottebohm Case (Liechtenstein v. Guatemala)*, [1955] I.C.J. Rep. 4; *Interhandel Case (Switzerland v. United States)*, [1959] I.C.J. Rep. 4; *Barcelona Traction Case (Belgium v. Spain)*, [1970] I.C.J. Rep. 4.

Some treaties of friendship, commerce, and navigation provide that if a dispute over alleged denial to a person of a treaty right has not been resolved in the national courts or by diplomatic negotiation, it may be submitted to arbitration or to the International Court of Justice. In the European Communities, a member state may vindicate the rights of its nationals by resort to the European Court of Justice or to one of the other branches of the Communities system. By international agreement, states have also created special tribunals to resolve claims of alleged injury by one state to the nationals of the other. See Reporters' Note 9 and § 902, Reporters' Note 8.

2. *Protection of persons of multiple nationality.* In *United States ex rel. Mergé v. Italian Republic*, 1955, 14 R.Int'l Arb.Awards

236, the Italian-United States Conciliation Commission decided that the United States could not claim on behalf of the relator, a United States citizen by birth, since she also held Italian nationality, had resided in Italy with her husband, traveled on an Italian passport, and lived with him in Japan where he was an official of the Italian Embassy, and was therefore not "dominantly" a United States national within the meaning of the Treaty of Peace with Italy. See also *Canevaro Case (Italy-Peru)*, Permanent Court of Arbitration, 1912, 1 Scott, Hague Court Reports 284 (1916). In *Esfahanian v. Bank Tejarat*, 2 Iran-U.S. C.T.R. 157 (1983), a Chamber of the Iran-United States Claims Tribunal permitted the United States to claim on behalf of a person possessing dual nationality, finding his United States nationality to be "dominant and effective." The Tribunal as a whole affirmed on the same ground. 78 Am.J.Int'l L. 914 (1984).

3. *Remedies for injured persons.* Treaties of friendship, commerce, and navigation generally provide that nationals of a state party have access to the courts of the other state on the same terms as nationals of that state. See, e.g., *Asakura v. Seattle*, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041 (1924), and other cases cited in § 111, Reporters' Note 5; § 906, Reporters' Note 2. Even when there is no applicable treaty, the laws of many states provide foreign individuals local remedies for injuries covered by §§ 711-12. States that launch major expropriation programs sometimes establish special bodies to consider claims arising out of such programs, but in some cases, for example the Chilean Copper Program of 1971 (10 Int'l

Leg.Mat. 1067 (1971); 12 *id.* 983 (1973)), the independence of the tribunal and therefore the adequacy of the remedy are open to question. Comment i. In general, the availability of a domestic remedy does not relieve the state of responsibility for the injury under international law, although in principle the domestic remedy must be exhausted before international remedies can be pursued. Comment f.

In the United States, highly developed remedies for breach of contract or for a taking by the government are generally available to foreign nationals, and satisfy the requirements of both international and constitutional law. See § 721, Reporters' Note 7, and § 722, Reporters' Note 3. The United States Government takes private property for public use either by depositing the estimated amount of the property's value in court, or by taking the property and remitting the former owner to a suit under the Tucker Act. *United States v. Cobb*, 328 F.2d 115 (9th Cir.1964). Under either procedure, interest must be paid from the time of taking. Occasionally, in a massive taking, special remedies are provided for valuation after the taking. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 156, 95 S.Ct. 335, 365, 42 L.Ed. 2d 320 (1974). Contract claims against the United States may be vindicated by suit in the courts, chiefly the Court of Claims, or through administrative procedures, chiefly the Boards of Contract Appeals of the various executive departments. Subject to domestic jurisdictional limitations, both United States and State courts are open to foreign nationals claiming injury by taking or other acts of States of the

United States. See § 722, Comments a, c.

Civil law systems tend to distinguish between commercial and administrative contracts, remitting disputes about the latter to administrative tribunals. As to the *contrat administratif*, see Friedmann, *The Changing Structure of International Law* 200-206 (1964).

A national of state X may have a remedy for a taking or for a breach of contract by state Y in the courts of state X or even of state Z. Thus, pursuant to the Foreign Sovereign Immunities Act and the Second Hickenlooper Amendment, United States courts are open to suits against a foreign state for compensation for expropriation of property if the property or its proceeds are present in the United States; or to suits in damages for breach of contract resulting from commercial activities of the foreign state. See §§ 453 and 455. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983), upheld the provision in the Foreign Sovereign Immunities Act permitting a foreign national to sue a third state in the United States on a contract claim. See § 457, Reporters' Note 5.

The courts of other states have sometimes granted relief to their own nationals in expropriation cases, but have been less free in assisting nationals of third states. For cases arising from the Iranian oil nationalization of 1953, see Brower, "The Future of Foreign Investment—Recent Developments in the International Law of Expropriation and Compensation," in *Private Investors Abroad—Problems and Solutions in International Business* in 1975, at 93, 165, 173 (1976). For

cases arising from the Chilean copper nationalization of 1971, see MacCrate, "International Arbitration in a New Climate of Foreign Nationalization," *id.* at 1, 24-25. See also Hunt v. Coastal States Gas Producing Co., Reporters' Note 8; Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, 577 F.2d 1196 (5th Cir.1978), *certiorari denied*, 442 U.S. 928, 99 S.Ct. 2857, 61 L.Ed.2d 296 (1979).

4. *Remedies pursuant to special contractual arrangements.* It is common for traders and investors dealing with foreign governments to seek clauses in their contracts providing for the resolution of disputes outside of national legal systems. See MacCrate, Reporters' Note 3. For example, a private party may seek to have disputes resolved through one of the channels commonly used in international trade, such as the Court of Arbitration of the International Chamber of Commerce. Such agreements are generally regarded as effectively waiving sovereign immunity and are enforceable in the courts of other states under the Convention on the Recognition and Enforcement of Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3. See § 456, Reporters' Note 3 and § 487; see generally Delaume, "State Contracts and Transnational Arbitration," 75 Am.J.Int'l L. 784 (1981).

In development contracts, reference might be to ICSID, *infra*, or to a special *ad hoc* tribunal. Such arrangements have resulted in a number of important arbitral awards, e.g., Petroleum Development Ltd. v. Sheikh of Abu Dhabi (1951), 18 Int'l L.Rep. 144 (1953); Sapphire Int'l Petroleum Ltd. v. National Iranian Oil

Co. (1963), 35 Int'l L.Rep. 136 (1967); Saudi Arabia v. Arabian American Oil Co. (1958), 27 Int'l L.Rep. 117 (1963). Three arbitrations arose from the cancellation of oil concession agreements by Libya: Texas Overseas Petroleum Co. v. Libyan Arab Republic (1977), 17 Int'l Leg.Mat. 1 (1978); BP Exploration Co. v. Libyan Arab Republic (1974), 53 Int'l L.Rep. 297 (1979); Libyan American Oil Co. v. Libyan Arab Republic (1977), 20 Int'l Leg. Mat. 1 (1981). See, generally, von Mehren and Kourides, "International Arbitration Between States and Foreign Private Parties: The Libyan Nationalization Cases," 75 Am.J. Int'l L. 476 (1981). For difficulties encountered in Switzerland and the United States in enforcing the Libyan-American award, see *id.* at 548, and Delaume, *supra*, at 788.

As regards investment disputes, as of 1987, 89 states were parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (1965), sponsored by the World Bank. A state party to that Convention may include in its legislation or in a contract with a foreign investor a clause referring disagreements to the International Centre for the Settlement of Investment Disputes (ICSID). As of 1986, 22 disputes had been referred to panels of arbitrators drawn from ICSID's roster; five had been disposed of by opinions of arbitrators; several had been settled by the parties; and two had been referred to conciliation proceedings. See ICSID Annual Reports. The Convention obligates states parties to enforce awards of ICSID tribunals. That obligation is implemented in the United States by

22 U.S.C. §§ 1650, 1650a. The states parties to the Convention have agreed not to espouse diplomatically claims by their nationals in respect of disputes within the jurisdiction of the Centre.

5. *Exhaustion of domestic remedies.* In the Interhandel Case (Switzerland v. United States), [1959] I.C.J. Rep. 6, 26-27, the International Court of Justice noted that "[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law"; and that this rule "has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law." The Court added that "[b]efore resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."

In that case, the United States had vested the assets of Interhandel during the Second World War, claiming that Interhandel, though incorporated in Switzerland, was controlled by a German company and therefore could properly be considered an enemy alien. Interhandel brought suit in the United States district court in 1946 to recover its assets; a judgment dismissing Interhandel's suit was affirmed in the court of appeals. While a petition for certiorari by Interhandel was pending before the United States Supreme Court in 1959, Switzerland brought a pro-

ceeding against the United States in the International Court of Justice.

The Supreme Court of the United States granted Interhandel's petition for certiorari and reversed and remanded the case to the district court. Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), § 442, Reporters' Note 6. The International Court of Justice dismissed the proceeding before it. The Court said that the exhaustion of local remedies rule must be observed *a fortiori* when the domestic proceedings are still pending, especially when both the domestic and the international actions are designed to obtain the same result, i.e., the restitution of Interhandel's assets.

As was stated in the Ambatielos Case (Greece v. United Kingdom), 1951, 12 R.Int'l Arb. Awards 91, 120, 122, the phrase "local remedies" should be interpreted broadly, including "the whole system of legal protection, as provided by municipal law," not only the courts and tribunals but also "the use of procedural facilities which municipal law makes available to litigants." There, the claimant lost the case in the lower court because he failed to call a crucial witness, and the Court of Appeals refused "to give leave to adduce [this] evidence." The tribunal held that the claimant had failed to exhaust local remedies, as it was due to his own action that the appeal became futile.

It is generally accepted that the claimant must utilize all available procedural means, presenting all pertinent evidence, raising all substantive arguments, both issues of law and fact, and exhausting all ap-

peals. See Finnish Ships Case (Finland v. United Kingdom), 1934, 3 R.Int'l Arb.Awards 1484, 1498-1505. If, however, a higher tribunal is not competent to deal with a particular contention, for instance if appeals are limited to issues of law and the claim is based primarily on a matter of fact, an appeal is not required and remedies are considered exhausted. *Id.* at 1535-43. "There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief; nor is it necessary again to resort to those courts if the result must be a repetition of a decision already given." Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania), P.C.I.J., ser. A/B, No. 76 at 18 (1939). See also Finnish Ships Case, *supra*, at 1495, 1504.

An arbitration clause in a contract between a state and a national of another state, or another forum selection clause, is not subject to the requirement of exhaustion of domestic remedies in the contracting state unless otherwise agreed. The 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Reporters' Note 4, provides in Article 26 that consent to arbitration under that Convention is deemed to exclude any other remedy, unless the contracting state requires "the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention." 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

6. *Waiver of rights by injured person.* Some Latin American states have long advocated a Calvo Doctrine (named after an Argentine diplomat and writer) to the effect

that states owed aliens no duty beyond treatment equal to that accorded to nationals. See § 712, Reporters' Note 1. The United States and other states denied the validity of the Doctrine and the effectiveness of a Calvo law or clause, Comment *g*, reflecting that doctrine. See [1976] Digest of U.S. Practice in Int'l Law 435. Arbitrations during the 1920's left the effectiveness of such a provision in doubt; in particular, they indicated, the clause was not effective in cases of denial of justice or in cases where the claim did not arise under the contract. See Shea, *The Calvo Clause* (1955). There has been no significant arbitral ruling since that time. See Note, "The Calvo Clause," 6 Texas Int'l.L.Forum 289 (1971).

Settlement by the injured person, after the alleged wrong but before espousal of the claim by the state of nationality, is generally regarded as effective if the settlement was voluntary. However, the United States has taken the position that it will not be bound if its national accepts less than adequate compensation. [1975] Digest of U.S. Practice in Int'l Law 488-89.

