

DRAFT CONVENTION ON INVESTMENTS ABROAD*
(ABS-SHAWCROSS DRAFT CONVENTION)

Proposals for the negotiation of a multilateral agreement to protect private foreign investment have been made from time to time since the end of the First World War. One of the most significant early efforts was launched by groups of European business people, and lawyers, under the leadership of Hermann Abs, Chairperson of the Deutsche Bank in Germany, and Lord Shawcross, former Attorney-General of the United Kingdom. The initiative began in 1957 when the Society to Advance the Protection of Foreign Investments, an organization of German business people, with headquarters in Cologne, published a draft instrument entitled International Convention for the Mutual Protection of Private Property Rights in Foreign Countries. That version was subsequently revised and, in April 1959, a Draft Convention on Investments Abroad was issued. The Draft Convention, which was under consideration by the Organisation for European Economic Co-operation, was not adopted. The Draft Convention was accompanied by a commentary by the authors. The commentary has not been included in this volume.

The High Contracting Parties:

believing that peace, security, and progress in the world can only be attained and ensured by fruitful co-operation between all peoples on a basis of international law and mutual confidence;

appreciating also the importance of encouraging commercial relations and promoting the flow of capital for economic activity and development; and considering the contribution which may be made towards these-ends by a restatement of principles of conduct relating to foreign investments; have resolved for this purpose to conclude the present Convention.

Article I

Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories shall not in any way be impaired by unreasonable or discriminatory measures.

Article II

Each Party shall at all times ensure the observance of any undertakings, which it may have given in relation to investments made by nationals of any other Party.

Article III

* *Source:* Abs, Herman and Hartley Shawcross (1960). "Draft Convention on Investments Abroad", in "The proposed convention to protect private foreign investment: a round table", *Journal of Public Law* (presently *Emory Law Journal*), vol. 1, Spring 1960, pp. 115-118. [Note added by the editor.]

No Party shall take any measures against nationals of another Party to deprive them directly or indirectly of their property except under due process of law and provided that such measures are not discriminatory or contrary to undertakings given by that Party and are accompanied by the payment of just and effective compensation. Adequate provision shall have been made at or prior to the time of deprivation for the prompt determination and payment of such compensation, which shall represent the genuine value of the property affected, be made in transferable form, and be paid without undue delay.

Article IV

Any breach of this Convention shall entail the obligation to **make** full reparation. The Parties shall not recognise or enforce within **their** territories any **measures** conflicting with the principles of this Convention and affecting the property of nationals of any of the Parties until reparation is made or secured.

Article V

No Party may take measures derogating from the present Convention unless it is involved in war, hostilities, or other public emergency, which threatens its life; and such measures shall be limited in extent and **duration** to those strictly required by the exigencies of the situation. Nothing in this Article shall be construed as superseding the generally accepted laws of war.

Article VI

The provisions of this Convention shall not prejudice the application of any present or future treaty or municipal law under which more favourable treatment is accorded to nationals of any of the Parties.

Article VII

1. Any dispute as to the interpretation or application of the present Convention may, with the consent of the interested Parties, be submitted to an Arbitral Tribunal set up in accordance with the provisions of the Annex to this Convention. Such consent may take the form of specific agreements or of unilateral declarations. In the absence of such consent or of agreement for settlement by other specific means, the dispute may be submitted by either Party to the International Court of Justice.

2. A national of one of the Parties claiming that he has been injured by measures in breach of this Convention may institute proceedings against the Party responsible for such measures before the Arbitral Tribunal referred to in paragraph 1 of this Article, provided that the Party against which the claim is made has declared that it accepts the jurisdiction of the said Arbitral Tribunal in respect of claims by nationals of one or more Parties, including the Party concerned.

Article VIII

If a Party against which a judgement or award is given fails to comply with the terms thereof, the other Parties shall be entitled, individually or collectively, to take such measures as are strictly required to give effect to that judgement or award.

Article IX

For the purposes of this Convention,

a. "nationals" in relation to a Party includes (i) companies which under the municipal

law of that Party are considered national companies of that Party and (ii) companies in which nationals of that Party have directly or indirectly a controlling interest. "Companies" includes both juridical persons recognised as such by the law of a Party and associations even if they do not possess legal personality.

- b. "property" includes all property, rights, and interests, whether held directly or indirectly. A member of a company shall be deemed to have an interest in the property of the company.

Article X

Final clauses relating to ratification, entry into force, accession, deposit, etc.

ANNEX RELATING TO THE ARBITRAL TRIBUNAL

1. The Arbitral Tribunal referred to in Article VII of the Convention shall consist of three persons appointed as follows: one arbitrator shall be appointed by each of the parties to the arbitration proceedings; a third arbitrator (hereinafter sometimes called "the Umpire") shall be appointed by agreement of the parties or, if they shall not agree, by the President of the International Court of Justice, or failing appointment by him, by the Secretary-General of the United Nations. If either of the parties shall fail to appoint an arbitrator, such arbitrator shall be appointed by the Umpire. In case any arbitrator appointed in accordance with this Article shall resign, die, or 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 such successor shall have all the powers and duties of such original arbitrator.
2. Arbitration proceedings may 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 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 adverse party shall notify the party instituting proceedings of the name of the arbitrator appointed by such adverse party.
3. If, within 60 days after the giving of such notice instituting the arbitration proceedings, the parties shall not have agreed upon an Umpire, either party may request the appointment of an Umpire as provided in, Article 1 of this Annex.
4. The Arbitral Tribunal shall convene at such time and place as shall be fixed by the Umpire. Thereafter, the Arbitral Tribunal shall determine where and when it shall sit.
5. Subject to the provisions of this Annex and except as the parties shall otherwise agree, the Arbitral Tribunal, shall decide all questions relating to its competence and, shall determine its procedure and all questions relating to costs. All decisions of the Arbitral Tribunal shall be by majority vote.
6. The Arbitral Tribunal shall afford to all parties a fair hearing and shall render its award in writing. Such award may be rendered by default. An award signed by the majority of the Arbitral Tribunal shall constitute the award of such Tribunal. A signed counterpart of the award shall be transmitted to each party. Any such award rendered in accordance with the provisions of this Annex shall be final and binding upon the parties and shall be published. Each party shall abide by and comply with any such award rendered by the Arbitral Tribunal.

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