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1 Expropriation

A Contracting Party shall not expropriate or nationalize directly or indirectly an investment of an investor of the other Contracting Party except:
(a) for a purpose which is in the public interest,
(b) on a non-discriminatory basis,
(c) in accordance with due process of law, and
(d) accompanied by payment of prompt, adequate and effective compensation.

Sample model clause

Textual Variations

Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given; (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the real value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned in any freely convertible currency accepted by the claimants.

Article 5 Netherlands–Poland BIT (1992).

Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. Such compensation shall be based on the genuine value of the investment or returns expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier, shall be payable from the date of expropriation with interest at a normal commercial rate, shall be paid without delay and shall be effectively realizable and freely transferable.

Article VII(1) Canada–Venezuela BIT (1996).

Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:

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(a) the measures are taken in the public interest and under due process of law;
(b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;
(c) the measures are taken against just compensation.

Article 6 Brazil–Netherlands BIT (1998).

Either Contracting Party may for security reasons or a public purpose, nationalize, expropriate or take similar measures (hereinafter referred to as 'expropriatory measures') against investments investors of the other Contracting Party in its territory. Such expropriatory measures shall be non-discriminatory and shall be taken under due process of national law and against compensation.

Article 4(1) China–Poland BIT (1998).

1. The investments of investors of either Contracting Party, carried out on the territory of the other Contracting Party, shall not be subject to expropriation, nationalization or other measures, equated by its consequences to expropriation (hereinafter referred to as expropriation), with the exception of cases, when such measures are not of a discriminatory nature and entail prompt, adequate and effective compensation.
2. The compensation shall correspond to the market value of the expropriated investments, prevailing immediately before the date of expropriation or when the fact of expropriation has become officially known. The compensation shall be paid without delay with due regard for the interest, to be charged as of the date of expropriation till the date of payment, at the interest rate for three months' deposits in US Dollars prevailing at the London interbank market (LIBOR) plus 1%, and shall be efficiently realizable and freely transferable.

Article 5 Russia–Ukraine BIT (1998).

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ('expropriation'), except:
   (a) for a public purpose;
   (b) in a non-discriminatory manner;
   (c) on payment of prompt, adequate, and effective compensation; and
   (d) in accordance with due process of law and Article 10.5.1 through 10.5.3.
2. The compensation referred to in paragraph 1(c) shall:
   (a) be paid without delay;
   (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('the date of expropriation');
   (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
   (d) be fully realizable and freely transferable.
3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

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4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:
   (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus
   (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.
5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Fifteen (Intellectual Property Rights).

Article 10.6 Oman–US FTA (2006).

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 1 Protocol I to the European Convention on Human Rights (1952).

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 14 African Charter on Human and Peoples' Rights (1986).

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Article 21 American Convention on Human Rights (1987).

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except:
(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law and Article 1105(1); and
(d) on payment of compensation in accordance with paragraphs 2 through 6.

Article 1110(1) North American Free Trade Agreement (1992).

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Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'Expropriation') except where such Expropriation is:
(a) for a purpose which is in the public interest;
(b) not discriminatory;
(c) carried out under due process of law; and
(d) accompanied by the payment of prompt, adequate and effective compensation.

Article 13(1) Energy Charter Treaty (1994).

A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as 'expropriation') except:
a) for a purpose which is in the public interest,
b) on a non-discriminatory basis,
c) in accordance with due process of law, and
d) accompanied by payment of prompt, adequate and effective compensation.

OECD Draft Multilateral Investment Agreement (1998).

Investments by investors of either Contracting State shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry the usual bank interest until the time of payment; it shall be effectively realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization or comparable measure for the determination and payment of such compensation. The legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law.

Article 4(2) German Model BIT (2004).

Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ('expropriation'), except:
(a) for a public purpose;
(b) in a non-discriminatory manner;
(c) on payment of prompt, adequate, and effective compensation; and
(d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).

Article 6(1) US Model BIT (2004) and US Model BIT (2012).

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I INTRODUCTION

A General

The protection against uncompensated expropriation has formed an important aspect of customary international law and is now widely included in IIAs. **1**

Expropriation, as such, is not generally prohibited. Rather, expropriation and state acts and omissions amounting to expropriation are subjected to legality requirements, such as public interest, due process and non-discrimination. Another main condition of legality is the duty to compensate, which is frequently addressed in a detailed fashion in IIAs. **2**

IIAs, both BITs and multilateral investment agreements, contain textual variations with regard to the specific wording describing the notion of expropriation, the legality of expropriation and the standard of compensation. Initially, they were rather short and uniform. Subsequently, various details were added in different 'waves': first, the legality criteria were specified, then the level of compensation, and, finally, IIAs aim at describing more precisely what exactly constitutes 'indirect' expropriation, trying to carve out legitimate regulation. **3**