7. *Expropriation insurance.* The United States has offered insurance against expropriation since shortly after World War II; the program is currently administered by the Overseas Private Investment Corporation (OPIC), a government corporation established under 22 U.S.C. §§ 2191-2200a. OPIC charges premiums and acts like a commercial insurance firm in some respects, but it is backed by the full faith and credit of the United States and it pursues various policies of the United States in selecting projects to insure. OPIC insures an

investment only if the host state agrees. Upon entering into a guaranty agreement, the investor is insured against loss through expropriation of the funds it has invested, usually less a deductible amount. (War risk and inconvertibility coverage are also available.) If an expropriation occurs, the investor presents a claim to OPIC; if an amicable settlement cannot be reached with the investor, the investor may resort to arbitration. 22 U.S.C. § 2197(i). ~~If OPIC pays a claim, it is subrogated to the investor's rights; it may pursue the matter with the expropriating state, and may resort to international remedies, including arbitration, if necessary. Other capital exporting states administer similar programs. See Meron, Investment Insurance in International Law (1976).~~

In 1985, the World Bank prepared a Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), 24 Int'l Leg.Mat. 1598 (1985), but the Convention was not yet in effect as of 1987.

8. *Compensation as remedy for unlawful expropriation or repudiation of contract.* In *Factory at Chorzów*, P.C.I.J. ser. A, No. 17, at 46-48 (1928), the Permanent Court of International Justice seemed to distinguish between takings in violation of a treaty, the remedy for which was restitution, and takings that were otherwise unlawful, which effectively passed title but gave rise to an obligation to compensate. Where restitution was the appropriate remedy but was not practicable, the claimant was entitled to compensation, including the higher measure if the property had appreciated in value between the time of the taking and the judgment

date. Contemporary cases generally involve disputes about just compensation rather than restitution. Governments generally accept and arbitrators generally award monetary compensation. Compare the law of the United States as to taking of Indian property, where Congress made compensation the exclusive remedy even when the taking was alleged to be unconstitutional because not for a public use. *Ogla Sioux Tribe of Pine Ridge Indian Reservation v. United States*, 650 F.2d 140 (8th Cir.1981), *certiorari denied*, 455 U.S. 907, 102 S.Ct. 1252, 71 L.Ed.2d 445 (1982).

The Second Hickenlooper Amendment (§ 444) directs the courts not to apply the Act of State doctrine and "to give effect to the principles of international law in a case in which a claim of title or other right to property" is asserted based upon an unlawful expropriation. See § 444, Comment *a*. The statute does not indicate what remedies the court may give, but the possibility of restitution seems contemplated. Cases holding the amendment inapplicable to breach of contract include *Hunt v. Coastal States Gas Producing Co.*, 583 S.W.2d 322 (Tex. 1979), *certiorari denied*, 444 U.S. 992, 100 S.Ct. 523, 62 L.Ed.2d 421 (1979); *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 434 (1968).

In other contexts, illegality under international law has been claimed to vitiate title. For example, the United Nations has sought to render minerals extracted in Namibia under the authority of the South African government unmarketable, by decreeing that such authority is invalid and that the title to such products remains in Namibia as rep-

resented by the United Nations Council on Namibia. See Schermers, "The Namibia Decree in National Courts," 26 Int'l & Comp. L.Q. 81 (1977).

Whether and in what circumstances specific performance may be ordered for a repudiation of a contract in violation of § 712(2) is not settled. See, e.g., Award in Dispute Between British Petroleum and Libya (1973), 53 Int'l L.Rep. 297, and Award in Dispute Between Libyan American Oil Co. and Libyan Arab Republic (1977), 20 Int'l Leg. Mat. 1, 61-64 (1981), denying specific performance but awarding compensation. In Texas Overseas Petroleum Co. and Libyan Arab Republic (1977), 17 Int'l Leg. Mat. 1, 32-37 (1978), the arbitrator, after extended discussion of restitution, declared that Libya was "legally bound to perform its contract"; the dispute was settled on a monetary basis (paid in oil).

9. *Diplomatic protection and claims settlement by the United States.* Throughout its history, the United States has provided active diplomatic protection for United States nationals and has pressed numerous claims for violations of their rights and interests in accordance with the principles of § 711.

United States practice in respect of claims for injury to United States nationals reflects the character of international remedies and United States claims practice generally. See § 902 and Reporters' Note 8 thereto. In 1853, when the United States was contemplating settling several claims against Chile, the Secretary of State first stated that "having originally taken up the subject at the instance of the claimants, and for their benefit, it would be

altogether inexpedient to pursue it, without the attempt at least to obtain their consent beforehand to the measures adopted." He added that a contrary course would be imprudent as it "might lay the foundations for an onerous demand upon Congress." Later it was explained that this statement did not imply that it was "indispensable to obtain the consent of the claimants in order to make a convention." 6 Moore, Digest of International Law 1015 (1906).

The Supreme Court has referred to Congressional authorization of payment to claimants as a result of an international claims settlement as "payments of grace." See cases cited in § 721, Reporters' Note 8. For a parallel Swiss case, see *Gschwind v. Swiss Confederation*, [1931-32] Annual Dig. 242.

As to whether the settlement of a claim of a United States national may constitute "taking" of private property, see § 721, Reporters' Note 8.

After the Second World War, several bloc settlement agreements led to the creation in 1949 of the International Claims Commission (renamed "Foreign Claims Settlement Commission" in 1954 and "Foreign Claims Settlement Commission of the United States" in 1982, when the Commission was transferred from the Department of State to the Department of Justice "as a separate agency"). Its function is to distribute funds received from foreign governments among the various claimants, after considering each claim separately and deciding on its validity and the amount due to each claimant on the basis of "applicable principles of international law,

justice, and equity." 22 U.S.C. §§ 1621-1645o, as amended. In some instances, groups of claims have been referred to the Commission even prior to a settlement agreement for a preliminary assessment (e.g., with respect to Vietnam in 1980, see 22 U.S.C. § 1645). There is a standing appropriation for the distribution of funds received by the United States from a foreign government and deposited in the Miscellaneous Receipts account of the Treasury. 22 U.S.C. § 2668a. For a summary report on United States settlements of claims for compensation for nationalization of property of United States nationals, see United States brief as *amicus curiae* at 30-32, *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), reprinted in 2 Int'l Leg. Mat. 1009, 1019 (1963).

A number of United States settlement agreements provided for the

establishment of claims commissions to adjudicate private claims. Notable among such bodies were the claims commission established by the General Claims Convention of 1923 between the United States and Mexico, § 711, Reporters' Note 2, and the Iran-United States Claims Tribunal created under the Algiers Declaration, § 487, Reporters' Note 6.

10. *Previous Restatement.* In the previous Restatement, the rules governing remedies for injury to foreign nationals were not set forth in one section. The requirement that local remedies be exhausted was treated in §§ 206-10, the effectiveness of waiver by the claimant in §§ 202-205, the practice of the United States in regard to claims in §§ 211-14. Questions about the nationality of the claimant for claims purposes were treated in §§ 171-73.

The general principles of remedies are considered in this Part; remedies for particular violations of international law may be found, e.g., in §§ 602 and 604, dealing with the protection of the environment, and §§ 703 and 713, dealing with injuries to private persons.

REPORTERS' NOTES

- 1. *Bibliography.*
- K. Carlston, *The Process of International Arbitration* (1946).
- F. Jeantet, ed., *International Courts* (1958).
- J. Merrills, *International Dispute Settlement* (1980).
- J. Mosler & R. Bernhardt, eds., *Judicial Settlement of International Disputes* (1974).
- S. Rosenne, *The Law and Practice of the International Court* (1965).
- J. Wetter, *The International Arbitral Process, Public and Private* (1979).
- 2. *Previous Restatement.* The previous Restatement contained no separate treatment of remedies but dealt with some aspects of this subject in connection with responsibility of states (§§ 200, 202-14) and the effect of violations of international law (§ 3).

§ 901. Redress for Breach of International Law

Under international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury.

Comment:

a. *International obligation to provide redress.* This section states the basic principle of the international law of remedies. A state that has violated an international obligation to another state, or to an international organization, has the further obligation to provide redress for the violation. The obligation to provide redress presupposes that there had been an international obligation, that the obligation was violated, and that the violation was not justified or excused under international law.

A state may not be liable for a violation if its act was due to an irresistible force or other event beyond its control (*force majeure*). Other defenses, comparable to those in domestic legal systems generally, such as duress, impossibility, waiver, acquiescence, and perhaps estoppel, may also be applicable to states and their agents. These defenses usually provide full exoneration for the action taken; extenuating circumstances, such as contributory fault, may

reduce the extent of liability. That the violation was compelled or authorized by the state's domestic law is not a defense. See § 115, Comment e.

In general, the state seeking redress has the burden of proving the existence of an international obligation and its breach; the responding state has the burden of establishing any justification or excuse. As in some domestic legal systems, the burden of proof may shift to the party that has control over the evidence.

Ordinarily, claims for damages require injury, but other forms of redress may be available even if there is no injury, or to prevent an injury. See Introductory Note to this Part and Comment c to this section.

b. *State interests subject to international remedies.* A state may seek redress under international law for any violation of its legal interests, including those concerning its political subdivisions (States, provinces, cantons, or regions), public corporations, or private persons (principally its nationals, but in special circumstances other persons as well, § 902, Comment j).

c. *Obligation to discontinue violation.* The obligation of a state to terminate a violation of international law may include discontinuance, revocation, or cancellation of the act (whether legislative, administrative, or judicial) that caused the violation; abstention from further violation; or performance of an act that the state was obligated but failed to perform. For instance, there is an obligation to repeal a law illegally annexing a foreign territory, to release from jail an illegally arrested foreign ambassador, to stop releasing toxic fumes into another state's territory, and to clean up an oil spill threatening the shores of a neighboring state. There is also an obligation to carry out a treaty undertaking that has not been performed, e.g., to cede a territory, to pay money, to provide landing rights to another state's airline, or to allow access to the sea to a land-locked state.

d. *Forms of reparation.* All forms of reparation are designed to provide redress for the breach of the international obligation that gave rise to the claim. Ordinarily, emphasis is on forms of redress that will undo the effect of the violation, such as restoration of the *status quo ante*, restitution, or specific performance of an undertaking. For instance, if a foreign embassy has been occupied by a mob, there is an obligation to remove the mob and to return the embassy to its diplomatic staff; there may also be an obligation to pay compensation for the damage to the building and to its contents, and for the injuries and indignities suffered by the embassy's staff. Compensation is a common remedy for monetary dam-

age, Comment *e*, and in some instances compensation may be required even though no monetary damage had occurred. Acknowledgment of a violation and an apology are common forms of redress, sometimes supplemented by compensation. There is variety also in the remedies that may be ordered by a third party to which a claim has been presented for resolution. Principles of international law concerning remedies are not rigid or formalistic and give an international tribunal wide latitude to develop and shape remedies, but the tribunal is usually restricted to measures proposed by the parties.

e. Principle and measure of compensation. Monetary compensation is the usual remedy in cases of economic injury. Compensation ordinarily is limited to the loss directly sustained, but in appropriate circumstances may include also damages for injuries caused indirectly by the wrongful act or omission. For instance, compensation in case of an oil spill may include the cost of clean-up, replacement of the property destroyed, and damages for lost tourist business; compensation for a wrongful seizure of a ship may include cost of repair, seamen's wages paid during the seizure, and lost revenue; compensation for nonpayment of debt may include payment of the principal and interest. When compensation is awarded for an economic loss, interest is generally payable from the date of the injury to the date of payment. When an intergovernmental claim derives from an injury to a private person, the compensation to the state need not be measured by or limited to the loss suffered by the individual, although that loss usually provides a basis for calculating the compensation due to the state. In some circumstances, the remedy for a violation may reflect such elements as malice or the repetitive character of the violation.

REPORTERS' NOTES

1. *International obligation as basis for international redress.* The obligation of a state to make reparation for a violation of international law ordinarily runs to the state injured by the violation, but it may run to a state otherwise entitled to present a claim based on the violation, either because the obligation is *erga omnes*, for example a claim for an injury to the marine environment, or because the obligation runs to all parties of a multilateral agreement, such as a human rights convention. The International Law Commission, in its draft articles concerning responsibility of states, declared that some violations of international obligations are international crimes rather than merely delicts. The Commission defined an international crime as a violation of an international obligation that is "so essential for the protection of the fundamental interests of the international community that its breach is recognized as a crime by the international community as a whole."

