

## Combating Trade Secret Theft by Foreign State-Owned Entities: An International Law Approach

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**COMBATING TRADE SECRET THEFT BY FOREIGN STATE-OWNED ENTITIES:  
AN INTERNATIONAL LAW APPROACH**Griffin M. Barnett\*<sup>1</sup>

## ABSTRACT

Misappropriation by foreign state-owned entities, particularly Chinese state-owned enterprises, of U.S.-owned trade secrets is a growing problem. For jurisdictional reasons, traditional legal means of stopping this activity have generally failed. This Article presents an international law strategy for combating trade secret theft by foreign state-owned enterprises. First, this Article argues that the activities of state-owned enterprises are attributable to the State under international law. Second, this Article argues that trade secrets are a form of intellectual property, and as property, State expropriation requires compensation under international law. Thus, the Article argues that misappropriation of trade secrets by foreign state-owned enterprises constitutes an act of State expropriation requiring compensation under international law. Therefore, to combat this problem, the United States could bring a case before the International Court of Justice against China (or any other State where such a practice is occurring) to seek compensation from the State on behalf of U.S. businesses whose trade secrets have been misappropriated by a foreign state-owned enterprise while the business was operating in the foreign State.

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## INTRODUCTION

Trade secrets are a form of intellectual property comprising of confidential information, which provides an enterprise a competitive advantage, the unauthorized use of which by persons other than the holder is regarded as an unfair practice and a violation of the trade secret.<sup>2</sup> United States businesses are reportedly dealing with “rampant state-supported theft of trade secrets” in China.<sup>3</sup> Business groups have said that China maintains an “extensive web of discriminatory policies that prevent U.S. companies from making additional sales and investments in the world’s second-largest economy.”<sup>4</sup> One such discriminatory policy is that joint ventures are required between a foreign (non-Chinese) investor and a Chinese entity in certain “restricted” sectors and industries.<sup>5</sup> These “restricted” sectors and industries include certain farming, forestry, animal husbandry and fishery industries; mining industries; manufacturing industries; production and supply of power, gas and water industries; communication and transportation, storage, post and telecommunication services industries; wholesale and retail trade industries; banking and insurance industries; real estate industries; leasing and commercial service industries; scientific research and technical services industries and geological prospecting; irrigation, environment and public utilities management; education; public health, sports and social welfare industries; and art, sport and entertainment industries.<sup>6</sup>

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<sup>2</sup> See World Intellectual Property Organization (WIPO), *What is a Trade Secret?*, [http://www.wipo.int/sme/en/ip\\_business/trade\\_secrets/trade\\_secrets.htm](http://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm) (last visited Nov. 28, 2012).

<sup>3</sup> See Doug Palmer, *Theft of Trade Secrets Worsening in China - U.S. Business*, REUTERS, Oct. 3, 2012, <http://www.reuters.com/article/2012/10/03/us-usa-china-tradesecrets-idUSBRE89211920121003> (quoting a U.S. industry official). While theft of U.S. trade secrets doubtlessly takes place in other countries, this Article will focus on China – where such activity is most prevalent. The analytical framework presented in this Article, however, could be applicable in any country where state-owned enterprises misappropriate U.S. trade secrets.

<sup>4</sup> See *id.*

<sup>5</sup> See U.S.-China Business Council, *Equity Joint Venture Fact Sheet*, 1 (2011), <https://www.uschina.org/public/documents/2011/02/equity-joint-venture-fact-sheet-2011.pdf>.

<sup>6</sup> See Decree of the State Development and Reform Commission (promulgated by the Ministry of Commerce of the People’s Rep. of China, Oct. 31, 2007) (specifying each particular industry within each sector category that requires an equity or contractual joint venture).

While China's laws regarding joint ventures are less restrictive today than they once were,<sup>7</sup> joint ventures are generally unpalatable to foreign companies setting up operations in China unless they are seeking to operate in more remote provinces or plan to operate in one of the aforementioned sectors that legally require a joint venture partner.<sup>8</sup> Additionally, foreigners commonly enter into a joint venture because "they lack sufficient knowledge of China to go it alone, or don't have the funds to staff an independent company in the country."<sup>9</sup> Thus, though Chinese law permits independent foreign-owned ventures in certain industries, nearly a third of foreign business operations in China continue to utilize the joint venture model.<sup>10</sup>

Through the joint venture, the U.S. business is either forced to share proprietary or trade secret information with the Chinese company or is made vulnerable, as a result of this system, to trade secret theft.<sup>11</sup> Once the Chinese counterpart has acquired this valuable information from the U.S. partner, it often abandons the joint venture and practices the business independently, preventing the U.S. entity from effectively practicing its business in China.<sup>12</sup>

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<sup>7</sup> Dan Harris, *Joint Venture Jeopardy*, WALL ST. J., June 25, 2007, <http://online.wsj.com/article/SB118272173861246378.html> (discussing a joint venture between French beverage maker Groupe Danone and Chinese partner Wahaha begun in 1996). Prior to a 2001 revision, China's law on Chinese-Foreign Joint Ventures "mostly prohibited foreign companies from setting up shop alone."