B Historic Background of Property Protection

Today the protection of foreign investment against uncompensated and/or unlawful expropriation is primarily treaty-based. Most of these rules are historically rooted in the customary international law principles governing the treatment of foreigners/aliens and their property. More recently there has been an evolution of the right to property as a human right enjoyed by all persons and directed also against interference by a person's home state. **4**

1 The International Minimum Standard: The Treatment of Foreigners

The classic authors of public international law, such as Grotius and Emer de Vattel, already considered that the expropriation of foreigners was in principle lawful.[1] However, where it occurred without compensation it led to an unjustified wealth transfer from the home state of the expropriated foreigner to the expropriating state. In addition, property rights of individuals were increasingly regarded as 'vested' or 'acquired rights' which merit special protection under international law. Thus, the traditional international law on the treatment of foreigners required adequate compensation.[2] **5**

These notions led to a rich case law of numerous arbitration bodies, often quasi-institutionalized in the form of so-called Mixed Claims Commissions during the **6**

1 H. Grotius, *The Rights of War and Peace*, Book I, Chapter I, Section 6-10 (1625); E. de Vattel, *The Law of Nations, Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758) 163–4.

2 See I. Brownlie, *Principles of Public International Law* (7th ed., 2008) 533 et seq.

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nineteenth and early twentieth century. They affirmed the principle that a state incurs international responsibility if it expropriates the property of foreign nationals unless such expropriation is for a public purpose, non-discriminatory and accompanied by compensation.[3]

7 While tribunals have insisted on certain requirements, they have also upheld the right of states to expropriate foreign property/investments.[4]

8 This basic premise that expropriation is a sovereign right of states which may be exercised within the limits of international law is still widely accepted in investment arbitration.[5]

9 During the twentieth century, though, the consensus about the prerequisites for lawful expropriation, in particular about the level of compensation due, was eroded.[6]

10 Initially, the notion that states had to conform to certain requirements when they expropriated foreign property, most importantly to pay full or adequate compensation, was widely regarded as an expression of customary international law. The appropriate level of compensation was reflected in the so-called *Hull* formula. It derives from the succinctly formulated demands of US Secretary of State Cordell Hull to his Mexican counterpart Eduardo Hay in 1938 as a response

3 See, e.g., *Rudloff Case* (*US* v. *Venezuela*) (1903) 9 RIAA 244, 250 ('entitling the sufferer to redress, as the taking away or destruction of tangible property; and such an act committed by a government against an alien resident gives, by established rules of international law, the government to which the alien owes allegiance and which in return owes him protection, the right to demand and to receive just compensation.'); *de Sabla Claim* (*US* v. *Panama*) (1933) 6 RIAA 358, 366 ('[A]cts of a government in depriving an alien of his property without compensation impose international responsibility.').

4 *Texaco* v. *Libya*, Award, 19 January 1977 (1978) 17 ILM 1; (1979) 53 ILR 389, para. 59 ('[T]he right to nationalize is unquestionable today. It results from international customary law, established as the result of general practices considered by the international community as being the law.').

5 See, e.g., *Siag* v. *Egypt*, Award, 1 June 2009, para. 428 ('expropriation in and of itself is not an illegitimate act. It is well-accepted that a State has the right to expropriate foreign-owned property. It is equally well accepted, however, that an expropriation is only lawful if certain conditions are met. Several of these requirements have become part of customary international law.'); *Toto Costruzioni* v. *Lebanon*, Decision on Jurisdiction, 11 September 2009, para. 107 ('The authority to expropriate is a typical example of a prerogative that can only be exercised by the State (or by its emanation) as holder of the "*puissance publique*."'; *Bureau Veritas* v. *Paraguay*, Further Decision on Objections to Jurisdiction, 9 October 2012, para. 256 ('an act of expropriation, which by its very nature is conduct that only a State can engage in and which is, almost by definition, an example of the exercise of sovereign authority.'); *Guaracachi* v. *Bolivia*, Award (corrected), 31 January 2014, para. 436 ('The right to expropriate is a sovereign right recognized by international law, subject to certain conditions. Both Parties agree with that statement, which is uncontroversial.'); *Achmea* v. *Slovak Republic [II]*, Award on Jurisdiction and Admissibility, 20 May 2014, paras. 244–8, esp. 245 ('It is true that the exact scope of the requirements which make an expropriation lawful have been hotly debated in the past decades, but the core principle under international customary law has remained untouched, i.e. that a State may expropriate foreign-held assets.').

6 See A. Lowenfeld, *International Economic Law* (2nd ed., 2008) 470 et seq.; see also I. Brownlie, *Principles of Public International Law* (7th ed., 2008) 539 et seq.; C. F. Dugan, D. Wallace, N. Rubins and B. Sabahi, *Investor–State Arbitration* (2008) 429–38.