[1976] 2(2) Y.B.Int'l L.Comm'n 95, 31 U.N. GAOR Supp. No. 10, at 226 (1976). Although the implications of declaring a violation to be an international crime are not indicated, presumably a crime is an offense against the community of states as a whole and the obligation to remedy also runs to all states and may be the subject of a collective response. For the rules governing international responsibility of states, see § 207.

The International Law Commission has also considered "circumstances precluding wrongfulness" and prepared articles concerning consent, legitimate countermeasures, *force majeure* and fortuitous event, extreme distress, state of necessity, and self-defense. For text and comments on these subjects, see [1979] 2(2) Y.B.Int'l L.Comm'n 106-36, [1980] 2(2) *id.* 34-62; 34 U.N. GAOR Supp. No. 10, at 284-369 (1979); 35 U.N. GAOR Supp. No. 10, at 69-135 (1980); for the text of the Commission's other draft articles on responsibility of states, see [1980] 2(2) Y.B.Int'l L.Comm'n 30-34; 35 U.N. GAOR Supp. No. 10, at 59-69 (1980).

The question of estoppel as a bar to a claim arose in two cases before the International Court of Justice. In a case involving an arbitral award by the King of Spain made in 1906, the Court held that the award was valid and that it was no longer open to Nicaragua to challenge its validity, as Nicaragua by express declaration and by conduct had recognized the award as valid; only a dissenting opinion discussed the question of estoppel. Case Concerning the Arbitral Award Made by the King of Spain (Honduras v. Nicaragua), [1960] I.C.J. Rep. 192,

213, 222, 236. When Thailand claimed that a frontier agreement was not binding because it was based on error, the Court held that Thailand was precluded by its subsequent conduct from challenging the validity of the treaty. Temple of Preah Vihear Case (Cambodia v. Thailand), [1962] I.C.J. Rep. 6, 32.

2. *Obligation to discontinue violation.* The obligation to discontinue a violation has sometimes been implemented by an order of a tribunal. For instance, in the *Hostages* case, the International Court of Justice decided that Iran "must immediately take all steps to redress the situation," and in particular "must immediately terminate the unlawful detention" of the diplomatic and consular staff and other United States nationals held hostage in Iran, and "must immediately place in the hands of the protecting Power the premises, property, archives and documents" of the United States Embassy and Consulates in Iran. Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), [1980] I.C.J. Rep. 3, 44-45.

3. *Forms of reparation.* The essential principle of international law is "that reparation 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." Chorzów Factory (Indemnity) Case (Germany v. Poland), P.C.I.J., ser. A, No. 17, at 47 (1928). The Court added that this result can be accomplished in several ways: through restitution in kind; or, if this is not possible, through "payment of a sum corresponding to the value which a restitution in kind would

bear"; and "the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it." *Ibid.* A few years later, however, in Central Rhodope Forests Case (Greece v. Bulgaria), 1933, the arbitrator (Undén, Sweden) rejected a request for restitution on the ground that it was hardly likely that the forests were in the same condition in 1933 as when they were seized by Bulgaria in 1918. 2 Whiteman, Damages in International Law 1460, 1483-84 (1937); 3 R.Int'l Arb.Awards 1405, 1432. In the *Temple of Preah Vihear* case, Reporters' Note 1, [1962] I.C.J. Rep. at 36-37, the International Court of Justice ordered Thailand to "restore to Cambodia any objects . . . removed from the Temple or the Temple area by the Thai authorities."

In an arbitration between a state and a private company, *Texas Overseas Petroleum Co. v. Libyan Arab Republic* (1977), 53 Int'l L.Rep. 389, 507-09, 511 (1979), the arbitrator (Dupuy, France) held that restitution is, "under the principles of international law, the normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the *status quo ante* is impossible"; called upon Libya "to perform specifically its own obligations"; decided that Libya "is legally bound to perform these contracts and to give them full effect"; and reserved for further proceedings the question what should be done if the award were not implemented. But in the parallel case of *B.P. (British Petroleum) v. Libya*, the arbitrator (Lagergren, Sweden) rejected the claim that the company be restored to the full enjoyment of its rights, and awarded damages in-

stead (1973), 53 Int'l L.Rep. 297, 356-57. Accord, *Libyan American Oil Co. v. Libya* (by Mahmassani, Lebanon, 1977), 20 Int'l Leg.Mat. 1, 122-25 (1981) (restitution is inconsistent with "respect due for the sovereignty of the nationalizing state"). See Fatouros, "International Law and the Internationalized Contract," 74 Am.J.Int'l L. 134 (1980); see also § 713, Reporters' Note 8.

4. *Principle and measure of compensation.* The rules relating to compensation for a violation are unclear in a number of respects, such as the calculation of direct and indirect damages, prospective profits, rate of exchange, interest, incidental expenses, and costs connected with the preparation and presentation of the claim. For many decisions dealing with these topics, see 3 Whiteman, Damages in International Law 1765-2031 (1943); for a table summarizing the amounts claimed and awarded in 101 international arbitrations, and by 36 domestic claims commissions, see *id.* at 2068a. For later cases, see 8 Whiteman, Digest of International Law 1143-1216 (1967).

5. *Punitive or exemplary damages.* If a violation is not merely a delict but an international crime, see Reporters' Note 1, punitive damages may be awarded. In fixing the amount of an award, some international tribunals have taken into consideration the seriousness of the offense and included an element of punishment in the award. Borchard, *The Diplomatic Protection of Citizens Abroad* 419 (1915); see the case of *The I'm Alone*, 1935, 3 R.Int'l Arb.Awards 1616, 1618 (1949) ("as a material amend in respect of the wrong, the United States should pay the sum of

\$25,000" to Canada). For a contrary view, see Judge Parker's opinion in *Lusitania Cases* (United States v. Germany), 1923, 7 R.Int'l Arb. Awards 32, 38-44 ("counsel has failed to point us to any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been as-

sessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals"). In the United States, the Foreign Sovereign Immunities Act excludes punitive damages against a foreign state, but allows them against an agency or instrumentality of the foreign state. 28 U.S.C. § 1606.

§ 902. Interstate Claims and Remedies

(1) A state may bring a claim against another state for a violation of an international obligation owed to the claimant state or to states generally, either through diplomatic channels or through any procedure to which the two states have agreed.

(2) Under Subsection (1), a state may bring claims, *inter alia*, for violations of international obligations resulting in injury to its nationals or to other persons on whose behalf it is entitled to make a claim under international law.

Comment:

a. Standing to make claims. Ordinarily, claims for violation of an international obligation may be made only by the state to whom the obligation was owed. See § 901, Comment *b* and Reporters' Note 1. When a state has violated an obligation owed to the international community as a whole, any state may bring a claim in accordance with this section without showing that it suffered any particular injury. Thus, any state may call on the violating state to terminate a significant injury to the general environment, § 602, Comment *a*, or pursue a remedy for a denial of human rights in violation of customary international law, § 703(2). Some multilateral international agreements, such as regional human rights agreements, may also give standing to any state party to raise a claim of violation of the agreement without having to show injury to its particular interest.

For the forms of reparation and the principle and measure of monetary compensation, see § 901, Comments *d* and *e* and Reporters' Notes 3-5.

b. Ripeness. Ordinarily, a state may bring a formal claim against another state or resort to available third-party procedures only after a violation has actually occurred, but it can make an informal protest in advance of a violation that it reasonably believes

\$25,000" to Canada). For a contrary view, see Judge Parker's opinion in *Lusitania Cases* (United States v. Germany), 1923, 7 R.Int'l Arb. Awards 32, 38-44 ("counsel has failed to point us to any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals"). In the United States, the Foreign Sovereign Immunities Act excludes punitive damages against a foreign state, but allows them against an agency or instrumentality of the foreign state. 28 U.S.C. § 1606.

§ 902. Interstate Claims and Remedies

(1) A state may bring a claim against another state for a violation of an international obligation owed to the claimant state or to states generally, either through diplomatic channels or through any procedure to which the two states have agreed.

(2) Under Subsection (1), a state may bring claims, *inter alia*, for violations of international obligations resulting in injury to its nationals or to other persons on whose behalf it is entitled to make a claim under international law.

Comment:

a. Standing to make claims. Ordinarily, claims for violation of an international obligation may be made only by the state to whom the obligation was owed. See § 901, Comment *b* and Reporters' Note 1. When a state has violated an obligation owed to the international community as a whole, any state may bring a claim in accordance with this section without showing that it suffered any particular injury. Thus, any state may call on the violating state to terminate a significant injury to the general environment, § 602, Comment *a*, or pursue a remedy for a denial of human rights in violation of customary international law, § 703(2). Some multilateral international agreements, such as regional human rights agreements, may also give standing to any state party to raise a claim of violation of the agreement without having to show injury to its particular interest.

For the forms of reparation and the principle and measure of monetary compensation, see § 901, Comments *d* and *e* and Reporters' Notes 3-5.

b. Ripeness. Ordinarily, a state may bring a formal claim against another state or resort to available third-party procedures only after a violation has actually occurred, but it can make an informal protest in advance of a violation that it reasonably believes

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greement on a point of law or fact, a conflict of legal views or of interests between two persons" or states. *Mavrommatis Palestine Concessions*, Reporters' Note 6, at 11-12. See also *German Interests in Polish Upper Silesia (Jurisdiction) (Germany v. Poland)*, P.C.I.J., ser. A, No. 6, at 14 (1925). See § 903, Reporters' Note 5.

8. *International claims practice of the United States*. The United States has a long tradition of settling international claims by negotiation or international arbitration. Some claims implicated national interests directly, such as boundary disputes; some claims by the United States were for injury to private interests of its nationals. See Comment *i* and § 713. Sometimes a single dispute was settled or arbitrated, sometimes several disputes were combined; sometimes a dispute involved large numbers of claims, usually private claims. Thus, in 1794, the United States and Great Britain referred to a mixed commission more than 500 claims relating to maritime seizures. 1 Moore, *History and Digest of International Arbitrations* 299-349 (1898). The United States-Mexican Commission established in 1868 disposed of some 2,000 claims. 2 *id.* at 1287-1359. Two United States-Mexico claims commissions were established in 1923 to deal with more than 6,000 claims, mostly by the United States against Mexico, and a few by Mexico against the United States. See Feller, *The Mexican Claims Commissions, 1923-34* (1935). Under the Algiers Declaration of 1981, 20 *Int'l Leg. Mat.* 230 (1981), more than 3,000 claims were submitted to an Iran-United States Claims Tribunal, most of them by United States nationals against

Iran, some by Iranians against the United States, and some claims were between the two governments. See § 487, Reporters' Note 6. See generally, Lillich, ed., *The Iran-United States Claims Tribunal* (1984).

Matters affecting the national interest directly are generally resolved or submitted to international arbitration by treaty made with the consent of the United States Senate; most agreements settling claims of nationals have been made by executive agreement. The validity of such executive agreements was upheld in *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937), and *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942). See also *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir.1951); *Shanghai Power Co. v. United States*, 4 Ct.Cl. 237, 244, 247 (1983). Presidential action in the case of Iran was sustained in *Dames and Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981), § 721, Reporters' Note 8. As the Supreme Court noted in *Dames and Moore*, Congress has generally acquiesced in this exercise of presidential power. In 1974, however, Congress found a proposed agreement with Czechoslovakia unacceptable and adopted the Gravel Amendment to the Trade Act of 1974 (88 Stat. 1978, § 408), requesting that the agreement be renegotiated and submitted to Congress as part of any agreement entered under that Act; gold belonging to Czechoslovakia was not to be released to that country. For difficulties which arose as a result of that legislation, see [1974] *Digest of U.S. Practice in Int'l L.* 422-25; [1976] *id.* 439-41; [1977] *id.* 695-98; [1978] *id.* 1220-26.

The Department of State is authorized to pay any small (less than \$15,000) "meritorious claim" against the United States presented by a foreign government. 22 U.S.C. § 2669(b). See also 22 U.S.C. § 2669(f), 28 U.S.C. § 2672 and 31 U.S.C. § 3725.

For United States practice in respect of claims for injury to United

States nationals, see § 713, Reporters' Note 8.

9. *Previous Restatement*. The previous Restatement dealt with remedies in the special context of responsibility of states for injuries to aliens, §§ 164-214. Compare this Restatement, § 713.