<sup>8</sup> *See id.*

<sup>9</sup> *Id.*

<sup>10</sup> *See* Law of the People's Rep. of China on Chinese-Foreign Joint Ventures (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2001, effective Mar. 15, 2001); Harris, *supra* note 7 (noting that 27% of new foreign-invested businesses used the joint venture structure in 2006).

<sup>11</sup> *See* Center for Responsible Enterprise and Trade (CREATE), *Trade Secret Theft: Managing the Growing Threat in Supply Chains 3* (2012) [hereinafter CREATE Report] ("In countries with a weak rule of law, trade secret theft is so pervasive and so clearly a part of a strategy in certain intellectual property-intensive industries that supply chains in operation in those countries inevitably create vulnerabilities and access points for theft of trade secrets."); Tom Barkley, *US Grapples With Growing Threat From Trade Secret Theft*, DowJones NewsPlus, May 1, 2012, <http://www.djnewsplus.com/rssarticle/SB133587487568621636.html> (noting that the Obama administration has raised the issue of trade secret theft with China and other countries that present challenges like investment policies that compel technology transfers and "condition market access on the sharing of sensitive information [which] leave[s] companies vulnerable to trade secret theft").

<sup>12</sup> *See State-Owned Enterprises: The State Advances*, THE ECONOMIST, Oct. 12, 2012, <http://www.economist.com/node/21564274> ("American firms grouse that in markets such as electric cars, foreigners are strong-armed verbally by officials into conceding intellectual property to joint-venture partners."). For example, after General Motors began preparations to sell its plug-in hybrid vehicle, the Volt, in China, the Chinese government refused to allow the Volt to qualify for consumer subsidies totaling up to \$19,300 per car unless GM

Many of these Chinese enterprises are state-owned enterprises (“SOEs”).<sup>13</sup> Actual control by the State of the SOE may vary, such that the State may exert more control over SOEs in industries which it seeks to promote, and less control in other industries which are less critical in the State economic plan.<sup>14</sup> While certain remedies to trade secret theft exist under U.S. law, these often cannot reach wrongful activity that takes place entirely within a foreign jurisdiction and where the products of such trade secret theft are not imported into the U.S.<sup>15</sup> The only alternative, then, is to conduct legal proceedings through the judicial system of the country where the trade secret theft has occurred – which has the potential to be unreliable or biased against the foreign litigant, and, in cases where the foreign litigant prevails, may provide inadequate

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agreed to transfer engineering secrets to a joint venture with a Chinese automaker. CREATE Report, *supra* note 11, at 19.

<sup>13</sup> See CREATE Report, *supra* note 11, at 19 (“There is also evidence that certain Chinese government officials and state-owned enterprises (SOEs) have been involved in trade secret theft.”).

<sup>14</sup> See *State-Owned Enterprises: The State Advances*, *supra* note 12 (“Though fewer in number, today’s SOEs are more powerful than ever. One reason is that they can be vast . . . and so their market power is often greater in a given industry.”). Their shrinking number is the result of a concerted effort to consolidate disparate SOEs into national champions in a range of “strategic industries”, which range from telecoms to shipbuilding.”).

<sup>15</sup> See Economic Espionage Act, 18 U.S.C. § 1831 (1996) (“Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly . . . (1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret ; (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret; (3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization . . . shall [if an individual] be fined not more than \$500,000 or imprisoned not more than 15 years, or both . . . [or, if an organization] . . . shall be fined not more than \$10,000,000.”); *id.* § 1832 (Whoever, with intent to convert a trade secret, that is related to or included in a product that is produced for or placed in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will , injure any owner of that trade secret, knowingly . . . (1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information; (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information; (3) receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization . . . shall [if an individual] be fined under this title or imprisoned not more than 10 years, or both . . . [or, if an organization] . . . shall be fined not more than \$5,000,000.”); 19 U.S.C. § 1337(a)(1)(A) (1930) (prohibiting “u[n]fair methods of competition and unfair acts in the importation of articles . . . into the United States, . . . the threat or effect of which is . . . to destroy or substantially injure an industry in the United States”); *TianRui Group Co. v. Int’l Trade Comm.*, 661 F.3d 1322, 1326-31 (Fed. Cir. 2011) (holding that the ITC has the authority, pursuant to 19 U.S.C. § 1337(a)(1)(A) to ban importation of goods manufactured in China using “unfair methods of competition” including misappropriation of trade secrets, where the importation could harm a U.S. company). See also Steven E. Feldman & Sherry L. Rollo, *Extraterritorial Protection of Trade Secret Rights in China: Do Section 337 Actions at the ITC Really Prevent Trade Secret Theft Abroad?*, 11 J. Marshall Rev. Intell. Prop. L. 523 (2012) (concluding that Section 337 actions are “powerless to prevent the exploitation of the trade secret abroad and ultimately the loss of the trade secret both abroad and in the United States”).

remedies.<sup>16</sup> In circumstances where the entity conducting the trade secret theft is state-owned or controlled, however, there may be an alternative strategy: suing the State in an international court for wrongful expropriation of property.