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to widespread expropriations carried out in the course of the Mexican land reform. In a diplomatic note, Hull stated that

> no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore.[7]

Since the late 1950s, a considerable part of the expropriation debate was conducted within the United Nations (UN) and under the topic of permanent sovereignty over natural resources.[8] **11**

Initially, the United Nations General Assembly (UN GA), dominated by Western states, adopted a series of resolutions which, on the one hand, confirmed the right to expropriate as an expression of the permanent sovereignty over natural resources, while, on the other hand, insisting that such right was dependent upon the observance of certain customary international law prerequisites including the duty to compensate expropriated foreigners. Paragraph 4 of the 1962 UN GA Resolution 1803 on Permanent Sovereignty over Natural Resources provided the classic formulation: **12**

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.[9]

With the rise of the G-77 during the second half of the 1960s, however, developing countries started to dominate the UN GA and influenced the text of subsequent UN GA resolutions in an attempt to establish a 'New International Economic Order'.[10] One central element of this new concept was a sovereign right to expropriate which basically left it to the expropriating state to decide whether and, if so, how to compensate foreign property owners. The 1973 UN GA Resolution 3171 on Permanent Sovereignty over Natural Resources stated **13**

7 G. H. Hackworth, *Digest of International Law, vol. III* (1942) 658–9, § 288 ('The Government of the United States merely adverts to a self-evident fact when it notes that the applicable and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore.').

8 See also N. Schrijver, *Sovereignty over Natural Resources* (1997) 37 et seq.

9 GA Res. 1803 (XVII), UN GAOR, 17th Sess., Agenda Item 39, para. 4, UN Doc. A/RES/1803 (XVII) (1962).

10 See, among others, G. Sh. Varges, *The New International Economic Order Legal Debate* (1983); Th. Oppermann and E.-U. Petersmann (eds.), *Reforming the International Economic Order* (1987); J. Bhagwati (ed.), *The New International Economic Order: The North-South Debate* (1977); R. Rothstein, *Global Bargaining: UNCTAD and the Quest for a New International Economic Order* (1979); C. Murphy, *Emergence of the NIEO Ideology* (1984); K. Sauvant and H. Hasenpflug (eds.), *The New International Economic Order: Confrontation or Cooperation between North and South* (1977); R.-J. Dupuy (ed.), *Le nouvel ordre économique international: aspects commerciaux, technologiques et culturels* (1981).

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> that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures.[11]

14 In a similar way, Article 2(2) of the 1974 Charter of Economic Rights and Duties of States, also a UN GA resolution, provided that

> [e]ach State has the right . . . (c) 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 it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.[12]

15 These conflicting views on the preconditions for expropriation led to a heated political as well as legal debate about the actual status of the law of expropriation. It is accepted that the UN GA does not possess a general law-making power in the field of international economic law and that the voting behaviour of its member states, though possibly an expression of their *opinio juris*, cannot create 'instant custom'.[13] Still, it is widely acknowledged that the broad rejection of the traditional legality requirements coupled with a corresponding expropriation practice of many developing countries since the 1960s eroded the previous consensus and left the customary international law on expropriation in a state of uncertainty.

16 This uncertainty about the customary international law standard of expropriation may have contributed to the rise of IIAs in the field. As *lex specialis*, a BIT provision on expropriation prevails over customary rules.[14]

17 In addition, the widespread practice of similar IIA provisions on expropriation, largely adhering to the traditional legality requirements, may have had an impact on the content of customary international law. It is sometimes argued that the

11 UNGA Res. 3171 (XXVIII), UN GAOR, 287th Sess., para. 3, UN Doc. A/RES/3171 (XXVIII) (1973).
12 UNGA Res. 3281 (XXIX), UN GAOR, 29th Sess., UN Doc. A/9631 (1974).
13 See on the controversial concept of 'instant custom', among others, B. Cheng, 'Custom: The Future of General State Practice in a Divided World' in R. St J. MacDonald and D. M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1983) 513, 532; G. J. H. van Hoof, *Rethinking the Sources of International Law* (1983) 86; P. Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413, 435.
14 *ADM* v. *Mexico*, Award, 21 November 2007, para. 117; *ADC* v. *Hungary*, Award, 2 October 2006, para. 481.