§ 903. International Court of Justice

(1) A state party to a dispute with another state may submit that dispute to the International Court of Justice for adjudication, and the Court has jurisdiction over that dispute, if the parties:

- (a) have, by a special agreement (*compromis*) or otherwise, agreed to bring that dispute before the Court; or
- (b) are bound by an agreement providing for the submission to the Court of a category of disputes that includes the dispute in question; or
- (c) have made declarations under Article 36(2) of the Statute of the Court accepting the jurisdiction of the Court generally or in respect of a category of legal disputes that includes the dispute in question.

(2) The Court may render an advisory opinion at the request of:

- (a) the General Assembly or the Security Council on any legal question; or
- (b) other organs and specialized agencies of the United Nations, authorized by the General Assembly to request such an opinion, on legal questions arising within the scope of their activities.

(3) The Court has authority to determine whether it has jurisdiction to decide a dispute submitted to it, or whether to issue an advisory opinion requested of it.

Comment:

a. *Jurisdiction of International Court of Justice*. The Court has two kinds of jurisdiction: to decide contentious cases

Jamahiriya/Malta) [1985] I.C.J. Rep. 13, 31, 38-40, 57 ("the delimitation is to be effected in accordance with equitable principles and taking account of all relevant circumstances, so as to arrive at an equitable result").

10. *Declaratory judgments.* In the Corfu Channel Case (United Kingdom v. Albania); the International Court of Justice declared that the action of the British Navy had constituted a violation of Albanian sovereignty. It added that this declaration "is in itself appropriate satisfaction." [1949] I.C.J. Rep. 4, 35. In the Eastern Greenland Case, the Permanent Court of International Justice declared that the 1931 proclamation placing Eastern Greenland under Norwegian sovereignty and later steps taken by the Norwegian Government "constitute a violation of the existing legal situation and are accordingly unlawful and invalid." P.C.I.J. ser. A/B No. 53, at 75 (1933). Two days later Norway revoked the 1931 proclamation. 3 Hudson, World Court Reports 148 (1938). In the North Sea Continental Shelf Cases (Fed. Rep. of Germany/Denmark and the Netherlands), the International Court of Justice was asked to decide what "principles and rules of international law are applicable to the delimitation" of the continental shelf areas in the North Sea. The parties had agreed that they would delimit the shelf as between them pursuant to the decision of the Court, and after the Court established the basic principles, the parties delimited their boundary accordingly. [1969] I.C.J. Rep. 3, 6, 53-54; for the 1971 agreements, see 10 Int'l Leg. Mat. 600-12 (1971). A similar procedure was followed in Continental Shelf Case

(Tunisia/Libyan Arab Jamahiriya) [1982] I.C.J. Rep. 18, 21, 92-94.

11. *Compliance with judgments of the Court.* The judgments of the Court have been generally complied with, but there have been exceptions. For instance, Albania did not comply with the Court's judgment in the Corfu Channel Case (Reporters' Note 10) awarding compensation to the United Kingdom for damage to its warships and the loss of life caused thereby; and Iran failed to comply with the Court's judgment in the United States Diplomatic and Consular Staff in Tehran Case (Reporters' Note 5). In 10 cases submitted to the Court by application of a party to a dispute, the other party failed to appear; when judgment was rendered against it, it refused to comply. For a list of these cases, see [1985-86] I.C.J. Y.B. 124, n. 1.

In the Nicaragua v. United States case, after the Court rejected the arguments of the United States and decided that it had jurisdiction, the United States refused to participate further in the proceedings and reserved "its rights in respect of any decision by the Court regarding Nicaragua's claims." [1986] I.C.J. Rep. 14, 23. The Court declared that this reservation has "no effect on the validity" of its judgment. *Id.* at 23-24. In July 1986, the United States vetoed a resolution of the Security Council calling for compliance with the Court's 1986 judgment in this case. U.N. Docs. S/18250 (1986) and S/PV. 2704 (1986), reprinted in 25 Int. Leg. Mat. 1352-65 (1986). The General Assembly adopted a resolution calling for "full and immediate compliance" with the Court's Judgment. U.N. Doc. A/RES/41/31 (1986).

12. *Advisory opinions.* Under the Court's Statute, some international organizations may request advisory opinions; states have no right to request an advisory opinion or to demand that an international organization do so.

Some international agreements between an international organization and a state provide that disputes relating to the interpretation or application of the agreement shall be submitted to the Court for an advisory opinion, which "shall be accepted as decisive by the parties," See, e.g., Convention on the Privileges and Immunities of the United Nations, 1946, sec. 30, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 16.

In addition to the General Assembly and the Security Council, four other organs of the United Nations have been authorized by the General Assembly to request advisory opinions: the Economic and Social Council, the Trusteeship Council, the Interim Committee of the General Assembly (which stopped functioning in 1952), and the Committee on Applications for Review of Administrative Tribunal Judgments (which has requested three opinions). Fifteen specialized agencies have also been authorized to request advisory opinions, and three of these (UNESCO, WHO, and IMCO) have made one request each. As to the development of the advisory jurisdiction of the Court, see 2 Rosenne, *The Law and Practice of the International Court* 651-757 (1965). As of 1986, the Court had rendered 18 advisory opinions. For a list, see [1985-86] I.C.J. Y.B. 51, nn. 3-4, and 52, nn. 1-4.

13. *Jurisprudence of the Court and its predecessor.* The Interna-

tional Court of Justice frequently follows the jurisprudence of its predecessor, the Permanent Court of International Justice. See Reporters' Note 1. In the 65 disputes that came before it, the Permanent Court rendered 32 judgments, 27 advisory opinions, and more than 200 orders. It effected settlement of numerous disputes, each of which was important to the parties and some of which were of wider significance. The matters considered by the Court included several disputes between Poland and Germany and between Poland and Danzig; a number of disputes between other Eastern European countries relating to the interpretation and application of treaties for the protection of minorities; a claim of domestic jurisdiction in the Anglo-French dispute concerning nationality decrees in Tunis and Morocco; boundary disputes between Czechoslovakia and Poland, Iraq and Turkey, and France and Switzerland (concerning the Free Zones); sovereignty over Eastern Greenland (Denmark v. Norway); the attempted customs union between Germany and Austria; jurisdiction of states in cases of collisions at sea; competence of the International Labour Organization with respect to regulation of agricultural labor, women in supervisory positions, and incidental work of employers; restoration of railway traffic between Poland and Lithuania; navigation on the Danube and Oder Rivers and through the Kiel Canal; diversion of water from the River Meuse by Belgium (the first Court decision on the basis of equity); validity of the gold clause in international loans; and various claims involving violations of international law with respect to private persons and the

right of states to present claims on their behalf.

The cases that have come before the International Court of Justice are also impressive. Since the first application was submitted to the Court in 1947, 73 cases had been presented to it by 1986, and by that date the Court had rendered 48 judgments, 18 advisory opinions, and 213 orders (mostly procedural). [1985-86] I.C.J. Y.B. 3. It has rendered several decisions relating to the law of the sea—Norway's maritime boundary, transit of warships through the Corfu Channel, the delimitation of the North Sea continental shelf, fisheries jurisdiction of Iceland, the continental shelf boundaries between Tunisia and Libya and between Libya and Malta, the maritime boundary between Canada and the United States in the Gulf of Maine area, the last a decision by a panel of the Court; it dealt with several territorial disputes—between France and the United Kingdom concerning the Minquiers and Ecrehos islands, the boundary between Honduras and Nicaragua, sovereignty over certain Belgian enclaves in the Netherlands, the ownership of the Temple of Preah Vihear on the Cambodia-Thailand boundary; right of asylum (Colombia-Peru); claims on behalf of stockholders in a foreign company (Barcelona Traction Case); and safety of diplomatic and consular personnel (United States-Iran). The Court's advisory opinions dealt with: the right of the United Nations to present claims on behalf of its injured officials; several issues relating to South West Africa (Namibia); the admission of members to the United Nations; decisions of the United Nations Administrative Tribunal; the effect of reservations to general

international agreements; the authority of the United Nations to engage in peacekeeping activities and the obligation of member states to pay for those activities; the interpretation of an agreement relating to a regional office of an international organization; and the status of Western Sahara.

14. *Other international courts.* There are several specialized international courts. The Court of Justice of the European Communities has broad jurisdiction and is open not only to states but also to the organs of the Community and to private persons. The European Court of Human Rights and the Inter-American Court of Human Rights have jurisdiction relating to human rights questions. These courts can render binding decisions, and there are special provisions for the execution of their judgments. Treaty Establishing the European Community, Arts. 187, 192 (decisions of the Court of Justice of the European Communities that impose a pecuniary obligation on persons other than states are to be enforced pursuant to rules of civil procedure in force in the state in whose territory the execution takes place); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 54 (§ 906, Reporters' Note 1) (the Committee of Ministers of the Council of Europe shall supervise the execution of the judgments of the European Court of Human Rights); American Convention on Human Rights, Art. 68 (a judgment of the Inter-American Court of Human Rights that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgment against

the state). The Inter-American Court has broad jurisdiction to render advisory opinions. On the scope of that jurisdiction, see Advisory Opinion of Sept. 24, 1982, Inter-Am. Court Hum.Rt., ser. A, No. 1, 22 Int'l Leg.Mat. 51 (1983). The International Tribunal of the Law of the Sea to be established under Annex VI of the Convention on the Law of the Sea (see Part V of this Restatement) will have jurisdiction not only over disputes between states but also over disputes involving interna-

tional organizations, state enterprises, or natural or juridical persons. LOS Convention, Art. 187, and Annex VI, Art. 20.

15. *Previous Restatement.* There was no comprehensive treatment of the International Court of Justice in the previous Restatement; there were references to its jurisdiction in § 3, Comments c and d, and § 148, Reporters' Note 1, and to various decisions of the Court where appropriate.

§ 904. Interstate Arbitration

(1) States parties to a dispute may submit it to arbitration by special agreement (*compromis*).

(2) A state party to a dispute with another state may submit the dispute to an arbitral tribunal pursuant to a bilateral or multilateral agreement providing for the submission to arbitration of a category of disputes that includes the claim in question.

(3) An award by an arbitral tribunal is binding on the parties unless they have agreed otherwise.

Comment:

a. *Interstate arbitration.* This section applies to arbitration of disputes between states under international law. For commercial arbitration between a state and a private person, see § 487, Reporters' Notes 1-6; § 713, Comment j.

b. *Consent requirement.* A state may not be compelled to submit to arbitration without its consent. Consent to arbitration is indicated either by agreement between the parties to arbitrate a particular dispute (Subsection (1)), or by agreement authorizing either party to submit to arbitration any dispute with the other party, or a dispute belonging to a specified category of disputes, e.g., those arising out of a particular agreement or relating to a particular subject (Subsection (2)). Agreement to proceed to arbitration is usually embodied in a special agreement (*compromis*) between states parties to the dispute. Some arbitration agreements, both bilateral and multilateral, provide a method for the preparation of a *compromis* if the parties cannot agree upon it, either by a third party or by the tribunal itself once it is constituted; an agreement may designate an appropriate authority to assist in

with in the previous Restatement means for the settlement of international disputes (§ 3, Comment c).

§ 905. Unilateral Remedies

(1) Subject to Subsection (2), a state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures

(A)
countermeasures

- (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and
- (b) are not out of proportion to the violation and the injury suffered.

(2) The threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter, as well as to Subsection (1).

Comment:

a. *Permissibility of unilateral remedies under international law.* In general, international law encourages the settlement of legal disputes by negotiation or third-party resolution, and discourages self-help unless it becomes necessary. Subsection (1)(a) and Comment c. Even when self-help is necessary, the measures taken must not be out of proportion to the violation or the injury. Subsection (1)(b) and Comment d. The use of force against another state, even in response to a violation of international obligation, is generally prohibited by the United Nations Charter. Subsection (2) and Comment g.

