

DRAFT CONVENTION ON THE PROTECTION OF FOREIGN PROPERTY*
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PREAMBLE

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

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

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

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

The States signatory to this Convention HAVE AGREED as follows:

Article 1
Treatment of Foreign Property

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

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

Article 2
Observance of Undertakings

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

Article 3
Taking of Property

* Source: Organisation for Economic Co-operation and Development (1967). *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention* (Paris: OECD) [Note added by the editor].

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

- (i) The measures are taken in the public interest and under due process of law;
- (ii) The measures are not discriminatory; and
- (iii) The measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the property affected, shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the national entitled thereto.

Article 4

Recommendation on Transfers

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

Article 5

Breaches of the Convention

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

Article 6

Derogations

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

- (i) involved in war, hostilities or other grave national emergency due to force majeure or provoked by unforeseen circumstances or threatening its essential security interests; or
- (ii) taken pursuant to decisions of the Security Council of the United Nations or to recommendations of the Security Council or General Assembly of the United Nations relating to the maintenance or restoration of international peace and security.

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

Article 7

Disputes

- (a) Any dispute between Parties as to the interpretation or application of this

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

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

- (i) the Party against which the claim is made has accepted the jurisdiction of that Arbitral Tribunal by a declaration which covers that claim; and
- (ii) the Party of which he is a national has indicated that it will not institute proceedings under paragraph (a) or, within six months of receiving a written request from its national for the institution of such proceedings, has not instituted them.

(c) The declaration referred to in paragraph (b)(i), whether general or particular, may be made or revoked at any time. In respect of claims arising out of or in connection with rights acquired during the period of the validity of such declaration, it shall continue to apply for a period of five years after its revocation.

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

Article 8

Other International Agreements

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

Article 9

Definitions

For the purposes of this Convention:

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

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

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

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

Article 10 Ratification

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

Article 11 Territorial Application

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

Article 12 Coming into Force

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

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

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

Article 13 Termination

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

Article 14

Signature and Accession
(*pro memoria*)

Final Clause
(*pro memoria*)

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ANNEX RELATING TO THE STATUTE
OF THE ARBITRAL TRIBUNAL

1. The Arbitral Tribunal referred to in Article 7 of the Convention shall consist of three persons appointed as follows: one arbitrator shall be appointed by each party to the arbitration proceedings and a third arbitrator, who shall also act as Chairman of the Tribunal (hereinafter sometimes called the "Chairman of the Tribunal"), shall be appointed by agreement of the parties.
2. Arbitration proceedings shall be instituted upon notice by the party instituting such proceedings (whether a Party to the Convention or a national of a Party to the Convention, as the case may be) to the other party. Such notice shall contain a statement setting forth in summary form the grounds of the claim, the nature of the relief sought, and the name of the arbitrator appointed by the party instituting such proceedings. Within 30 days after the giving of such notice, the respondent party shall notify the party instituting proceedings of the name of the arbitrator appointed by the respondent party.
3. If, within 60 days after the giving of notice instituting the arbitration proceedings, the parties shall not have agreed upon a Chairman of the Tribunal, either party may request the President of the International Court of Justice, or if he is unable to act, the Vice-President of the International Court of Justice, to make the appointment. If either of the parties shall fail to appoint an arbitrator, such arbitrator shall be appointed by the Chairman of the Tribunal.
4. In case any arbitrator appointed as provided in this Annex shall resign, die, or otherwise become unable to act, a successor arbitrator shall be appointed in the same manner as herein prescribed for the appointment of the original arbitrator and his successor shall have all the powers and duties of the original arbitrator.
5. The Arbitral Tribunal shall convene at such times and places as shall be fixed by the

Chairman of the Tribunal. Thereafter, the Tribunal shall determine where and when it shall sit.

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

(b) In particular, the Arbitral Tribunal may:

- (i) permit intervention by a Party which considers that it has an interest of a legal nature which may be affected by the decision in the case;
- (ii) consolidate pending proceedings with the agreement, where necessary, of any other Arbitral Tribunal established in accordance with this Annex; and
- (iii) provided that no objection is made by any Party to such proceedings, stay proceedings if other proceedings arising out of the same facts and raising substantially the same issues are pending before any other international Tribunal or Commission.

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

- (i) order that national to give security for costs; or
- (ii) dismiss the claim if, from the statements made by that national to the Tribunal, the institution of the proceedings appears frivolous or vexatious.

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

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

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