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largely uniform adoption of the *Hull* formula or variations of it may have led to a revival of traditional customary law.[15]

Some tribunals have expressly found that BIT provisions on expropriation may be seen as codifications of customary international law principles.[16] Often, however, their statements are on such a level of abstraction that it would be difficult to ascribe to them the view that custom conforms to the codified standards. **18**

For instance in *Generation Ukraine* v. *Ukraine*[17] an ICSID tribunal stated: **19**

> It is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law.[18]

The tribunal in *Glamis Gold* v. *United States* was of the opinion that '[t]he inclusion in [NAFTA] Article 1110 of the term "expropriation" incorporates by reference the customary international law regarding that subject.'[19] Another tribunal which probably hinted at a codification of custom on expropriation was the ICSID tribunal in *AIG* v. *Kazakhstan*, finding that 'Article III incorporates into the BIT international law standards for "expropriation" and "nationalisation".'[20] The tribunal in *Accession Mezzanine* v. *Hungary* opined that 'UK BITs, including expropriation provisions, have tended to use consistent wording since the early 1970s, trying to invoke but not go beyond customary international law standards.'[21] **20**

The intention to codify custom on expropriation is also evidenced in some BITs: the Oman–US Free Trade Agreement (FTA), for example, explicitly provides in its Annex 10-B that 'Article 10.6.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.'[22] Likewise, the 2012 US Model BIT clarifies in its annex B that Article 6 **21**

15 See B. Kishoiyian, 'The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law' (1994) 14 *Northwestern Journal of International Law & Business* 327–75; M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999) 59; S. Schwebel, 'Investor-State Disputes and the Development of International Law: the Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 ASIL Proc 27; S. Hindelang, 'Bilateral Investment Treaties, Custom and a Healthy Investment Climate – The Question of Whether BITs Influence Customary International Law Revisited' (2004) 5 *Journal of World Investment & Trade* 789–809.

16 See on this issue also J. Alvarez, 'A Bit on Custom' (2009) 42 *NYU Journal of International Law and Politics* 17; P. Dumberry, 'Are BITs Representing the "New" Customary International Law in International Investment Law?' (2010) 28 *Penn State International Law Review* 675; T. Gazzini, 'The Role of Customary International Law in the Field of Foreign Investment' (2007) 8 *Journal of World Investment & Trade* 691.

17 *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, para. 11.3.

18 Ibid., para. 11.3.

19 *Glamis Gold* v. *USA*, Award, 8 June 2009, para. 354.

20 *AIG* v. *Kazakhstan*, Award, 7 October 2003, para. 10.3.1.

21 *Accession Mezzanine* v. *Hungary*, Decision on Respondent's Objection under Arbitration Rule 41(5), 16 January 2013, para. 69 (footnote omitted).

22 Annex 10-B Oman–US FTA (2006).

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'is intended to reflect customary international law concerning the obligation of States with respect to expropriation.'[23]

22 In spite of many controversies, it appears that the requirements of public interest, non-discrimination and probably due process as well as the obligation to compensate, in principle, form part of contemporary customary international law (see *infra* para. 897). Most controversial remains the precise amount of compensation (see *infra* para. 1076).

23 In practice, claims for compensation for expropriated property were often espoused by the owners' home states and joined. In direct state–state negotiations this often led to global settlement agreements providing for the payment of a lump sum by the expropriating state to be distributed to the former property owners by their home state.[24]

24 Only few cases were resolved through direct dispute settlement, usually arbitration, between investors and expropriating states.[25]

25 A close link between state responsibility and expropriation was still evident when in the 1950s the International Law Commission (ILC) started its codification project of customary international law principles on state responsibility. The first drafts of the ILC and its Special Rapporteur clearly focused on expropriation, which was considered to be a paradigmatic case of 'injury to aliens.'[26] In his Fourth Report, the Special Rapporteur concluded that an expropriation of foreigners led to the international responsibility of the expropriating state unless carried out in conformity with certain internationally required conditions, such as 'public utility' or 'public interest', non-discrimination and 'lack of arbitrariness'.[27] The last version of the ILC draft articles before the ILC changed its general approach contained the following provision on expropriation:

> In the case of nationalization or expropriation measures which are of a general nature and which are not directed against a particular person or against particular persons, the State is responsible if the measures are not taken on grounds of

23 Annex B (1) US Model BIT (2012) ('The Parties confirm their shared understanding that: Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.').

24 R. B. Lillich and D. J. Weston, *International Claims: Their Settlement by Lump-Sum Agreements* (1975).

25 S. J. Toope, *Mixed International Arbitration. Studies in Arbitration Between States and Private Persons* (1990).

26 See, in particular, the Special Rapporteur's Fourth Report on State Responsibility, F. V. García-Amador, *Responsibility of the State for injuries caused in its territory to the person or property of aliens – measures affecting acquired rights*, UN Doc. A/CN.4/119, *Yearbook of the International Law Commission* (1959-II). See also L. B. Sohn and R. R. Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 AJIL 545; F. V. Garcia-Amador, L. B. Sohn and R. R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974).

27 F. V. García-Amador, *Fourth Report on State Responsibility*, *Yearbook of the International Law Commission* (1959-II) paras. 42 *et seq*.

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