✓
(A)

Under this section, a state may take limited measures that would be unlawful were they not in response to a violation, measures such as termination or suspension of treaty obligations, or seizure of the offending state's assets. See Comment b. A state may also respond to a violation by measures that, while abnormal and perhaps "unfriendly," do not violate any international obligation and are, therefore, not governed by this section. Thus, a state may express its displeasure over a violation by "cooling" relations with the offending state, taking the violation into account in political decisions, withholding future benefits, refraining from entering into new arrangements, or taking other steps not prohibited by international law or agreement. In general, however, diplomatic relations, communication, and trade are fundamentals of interstate intercourse and in practice are governed by considerations of necessity and proportionality, and hence are not seriously disrupted for

Treaty
Assets

any but the grossest violations. When an international agreement provides for a particular response by a party to violation by another party, other responses are generally precluded. See, for example, the General Agreement on Tariffs and Trade (GATT), Introductory Note to Part VIII and §§ 804, 806-808.

The principles governing unilateral countermeasures apply as well when a state responds to a violation of an obligation to all states (*erga omnes*). See § 703(2) and Comment a. This section does not address actions in response to violations that are taken by states pursuant to resolutions of appropriate organs of international organizations, such as the United Nations Security Council (United Nations Charter, Articles 41 and 42), or the Organ of Consultation under Article 8 of the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty), 4 Bevans 559, 21 U.N.T.S. 77.

b. *Range of permissible countermeasures.* The measures that a state may take under this section (subject to the principles of necessity and proportionality) include: suspension or termination of treaty relations generally or of a particular international agreement or provision; freezing of assets of the offending state; imposition of other economic sanctions. Self-help measures against the offending state may not include measures against the state's nationals that are contrary to the principles governing human rights and the treatment of foreign nationals. See § 711, Comments f, g, and h, and § 712, Comment f; see also § 335, Comment c. Under the law of the United States, certain actions in retaliation against nationals of an offending state may be forbidden by the Constitution. See § 722, Comments d and h, and Reporters' Note 6.

c. *Necessity.* Under this section, countermeasures in response to a violation of an international obligation are ordinarily justified only when the accused state wholly denies the violation or its responsibility for the violation; rejects or ignores requests to terminate the violation or pay compensation; or rejects or ignores proposals for negotiation or third-party resolution. Countermeasures are to be avoided as long as genuine negotiation or third-party settlement is available and offers some promise of resolving the matter. A showing of necessity is particularly important before any drastic measures of self-help are taken. In a dispute between members of an international organization, there may be a requirement that the dispute be submitted to the dispute settlement procedures of the organization, and countermeasures are precluded before that procedure has been concluded or terminated without success.

d. *Proportionality.* Countermeasures are ordinarily related to the violation. For instance, if a state has violated an obligation

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but do you need excuse to do this?

needs no excuse

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in respect of trade, the response of the other state will generally be limited to a corresponding trade restriction rather than a measure such as denial of airline landing rights. But an unrelated response is not unlawful so long as it is not excessive in relation to the violation. Different steps may be taken at different stages of a dispute. For instance, limited measures may be taken when a state refuses to negotiate (*e.g.*, freezing the offending state's assets); stronger measures may be used when a state refuses to comply with a judgment of an international tribunal (*e.g.*, seizure and appropriation of assets).

e. Response to violation of international agreement. A material breach of a bilateral agreement by one of the parties entitles the other to suspend or terminate the agreement in whole or in part. See § 335(1). Similarly, a party affected by a breach of a multilateral agreement may suspend its operation in whole or in part as between itself and the defaulting state. See § 335(2)(b). Some international agreements specify the responses that may be made to a breach of the agreement; *e.g.*, GATT specifies the compensatory actions that may be taken, see Part VIII, especially §§ 806 and 807. Some of these agreements provide, or may be interpreted as implying, that the specified actions are the only responses permitted. See Comment *a* and Reporters' Note 6. The aggrieved state may also take countermeasures unrelated to the agreement, subject to the limitations of this section.

f. Retaliation. The principle of necessity ordinarily precludes measures designed only as retribution for a violation and not as an incentive to terminate a violation or to remedy it. A state may retaliate, however, by acts of "retorsion" which are not otherwise illegal, such as the "unfriendly" acts indicated in Comment *a*. Retorsion is to be distinguished from "reprisal"; traditionally, reprisal was punitive in character and commonly involved the use of force, such as bombardment or temporary occupation of part of the offending state's territory. To the extent that reprisal involves threat or use of force, its use is now limited by the principles of the United Nations Charter. See Comment *g*.

g. Use of force in response to violation. The use or threat of force in response to a violation of international law is subject both to the requirements of necessity and proportionality (Subsection (1)) and to the prohibitions of the United Nations Charter (Subsection (2)). Virtually all states are parties to the Charter, and its rules in respect of the use of force are also binding as customary law and are *jus cogens*. See § 102, Comment *k*.

Article 2(4) of the Charter forbids the "threat or use of force against the territorial integrity or political independence of any

state, or in any other manner inconsistent with the Purposes of the United Nations." However, that provision is subject to "the inherent right of individual or collective self-defense if an armed attack occurs." Article 51.

Article 2(4) prohibits the threat or use of military force; it does not address the threat or use of economic force or pressure. It prohibits the threat or use of force generally, whether or not in response to a violation of international law. Important issues as to the scope of the prohibition in Article 2(4) have never been authoritatively resolved, but it is clear that it was designed, *inter alia*, to outlaw "gunboat diplomacy" even in response to violations of international law. However, an armed attack in violation of the law of the Charter permits the use of force in the exercise of the right of self-defense (Article 51), but important issues as to the scope of that right, too, remain unresolved.

It is generally accepted that Article 2(4) does not forbid limited use of force in the territory of another state incidental to attempts to rescue persons whose lives are endangered there, as in the rescue at Entebbe in 1976. That interpretation of the Charter, however, would not justify the use of force by one state on its own authority to conquer another state or overthrow its government even if that government had been guilty of persecution of minorities or other gross violations of human rights. See § 703, Comment *e* and Reporters' Note 8.

h. Authority to take measures in response to violation: law of the United States. Authority to take countermeasures on behalf of the United States in response to a violation by another state rests generally with the President, but some measures may require Congressional authorization. The President may, on his own authority, terminate or limit diplomatic relations with the offending state, and he may deploy forces under his command for purposes not involving engagement in hostilities. Successive Presidents and Congresses have differed as to the President's authority to use force in hostilities short of war. In time of peace, the President probably may not, without authorization from Congress, expel aliens or freeze assets of foreign states or their nationals. See § 712, Comment *f*. A State of the United States, unless authorized by Congress, may not take measures of self-help against a foreign state that has violated an international obligation to the United States. *Cf.* United States Constitution, Article I, Section 10; also § 1, Reporters' Note 5. See § 722, Reporters' Note 5.

A decision to resort to countermeasures is a political, not a judicial, decision. Courts in the United States will not decide whether and how the United States should respond to a violation by

another state. For example, if a provision in a treaty of the United States is violated by another party to that treaty, it is for the President and not for the courts to decide whether to respond by suspending the treaty or ceasing to carry out obligations under it. See § 339, Reporters' Note 1 and § 475, Reporters' Note 4. The courts will generally consider whether Executive acts against foreign nationals or their interests in the United States, in response to a violation of international law by another state, violate the Constitutional rights of the alien (§ 722), or are beyond the President's authority under the Constitution or acts of Congress. Courts will also entertain an objection, in an appropriate case, that the measure taken violates international law under this section because it is not necessary or because it is excessive, except where Congress directed or clearly authorized such measures (§ 115, Comment *a*), and except also, perhaps, when the action is within the President's constitutional authority and he has made an authoritative determination to take the action even though it would constitute a violation of international law by the United States. See § 115, Reporters' Note 3.

REPORTERS' NOTES

1. *Permissibility of unilateral remedies under international law.* There has been continuing uncertainty as to which measures of self-help are permissible under international law in response to violations of international obligations, in which circumstances, and subject to what limitations. There have been few judicial pronouncements on the subject, and the practice of states, though abundant, has not clarified either the circumstances in which unilateral countermeasures can be employed or the limits that need to be observed. See Stone, *Legal Control of International Conflicts* 285 (1954). This section distills a general principle from few cases and a confusion of precedents.

John Bassett Moore listed non-amicable processes for settling international differences in the order of their coercive nature. He began with "withdrawal of diplomatic rela-

tions, retorsion or retaliation, and the display of force"; then came "reprisals, 'pacific' blockade, embargo and non-intercourse." Those measures, he explained, though described as being "short of war," sometimes involved acts of war, but "if they are not opposed, they may not result in the legal condition of things called a state of war." Quoted in 2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 1654, n. 1 (2d ed. 1945).

The United Nations Charter imposes strict limits on the use of force in self-help (see Comment *g*), but it provides no clear guidance as to what is a use of force within the meaning of the Charter, or what use of force is to be considered to be "against the territorial integrity or political independence" of another state. No international agreement or other authoritative instru-

ment has clarified the scope and limits of self-help by means other than use of force.

In *Corfu Channel Case* (United Kingdom v. Albania), when two United Kingdom destroyers were damaged by mines in Albanian territorial waters, the United Kingdom resorted to a minesweeping operation in those waters, which it justified by invoking the right of "self-protection or self-help." The International Court of Justice refused to accept this defense. While the Court recognized that the Albanian Government failed to remove the mines after the explosions and was dilatory in answering diplomatic notes, it considered that "to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty." [1949] I.C.J. Rep. 4, 35.

In *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*), [1986] I.C.J. Rep. 14, 127, the Court held that the acts of which Nicaragua was accused "could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica"; they "could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force."

In its draft on state responsibility, the International Law Commission proposed an article on "countermeasures in respect of an internationally wrongful act" substantially consistent with this section. Art. 30, 34 U.N. GAOR Supp.

No. 10, at 311 (1979). The Commission considered but did not express conclusions on such questions as whether reprisals are legitimate under international law, whether countermeasures require a prior attempt to secure reparation, or whether proportionality between the injury suffered and the particular reaction is required. *Id.* at 314. See also Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* 67-75 (1984).

2. *Range of permissible countermeasures.* State responses to alleged violations of international obligations have varied. States have suspended sales of arms, technology, and even food, or military or economic assistance; limited fishing in their coastal waters by nationals of the offending state; or cancelled landing rights for its airlines or access to ports for its ships. For an early listing of instances in which non-military measures of self-help were used or authorized, see Wild, *Sanctions and Treaty Enforcement* 160-80 (1934).

States have also responded to violations by withholding benefits. Comment *a.* In the First Hickel-Loop Amendment, Congress directed the President to suspend foreign assistance to any state that nationalized properties of United States nationals without providing compensation as required by international law. Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2370(e). See § 444, Comment *c.* Congress has denied military and economic assistance to states guilty of consistent patterns of gross violations of internationally recognized human rights. See § 702, Reporters' Note 10. Under the Fisherman's Protective Act of 1954, as

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amended in 1967, the United States reimbursed American fishermen fined for fishing in zones not recognized by the United States as being within the jurisdiction of a foreign state, and the amount was deducted from United States aid funds designated for that state. 22 U.S.C. §§ 1971-80; but see 90 Stat. 331 (1976).

In response to the seizure of United States diplomatic and consular personnel as hostages by Iran in 1979, the United States discontinued purchases from Iran, blocked Iranian government assets, restricted the number of Iranian diplomatic and consular personnel in the United States, and intensified the enforcement of immigration regulations against Iranian students in the United States. See *Narenji v. Civiletti*, 617 F.2d 745 (D.C.Cir.1979), *certiorari denied*, 446 U.S. 957, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980) discussed in § 722, Reporters' Note 6; Lowenfeld, *Trade Controls for Political Ends*, ch. V (2d ed. 1983). Later the United States broke off diplomatic relations with Iran, prohibited exports to that country, cancelled all visas issued to Iranian citizens for future entry, prohibited travel to Iran by United States citizens, and took other economic measures, including the blockage of private assets of Iranian nationals. In *United States Diplomatic and Consular Staff in Tehran Case* (*United States v. Iran*), the International Court of Justice cited these countermeasures and appeared to accept them as not unlawful in the circumstances. [1980] I.C.J. Rep. 3, 17. See 80 Dep't State Bull. 56-57, May 1980; but see Reporters' Note 4.

Measures permitted under this section are, usually, measures

against the offending state and its instrumentalities. Some question the propriety, generally, of responses directed against the nationals of the offending state. But see *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 111 (2d Cir.1966), *certiorari denied*, 385 U.S. 898, 87 S.Ct. 203, 17 L.Ed.2d 130 (1966), upholding regulations that prohibited the transfer outside of the United States, without special authorization, of property owned by Cuban nationals. The court said: "It does not follow, however, that in dealing with the property of an alien the United States must be blind to the acts of the country of which he is a national; the Constitution protects the alien from arbitrary action by our government but not from reasonable response to such action by his own." Mass expulsion of nationals of the offending state would presumably be barred by the general prohibition on expulsion of aliens contained in some international agreements. See, e.g., *African Charter on Human and Peoples' Rights*, Art. 12(5), 21 Int'l Leg.Mat. 59 (1982); *American Convention on Human Rights*, Art. 22(9), O.A.S.T.S., No. 36; Protocol No. 4 to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 4, Eur. T.S., No. 46. (The United States has signed the American Convention but as of 1987 had not ratified it.) Measures against nationals of the offending state are clearly forbidden if they are contrary to the principles governing human rights and the treatment of foreign nationals. Comment *b*; § 711, Comments *g* and *h*; § 712, Comments *d* and *f*. Measures against selected nationals of the offending state are open to challenge

as discriminatory (*ibid.*), but in particular circumstances, measures directed against only some of the offending state's nationals, if not selected on an invidious basis, might be acceptable, whereas measures against all such nationals might be excessive and disproportional under Subsection (1)(b). Compare *Narenji v. Civiletti, supra*, upholding regulations issued during the hostages crisis that required Iranian nationals in student status to report to the Immigration Service.

3. *Necessity.* During an insurrection in Canada in 1837, the rebels were supplied from United States territory by the steamer *Caroline*. A British force entered United States territory, destroyed the steamer, and in the skirmish killed two United States citizens. The British Government justified this action by emphasizing "the necessity of self-defense and preservation." In his famous communication to the British Government, Secretary of State Webster stressed that the exceptions permitting self-defense should be confined to cases in which the "necessity of self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation". Earlier he had written that the British Government was required to show that the Canadian authorities "did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it." See Jennings, "The *Caroline* and *McLeod* Cases," 32 *Am.J.Int'l L.* 82, 85, 89 (1938). Although the principle of necessity was asserted in that instance to support a use of force in self-defense, it is accepted that the principle applies as well to other means of self-help that would

be unlawful were they not in response to a violation. Necessity may justify self-help, in particular, if all attempts to settle the issue, to achieve a cessation of the violation, or to obtain adequate compensation for the damage caused by the violation have proved fruitless. Tucker, "Reprisals and Self-Defense: The Customary Law," 66 *Am.J.Int'l L.* 586, 592 (1972) ("the necessity legitimizing reprisals is defined in terms of the injured state's inability to obtain redress by other, and peaceful, means"). Necessity disappears, however, once the case has been submitted to an international tribunal, and the tribunal is in a position to decide on interim measures of protection. *Case Concerning Air Service Agreement (U.S.-France)*, 1978, 18 *R.Int'l Arb.Awards* 417, 445-46.

The requirements of necessity and proportionality (Reporters' Note 5) are concurrent. Necessity may justify prompt action, but such action may not exceed the bounds of proportionality, and should cease when it is no longer necessary. The practice of states confirms that ordinarily an action justified by necessity is proportional, and is terminated when the violation of international law has stopped. For instance, in 1949, when Hungary refused to allow a United States consul to visit a United States citizen accused of espionage and sabotage, the United States closed two Hungarian consulates in the United States; as soon as the accused person was released and allowed to leave Hungary, the United States permitted the reopening of the consulates. See 8 *Whiteman, Digest of International Law* 867-73 (1967).

4. *Exhaustion of other remedies as condition for self-help.* An

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early study by the Institute of International Law concluded that measures of self-help are prohibited when redress can be obtained through available procedures for peaceful settlement, notably when the matter is within the jurisdiction of a court or tribunal and that court or tribunal can provide interim measures of protection. In addition, measures of self-help are not permitted while the case is pending (except as interim protection where the court or tribunal is unable to provide it), or when the defendant has complied with the decision of the court or tribunal. 38 *Institut de Droit International, Annuaire* 708-11 (1934); see also *id.* 1-166, 623-94, for an extensive discussion of retaliatory measures, based on a report by Nicolas Politis. In *United States Diplomatic and Consular Staff in Tehran Case* (Reporters' Note 2), the International Court of Justice criticized the United States for resorting to self-help to free the hostages while the case was before the Court. [1980] *I.C.J. Rep.* at 43. Compare *Case Concerning Air Service Agreement, Reporters' Note* 5, where the tribunal accepted measures of self-help implemented when there was yet no tribunal in existence to order measures of protection.

The 1907 Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts made the offer of arbitration by the state seeking payment on behalf of its nationals, and the refusal thereof by the debtor state, a condition precedent to the use of armed force by the claimant state. Art. 1, T.S. No. 537, 1 *Bevans* 607 (the undertaking not to use force is "not applicable when the debtor state refuses or neglects to

reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after arbitration, fails to submit to the award"). The Hague Convention has been largely overtaken by the more comprehensive prohibitions on the use of force of the United Nations Charter (Comment *g*), but the Convention is still in effect to the extent that it is not inconsistent with the Charter (Art. 103); as of 1986, the United States and 27 other states were parties to this Convention, some of them having acceded to it recently.

5. *Proportionality.* In considering countermeasures taken by the United States when France had allegedly violated an air services agreement between the two countries, the international arbitral tribunal addressed the requirement of proportionality. It pointed out that a state that is satisfied that another state has violated an international obligation to it is entitled, "within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through 'countermeasures.'" Countermeasures must "have some degree of equivalence with the alleged breach," and their aim should be "to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution," and to avoid escalation that would lead to a worsening of the conflict. The Tribunal upheld the denial by the United States to France of air service rights corresponding to those that France had denied to the United States. *Case Concerning Air Service Agreement (U.S.-France)*, 1978, *R.Int'l Arb. Awards* 417, 443-45 (1980). For other examples of proportionality,

see 2 Oppenheim, International Law 141 (7th ed. H. Lauterpacht 1952).

Even before the United Nations Charter, when forcible reprisals were not forbidden in principle, it was held by a German-Portuguese arbitral tribunal in the *Naulilaa* case, 1928, that the German action in destroying certain forts and posts and causing death of many persons, in reprisal for the killing of an official and two officers, was disproportionate. "Even if it were admitted that the law of nations does not demand that reprisals be in approximate proportion to the offense, it would nevertheless be necessary to consider as excessive and illegal any reprisals that are out of all proportion to the act motivating them." 2 R.Int'l Arb.Awards 1011, 1028. See also 6 Hackworth, Digest of International Law 154, 155 (1943).

6. *Response to violation of international agreement.* Some international agreements provide for responses to violations other than those specified in the Vienna Convention on the Law of Treaties. See § 335. The General Agreement on Tariffs and Trade (GATT) authorizes certain unilateral compensatory measures in cases of violations of that Agreement, especially when a state has refused to accept a report of a Working Party that has proposed a way to settle a dispute. See § 806, Reporters' Note 1.

In 1982, the states parties to the General Agreement on Tariffs and Trade (GATT) undertook "to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement," GATT, B.I. S.D., Supp. No. 29 (1983), at 9, 11. Relying on that undertaking, *inter alia*, the General Assembly of the

United Nations reaffirmed that "developed countries should refrain from threatening or applying trade restrictions, blockades, embargoes and other economic sanctions, incompatible with the Charter of the United Nations and in violation of undertakings contracted, multilaterally or bilaterally, against developing countries as a form of political and economic coercion which affects their economic, political and social development." G.A. Res. 210, 39 U.N. GAOR Supp. No. 51, at 160. The United States and 18 other states voted against this resolution. For a report of the Secretary-General and comments by various states, see U.N. Doc. A/39/415 (1984).

The parties to the 1980 Convention on the Conservation of Antarctic Marine Living Resources undertook "to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity contrary to the objectives" of that convention. T.I.A.S. No. 10240, Art. 22(1). As of 1986, the United States and 15 other states and the European Economic Community were parties to this convention.

7. *United Nations Charter prohibitions on use of force.* A number of issues in the interpretation of Articles 2(4) and 51 of the Charter have not been authoritatively resolved. See generally Henkin, Pugh, Schachter, and Smit, International Law, Cases and Materials 676 *et seq.* (2d ed. 1987); compare McDougal, "The Soviet-Cuban Quarantine and Self-Defense," 57 Am.J. Int'l L. 597, 599-601 (1963), with Henkin, How Nations Behave 139-45, 290-300 (2d ed. 1979); see also Bowett, Self-Defense in International Law 29-114, 182-99 (1958);

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Brownlie, *International Law and the Use of Force by States* 251-349, 372-73 (1963).

8. *Retaliation, retorsion, and reprisal.* Traditional international law permitted both "retorsion" and "reprisal," but their scope and the distinction between them have been a subject of controversy, and the traditional law as to reprisal has been modified by the law forbidding use of force. Comment *g*. Retorsion generally consisted of acts not involving the use of force in response to any unfriendly act, whether illegal or not. See, e.g., Stone, *Legal Control of International Conflict* 289-90 (1954); 2 Hyde, *International Law Chiefly as Interpreted by the United States* 1657-59 (2d ed. 1945); 7 Moore, *Digest of International Law* 105 (1906). A reprisal often involved some use of force and could be done only in response to a gross violation of international law. In the *Naulilaa* case, Reporters' Note 5, the German-Portuguese arbitral tribunal defined reprisal as follows:

Reprisals are acts of self-help by the injured State, acts in retaliation for acts contrary to international law on the part of the offending State, which have remained unredressed after a demand for amends. In consequence of such measures, the observance of this or that rule of international law is temporarily suspended, in the relations between the two States. They are limited by considerations of humanity and the rules of good faith, applicable in the relations between States. They are illegal unless they are based upon a previous act contrary to international law. They seek to impose on the

offending State reparation for the offence, the return to legality and the avoidance of new offences.

2 R.Int'l Arb.Awards 1011, 1026; 12 Whiteman, *Digest of International Law* 149 (1971). Reprisals have also been defined as "such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to settlement of a difference created by its own international delinquency." 2 Oppenheim, *International Law* 136 (7th ed. H. Lauterpacht 1948).

The provision in the United Nations Charter (Art. 2(4)), Comment *g*, proscribing "the threat or use of force" by one state against another has been generally interpreted as prohibiting reprisals that involve the use of force. See Brownlie, *International Law and the Use of Force by States* 281-82 (1963), and sources cited at 281 n. 4. In one of its early decisions, the Security Council decided that no party was permitted to violate the truce between Israel and the Arab states on the ground that it was undertaking reprisal or retaliation against the other party. Resolution 56 (1948), 3 S.C.O.R., Resolutions and Decisions of the Security Council 24 (1948). Similarly, in connection with the British retaliatory action against Yemen (the Harib Incident), the Security Council condemned "reprisals as incompatible with the purposes and principles of the United Nations." Resolution 188 (1964), 19 *id.* 9 (1964). See also Resolution 228 (1966), 21 *id.* 11 (1966), censuring Israel ("actions of military reprisal cannot be tolerated"). The Declaration of Principles of International Law Concerning Friendly Relations

and Co-operation Among States proclaims that "States have a duty to refrain from acts of reprisal involving the use of force." 25 U.N. GAOR Supp. No. 28, at 122 (1970). In 1974, the Department of State noted that it "has supported and supports" the principle contained in the Declaration, and pointed out that it is "desirable to endeavor to maintain the distinction between acts of lawful self-defense and unlawful reprisal." [1974] Digest of U.S. Practice in Int'l L. 700.

9. *Presidential authority to use self-help: Law of the United States.* The authority of the President to use measures of self-help in response to a violation of international law is an aspect of his general authority to conduct foreign relations and is subject to the general limitations on that authority. The President's authority to respond to violations by suspending or limiting diplomatic relations has been generally accepted. His authority to terminate an international agreement for breach by the other party is also commonly acknowledged. See § 339. Measures affecting individual interests are generally taken pursuant to authorization by Congress. Thus, retaliation for violation of United States rights with respect to foreign trade is authorized and limited by such statutes as the Trade Act of 1974. 19 U.S.C. §§ 2101 *et seq.*, especially § 2112. See § 803, Reporters' Note 5; § 804, Reporters' Note 7. The Internal Revenue Code authorizes the President to double the taxes of nationals of states that subject United States nationals to discriminatory or extraterritorial taxes. 26 U.S.C. § 891. The United States freezes assets in response to a violation of its rights under international law

pursuant to legislation such as the Trading with the Enemy Act (50 U.S.C. App. §§ 5(b)) or the International Emergency Economic Powers Act (50 U.S.C. §§ 1701 *et seq.*). See also Reporters' Note 2.

The President has on many occasions taken measures of self-help involving the use of armed forces abroad, usually to protect American lives and property, sometimes in retaliation for an alleged violation of international law. The authority of the President to use force without Congressional authorization has been a subject of continuing controversy. In a number of instances, the President obtained Congressional authorization. For comprehensive lists of the instances of use of United States armed forces abroad, see House Comm. on Foreign Affairs, Background Information on the Use of United States Armed Forces in Foreign Countries, H.Rep. No. 127, 82d Cong., 1st sess. 55-62 (1951), supplemented by 1970 Revision, 91st Cong., 2d sess. 15 *et seq.*, and Appendices I and II. The 1973 War Powers Resolution, 87 Stat. 555, adopted over the President's veto, included in Section 2(c) the following declaration by Congress:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

United States courts have ordinarily refrained from interfering with military action taken by the President, following in this respect the statement by Chief Justice Marshall that retaliation "is a political and not a legal measure," and that it is not for the courts "to interfere with the proceedings of the nation and to thwart its views." *The Nereide*, 13 U.S. (9 Cranch) 388, 422, 3 L.Ed. 769 (1815). Compare the lower court

cases holding that the President's authority to send forces to fight in Vietnam was a political question not subject to judicial review. See § 1, Reporters' Note 4.

10. *Previous Restatement*. Section 200 of the previous Restatement dealt only with the question whether a state is entitled to retaliate against an alien for acts of the state of the alien's nationality.

§ 906. Private Remedies for Violation of International Law

A private person, whether natural or juridical, injured by a violation of an international obligation by a state, may bring a claim against that state or assert that violation as a defense

- (a) in a competent international forum when the state has consented to the jurisdiction of that forum with respect to such private claims;
- (b) in a court or other tribunal of that state pursuant to its law; or
- (c) in a court or other tribunal of the injured person's state of nationality or of a third state, pursuant to the law of such state, subject to limitations under international law.

Comment:

a. International remedies available to private persons. International tribunals and other fora are generally not open to claims by private persons. However, the increasing recognition of the rights of private persons, whether natural or juridical, under international law, has led to a variety of remedies and arrangements to protect these rights. A few international agreements have given private persons access to an international forum where the agreement establishing the forum allows such extension of its jurisdiction. For instance, the International Tribunal for the Law of the Sea, when established, will be open to "entities other than States Parties" in any case submitted pursuant to "an agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case." United Nations Convention on the Law of the Sea (see Part V of this Restatement), Annex VI, Article 20. See § 903, Reporters' Note 14. Some human rights agreements grant individuals the right to present petitions to specified international institu-

a faction involved in civil war in Nicaragua. The district court dismissed the entire complaint on the ground that it involved nonjusticiable political questions. This court held that while the complaint was justiciable, it failed to state a claim on which relief could be granted, and dismissed. The court explained that the plaintiffs' attempt to enjoin funding of the Contras on the ground that it violated a peremptory norm of international law by contravening an International Court of Justice (ICJ) judgment was unavailing, because the ICJ judgment did not represent such a peremptory norm. *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 941.

N.D.Cal.1987. Quot. in case cit. in disc. (T.D. No. 3, 1982), cit. and quot. in disc. (T.D. No. 6, 1985). Argentine citizens now residing in the United States sued a former Argentine general, alleging that police and military personnel under the general's authority tortured, murdered, and arbitrarily detained certain of the plaintiffs and members of their families. The court denied the defendant's motion to dismiss the plaintiffs' claim for prolonged arbitrary detention, holding that there was sufficient consensus in the case law to establish that a prolonged arbitrary detention by a state constituted an international law violation and that the plaintiffs sufficiently alleged that claim. The court also denied the defendant's motion to dismiss the claim for murder and summary execution, holding that summary execution or murder by the state was universally viewed as a violation of the law of nations and that one plaintiff stated a cognizable claim for the murder of her brother by Argentine military personnel. The court granted the defendant's motion to dismiss the claim for causing the disappearance of a family member, holding that, although the Restatement listed the murder or causing the disappearance of individuals as a violation of international law, there did not yet exist the requisite degree of international consensus to demonstrate a claim on which relief could be granted. *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1541, 1542.

N.D.Cal.1988. Cit. in sup., quot. in disc. The district court granted an Argentine general's motion to dismiss claims brought under the Alien Tort Statute by an Argentine citizen, who was residing in the United States, for causing the disappearance of his mother and for the infliction of cruel, inhuman, or

degrading treatment. On plaintiff's motion to reconsider, the court reinstated the claim for causing disappearance, since that wrong was universally recognized as a violation of the international law of human rights. However, it denied the motion to reconsider the claim for the infliction of cruel, inhuman, or degrading treatment since, even though virtually all international legal authorities have held that a state violated international law if, as a matter of state policy, it practiced, encouraged, or condoned cruel, inhuman, or degrading treatment, the plaintiffs' submissions failed to establish a consensus as to what constituted such treatment; therefore, the claim was not actionable under the statute. *Forti v. Suarez-Mason*, 694 F.Supp. 707, 710, 711.

N.D.Ga.1985. Subsec. (e) quot. in ftñ. in disc. (T.D. No. 3, 1982). A group of Mariel Cubans who had been incarcerated after they arrived in the United States sued for declaratory and injunctive relief from their incarceration, including habeas corpus. The court held that the Cubans who were not mental incompetents and who had not committed serious crimes in Cuba had a federally created liberty interest in parole and were entitled to a hearing, because they had come to this country in response to an invitation from the President. Basing its conclusion on expert testimony, the court also held that, although the Cubans' continued indefinite detention appeared to violate the customary international law prohibition of prolonged arbitrary detention, the Cubans had failed to establish that this law applied to their case. The court also emphasized that a controlling executive act took precedence over international law, especially since Congress had given the Attorney General broad discretion over the detention of unadmitted aliens. *Fernandez-Roque v. Smith*, 622 F.Supp. 887, 903.

§ 711. State Responsibility for Injury to Nationals of Other States

C.A.2, 1983. Com. (a) and com. (b) cit. in disc. (T.D. No. 3, 1982). The defendants were convicted in the trial court of conspiracy to possess with intent to distribute heroin and they appealed. On appeal, the defendants contended *inter alia*, that the recording of a telephone conversation between them violated international law. This court stated that in

international law an alien could assert a denial of justice only upon a demonstration of grave or serious defects, such as a refusal to grant rights reasonably to be expected by an accused in a criminal trial. The court found that in the present case, the defendants were granted all of the constitutional guarantees, protections, and procedural safeguards enjoyed by American citizens. The court affirmed, holding held that no principle of international law was violated. *United States v. Romano*, 706 F.2d 370, 375.

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

§ 712. Economic Injury to Nationals of Other States

C.A.2, 1987. Subsecs. (1) and (2), com. (f), and Rptr's Note 5 cit. in sup. (T.D. No. 7, 1986). The Republic of Cuba nationalized an electric utility owned by an American corporation and did not pay the utility's debts to certain American banks. The American banks held the assets of various Cuban banks against the unpaid loans, and when the national bank of Cuba sued to recover the funds, the American banks counterclaimed for the money owed to them. The district court found for the defendants, and this court affirmed, holding that Cuba was liable because its policy of nationalization and nonpayment of debts discriminated against United States nationals and constituted a taking that was compensable under international law. *Banco*

Nacional de Cuba v. Chemical Bank N.Y. Trust, 822 F.2d 230, 237.

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

C.A.9, 1987. Com. (c) cit. in sup. (T.D.No. 7, 1986). Investors sued state-owned foreign banks for violations of federal securities laws and for the taking of property in violation of international law. The trial court granted summary judgment for the banks. Affirming, this court held that exchange controls instituted by the foreign country were not unlawful under international law providing for the surrender of foreign funds against payment in local currency at the official rate of exchange even when the local currency is less valuable than the funds surrendered. The court dismissed the investors' claim that they did not receive compensation equivalent to the full market value of their property, reasoning that as there had been no taking, there was no question as to whether the banks had made appropriate compensation. *West v. Multiban-*

co Comermex, S.A., 807 F.2d 820, 833, cert. denied 482 U.S. 906, 107 S.Ct. 2483, 96 L.Ed.2d 375 (1987), rehearing denied 483 U.S. 1040, 108 S.Ct. 10, 97 L.Ed.2d 800 (1987).

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

§ 721. Applicability of Constitutional Safeguards

C.A.5, 1988. Com. (b) cit. in diss. op., Rptr's Note 2 cit. in diss. op., Rptr's Note 13 quot. in fn. to diss. op. A naturalized American citizen filed a Title VII suit, claiming that a United States corporation had discriminated against him while he was working in Saudi Arabia. The district court dismissed the action for lack of subject matter jurisdiction. Affirming, this court stated that there was a presumption against the extraterritorial application of federal legislation absent a clear congressional expression of intent to the contrary. The dissent argued that, since extraterritorial application of Title VII would not violate international law principles, the court did not need to search for an affirmative statement of congressional intent. *Boureslan v. Aramco*, 857 F.2d 1014, 1026-1028, rehearing granted 863 F.2d 8 (5th Cir.1988).

C.A.D.C.1989. Quot. in conc. and diss. op., com. (b) cit. in conc. and diss. op., Rptr's Notes 1 and 2 cit. in conc. and diss. op. One domestic and two foreign organizations involved in population planning sued the Agency for International Development (AID), chal-

lenging its policy prohibiting family planning organizations abroad from using grant funds to promote or perform abortions. The plaintiffs sought a declaratory judgment, inter alia, that AID's policy was invalid as violative of their First Amendment rights. The trial court held that the foreign plaintiffs had no standing to assert a First Amendment violation, but concluded that the antiabortion policy did violate the First Amendment rights of the domestic plaintiff, and granted an injunction prohibiting AID's use of abortion-related limitations on grant funds. Affirming in part, reversing in part, and remanding for dismissal, this court held, inter alia, that AID's antiabortion policy was at most a refusal to subsidize exercise of free speech rights and did not violate the First Amendment. A concurring and dissenting judge argued, inter alia, that AID's policy blocked the domestic plaintiff from fruitful communication and association with foreign organizations and was therefore repugnant to the First Amendment; it noted that the Constitution restrained the United States government from infringing on individual rights both at home and abroad. *DKT Memorial Fund v. Agency for Intern. Dev.*, 887 F.2d 275, 308.

D.D.C. 1983. Cit. in disc. (T.D. No. 3, 1982). The plaintiffs' ancestors, who had owned land in Texas, were allegedly deprived of their land by the United States following the Mexican-American War. Pursuant to treaties between the United States and Mexico, each sovereign agreed to compensate its own citizens for their losses. The Mexican government never enacted legislation providing for compensation, and the plaintiffs brought suit against Mexico for its alleged taking and conversion of their claims against the United States. The defendant moved to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), which provided that foreign states were generally immune from the jurisdiction of United States courts. The plaintiffs asserted that this case fell within two exceptions to the Act's general grant of immunity: a foreign state was not immune from jurisdiction in any case involving rights in property in the United States acquired by succession, and a foreign state was not immune in any case involving property loss in the United States caused by the tortious act of that foreign state. This court disagreed. In en-

acting the succession clause, Congress did not intend to open the courts to all suits involving inherited property, but only to ensure that property rights were justiciable where a foreign sovereign obtained rights in property through a gift or inheritance. The tort exception to the Act did not apply because the Mexican government's alleged conversion of the plaintiffs' rights was a discretionary function of that government in which this court could not intervene. The court dismissed the complaint, holding that it lacked jurisdiction under the FSIA. The court alternatively held that the act of state doctrine barred consideration of the plaintiffs' case. *Asociacion de Reclamantes v. United Mexican States*, 561 F.Supp. 1190, 1197, affirmed 735 F.2d 1517 (D.C.Cir.), certiorari denied 470 U.S. 1051, 105 S.Ct. 1751, 84 L.Ed.2d 815 (1985).

§ 722. Rights of Aliens

C.A.D.C.1989. Com. (m) quot. in conc. and diss. op., Rptr's Note 16 quot. in conc. and diss. op. One domestic and two foreign organizations involved in population planning sued the Agency for International Development (AID), challenging its policy prohibiting family planning organizations abroad from using grant funds to promote or perform abortions. The plaintiffs sought a declaratory judgment, inter alia, that AID's policy was invalid as violative of their First Amendment rights. The trial court held that the foreign plaintiffs had no standing to assert a First Amendment violation, but concluded that the antiabortion policy did violate the First Amendment rights of the domestic plaintiff, and granted an injunction prohibiting AID's use of abortion-related limitations on grant funds. Affirming in part, reversing in part, and remanding for dismissal, this court held, inter alia, that AID's antiabortion policy was at most a refusal to subsidize exercise of free speech rights and did not violate the First Amendment. A concurring and dissenting judge argued, inter alia, that AID's policy blocked the domestic plaintiff from fruitful communication and association with foreign organizations and was therefore repugnant to the First Amendment; it noted that the Constitution restrained the United States government from infringing on individual rights both at home and abroad. *DKT Memorial Fund v. Agency for Intern. Dev.*, 887 F.2d 275, 308.

D.D.C.1988. Cit. generally in disc., com. (m) quot. in fn., Rptr's Note 16 cit. in fn. (Erron. cit. as § 721.) The FBI arrested a suspected Lebanese hijacker, after luring him into international waters, and transported him to the United States for criminal prosecution. The court denied his motion to dismiss his indictment for hostage taking and aircraft piracy on the ground of illegal arrest. The court stated that, although at least some actions by the United States in respect of foreign nations outside the country have been considered subject to constitutional limitations, including the extension of constitutional rights to aliens in certain cases, however, the government's method of arrest was not so outrageous in this case as to warrant dismissal of the indictment. *United States v. Yunis*, 681 F.Supp. 909, 917, order reversed 859 F.2d 953 (D.C.Cir.1988).

§ 823 [853]. Obligations in Foreign Currency: Law of the United States

C.A.2, 1986. Cit. in disc., com. (c) cit. in disc. and quot. in fn., subsec. (1) cit. in fn., coms. (b) and (d)(ii) cit. in fn. (T.D. No. 6, 1985). The plaintiff brought a diversity action in the United States to enforce an English judgment and to require payment in English pounds. The district court denied the defendant's motion for relief from an American judgment enforcing the English judgment and the court of appeals affirmed. The court applied the "breach-day" law of New York, and held that the judgment enforcing the English award required satisfaction of the dollar amount specified in that judgment, that it would not enforce a judgment satisfied by payment of the underlying judgment in English pounds, and that any pounds paid against the judgment must be credited in dollars at the rate prevailing on the date the pounds were paid. The court noted that there was an extreme rule of creditor preference that enabled creditors to benefit from currency fluctuations, although neither party should receive a windfall as a result of currency conversion. If foreign currency depreciated after the foreign obligation accrued, the conversion rate prevailing at the time of accrual would be applied. However, if the foreign currency appreciated, the currency rate on the date of the American judgment would be applied. *Competex, S.A. v. Labow*, 783 F.2d 333, 336, 337, 338.

C.A.7, 1992. Cit. generally in disc., subsec. (1) cit. in disc., subsec. (2), com. (b), and Rptr's Note 3 quot. in disc. After an oil tanker broke apart causing a large oil spill, a British insurer, as subrogee of the shipper, sued the tanker's owner to recover the funds paid to its insured for the loss of the oil. The district court awarded the insurer a judgment in pounds sterling. Reversing in part and remanding, this court held that, since the plaintiff dealt in dollars in its transactions and the loss was computed in dollars, the judgment should not have been converted from dollars to pounds sterling. The court stated that judgments in the United States could be entered in foreign currency and satisfied either in that currency or exchanged but that a judgment in dollars was more appropriate here, since ultimately the choice of currency and conversions was a question of forum law. *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1327-1330.

S.D.N.Y.1985. Cit. but not fol. (T.D. No. 6, 1985). The plaintiff obtained a final judgment in England for the defendant to pay a certain amount of damages in English pounds. When the defendant did not pay, the plaintiff brought a diversity action in the United States to enforce the English judgment and again prevailed. The trial court converted the damages from pounds to dollars; the defendant appealed this decision and lost. The plaintiff then sued to enforce this judgment, and the defendant resisted by arguing that he should not have to pay damages in American dollars. The court found for the plaintiff but did not accept the plaintiff's argument based on the Restatement that a debtor should not profit by his failure to timely pay a debt, since there was no indication that a New York court would abandon New York law to follow the Restatement view. *Competex, S.A. v. Labow*, 613 F.Supp. 332, 335, order affirmed 783 F.2d 333 (2d Cir.1986).

S.D.N.Y.1985. Cit. in sup. (T.D. No. 6, 1985). Two sections of the roof of the plaintiffs' concentrator mill building collapsed because of the accumulation of snow and ice. The plaintiffs sued the insurance companies for payment under their policies. The court found that the collapse of the two roof sections constituted two separate insured occurrences upon which the plaintiffs could recover. Although the insurance policies provided

for payment in Canadian dollars, the court held that the judgment must be expressed in United States currency. The court also held that New York's breach-day rule applied to the conversion and that therefore the rate of currency exchange on the day of breach was applicable. The court reasoned that, if the rate of exchange on the day of judgment (judgment-day rule) were applied, the effect would be to permit the insurance companies to benefit from their failure to pay their debt in a timely manner. The court stated that such a result would be inconsistent with the view that a debtor should not benefit from his failure to pay a debt on time. *Newmont Mines Ltd. v. Adriatic Ins. Co.*, 609 F.Supp. 295, 297, judgment affirmed 784 F.2d 127 (2d Cir.1986).

Cal.App.1988. Cit. in fn., coms. (a)-(d) cit. in fn. (T.D. No. 6, 1985). (Erron. cit. as Rest.2d.) Construction companies sued a construction project manager and others in Canada for breach of a contract to develop and build a golf course. After a Canadian court entered consent judgments for the plaintiffs, the plaintiffs had the judgments established against the named defendant in the superior court below under the Uniform Foreign Money-Judgments Recognition Act. The superior court entered judgment for the plaintiffs, using the exchange rate at the time of the Canadian judgment to convert that sum into American dollars. The defendant, however, satisfied the Canadian judgment in Canada and moved the California court to compel acknowledgment of full satisfaction of the California judgment. The plaintiffs opposed the motion, contending that between the time of the Canadian judgment and the satisfaction of that judgment the Canadian dollar had decreased in value relative to the American dollar, thus entitling them to an additional sum in compensation for the decrease. The superior court granted the defendant's motion to enter satisfaction in full. Affirming, this court held that, when enforcing a judgment rendered in foreign currency, a California court must ordinarily convert the foreign currency to American dollars using the exchange rate that was in effect at the time of the foreign judgment. The court noted, but did not follow, the Restatement rule that would allow a creditor to choose between the values of two currencies in the enforcement action even if the debtor did not

have sufficient assets in the foreign jurisdiction to satisfy judgment there. *Pecaflor Const., Inc. v. Landes*, 198 Cal.App.3d 342, 243 Cal.Rptr. 605, 609, 610.

Tex.App.1990. Subsec. (2) quot. in sup., com. (c) cit. in sup., Rptr's Note 2 cit. in fn. A Mexican newspaper company sued a Texas corporation to recover a debt for advertising services rendered. The trial court entered judgment for the plaintiff in Mexican pesos at the rate of exchange in effect on the date of the judgment. On appeal by the plaintiff, this court reformed the judgment and affirmed as reformed, holding that the judgment should have been entered at the conversion rate effective on the date the debt became due and payable. The court said that using the conversion rate in effect as of the date of the judgment would have been unfair to the plaintiff because the value of the loss on the date of the breach was substantially greater than the value of the loss on the date of the judgment. *El Universal v. Phoenician Imports*, 802 S.W.2d 799, 803, 804.

§ 901. Redress for Breach of International Law

C.D.Cal.1990. Cit. in disc., Rptr's Note 3 quot. in disc. (cit. as R.N. 3). Agents of the Drug Enforcement Agency (DEA) investigating the murder of a fellow DEA agent promised an award of \$50,000 to Mexican associates of a DEA informant for delivery of the suspect to the United States. After the suspect was kidnapped by the Mexican associates and brought to the United States, the Mexican government filed a formal complaint with the state department and the suspect filed a motion to dismiss the murder charges against him for outrageous government conduct and lack of personal jurisdiction. Ordering the defendant to be discharged and returned to Mexico, this court held, inter alia, that the United States violated the Extradition Treaty between the United States and Mexico when it unilaterally abducted the suspect from his homeland. The court found that the extradition treaty between the United States and Mexico was self-executing and the official protest by the Mexican government gave the suspect derivative standing to enforce its terms. The appropriate remedy for the illegal act was the immediate return of

the suspect to Mexico. *U.S. v. Caro-Quintero*, 745 F.Supp. 599, 614.

§ 902. Interstate Claims and Remedies

C.D.Cal.1990. Com. (a) quot. in disc. Agents of the Drug Enforcement Agency (DEA) investigating the murder of a fellow DEA agent promised an award of \$50,000 to Mexican associates of a DEA informant for delivery of the suspect to the United States. After the suspect was kidnapped by the Mexican associates and brought to the United States, the Mexican government filed a formal complaint with the state department and the suspect filed a motion to dismiss the murder charges against him for outrageous government conduct and lack of personal jurisdiction. Ordering the defendant to be discharged and returned to Mexico, this court held, inter alia, that the United States violated the extradition treaty between the United States and Mexico when it unilaterally abducted the suspect from his homeland. The court also held that it was for the state, and not for the individual, to initially protest and thereby raise a claim that the method of securing a person's presence violates an extradition treaty; therefore, the official protest by the Mexican government gave the suspect derivative standing to enforce its terms. *U.S. v. Caro-Quintero*, 745 F.Supp. 599, 607.

§ 906. Private Remedies for Violation of International Law

C.D.Cal.1990. Com. (a) cit. in disc. Agents of the Drug Enforcement Agency (DEA) investigating the murder of a fellow DEA agent promised an award of \$50,000 to Mexican associates of a DEA informant for delivery of the suspect to the United States. After the suspect was kidnapped by the Mexican associates and brought to the United States, the Mexican government filed a formal complaint with the state department and the suspect filed a motion to dismiss the murder charges against him for outrageous government conduct and lack of personal jurisdiction. Ordering the defendant to be discharged and returned to Mexico, this court held, inter alia, that the United States violated the extradition treaty between the United States and Mexico when it unilaterally abducted the suspect from his homeland. The court also held that it was for the state, and

not for the individual, to initially protest and thereby raise a claim that the method of securing a person's presence violates an extradition treaty; therefore, the official protest by the Mexican government gave the suspect derivative standing to enforce its terms. *U.S. v. Caro-Quintero*, 745 F.Supp. 599, 607.

§ 907. Private Remedies for Violations of International Law: Law of the United States

C.A.2, 1985. Com. (a) cit. in fn. (T.D. No. 5, 1984). The defendant, who had been convicted of numerous criminal violations in the United States and abroad, appealed his con-

victions on the grounds that his Swiss bank accounts had been procured in violation of treaty provisions and their admission had violated his rights of confrontation, that certain Cayman Island bank records had been improperly procured, and that there had been insufficient evidence to support his conviction for bankruptcy fraud. This court upheld the convictions. In regard to the Swiss bank accounts, the court held that international agreements between Switzerland and the United States precluded the defendant from raising the purported treaty violation, because he did not have proper standing to raise such an allegation. *United States v. Davis*, 767 F.2d 1025, 1030.