This Article will explore the viability of this strategy by examining whether trade secret theft or other interference with U.S.-owned intellectual property rights by state-owned enterprises may be attributed to the State under international law.<sup>17</sup> In answering this question, this Article will first conduct a broad analysis of whether acts of a state-owned enterprise may be attributed to the State under international law.<sup>18</sup> Second, this Article will examine whether trade secret theft constitutes an act of expropriation of property requiring a remedy under international law.<sup>19</sup> This Article will argue that trade secret misappropriation by state-owned enterprises is (1) attributable to the State and (2) requires compensation by the State under international law.<sup>20</sup>

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<sup>16</sup> See George O. White III, *Navigating the Cultural Malaise: Foreign Direct Investment Dispute Resolution in the People's Republic of China*, 5 Transactions: The Tennessee Journal of Business Law 55, 71 (2003) (noting that "bias against foreigners in the Chinese court system is commonplace"); see also Kristina Sepetyš & Alan Cox, *Intellectual Property Rights Protection in China: Trends in Litigation and Economic Damages*, in Topics in Law and Economics in China 2 (2009), [http://www.ipeg.eu/wp-content/uploads/NERA-IP-Protection\\_China\\_2009.pdf](http://www.ipeg.eu/wp-content/uploads/NERA-IP-Protection_China_2009.pdf) ("[U]nder the administrative systems established in China, penalties and fines for IPR violations generally do not appear to provide adequate deterrence to would-be infringers.").

<sup>17</sup> See *infra* Part II.

<sup>18</sup> See *infra* Part II.A.

<sup>19</sup> See *infra* Part II.B.

<sup>20</sup> See *infra* Part III.

I. ANALYSIS

A. *Is a State responsible for the acts of state-owned enterprises of the State under international law?*<sup>21</sup>

The law of state responsibility is, to a large part, reflected in the work of the International Law Commission of the United Nations, which adopted in 2001 its final version of the Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”).<sup>22</sup> Though not a treaty in force, the ILC Articles “accurately reflect customary international law on state responsibility.”<sup>23</sup> The ILC Articles delineate several circumstances under which the acts of state-owned enterprises may be attributed to the State under international law.

ILC Articles 4, 5, 8 are pertinent to attribution. Article 4 provides,

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.<sup>24</sup>

Article 5 provides,

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.<sup>25</sup>

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<sup>21</sup> The answer to this question is important because many international courts, such as the International Court of Justice, only have jurisdiction over State parties, and not over private individuals or entities. *See* Statute of the International Court of Justice Art. 34, ¶1 (“Only states may be parties in cases before the Court.”); *id.* Art. 35, para. 1 (“The Court shall be open to the states parties to the present Statute.”). The ICJ itself has reiterated that “[o]nly States may apply to and appear before the [ICJ].” *See* International Court of Justice, “Contentious Jurisdiction,” <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1> (last visited Sept. 28, 2012). Thus private parties, including corporate entities, are excluded from ICJ proceedings – either as claimants or respondents. Therefore, in order to establish jurisdiction in the ICJ the acts of a state-owned entity must be attributable to the State.

<sup>22</sup> *See* Int’l Law Commission [ILC], *Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at <http://www.unhcr.org/refworld/docid/3ddb8f804.html> [hereinafter “ILC Articles”]; Kaj Hobér, *State Responsibility and Attribution*, 2008 THE OXFORD HANDBOOK OF INT’L INVESTMENT LAW 550.

<sup>23</sup> *See* Michael Feit, *Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 BERKELEY J. OF INT’L L. 142, 146 (2010) (quoting Hobér, *supra* note 23, at 553); *see also* *Noble Ventures, Inc. v. Romania*, Award, ICSID Case No. ARB/01/11, ¶ 69 (Oct. 12, 2005) (“While [the ILC] Articles are not binding, they are widely regarded as a codification of customary international law.”).

<sup>24</sup> ILC Articles, art. 4(1).

<sup>25</sup> ILC Articles, art. 5.

Finally, Article 8 provides, “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.”<sup>26</sup>

Articles 5 and 8 are the most pertinent with regard to State attribution for the acts of state-owned enterprises.<sup>27</sup> The ILC's Commentary to Article 5 notes that Article 5

[I]s intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.<sup>28</sup>

The Commentary further notes:

Beyond a certain limit, what is regarded as “governmental” depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. . . . For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. . . . The internal law in question must specifically authorize the conduct as involving the exercise of public authority. . . .<sup>29</sup>

The Commentary to Article 8 notes that “[a]s a general principle, the conduct of private persons or entities is not attributable to the State under international law.”<sup>30</sup> Acts and omissions of a state-owned entity that is not a state organ cannot be automatically attributed to the state; rather, every conduct for which the investor considers the state to be responsible has to be

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<sup>26</sup> ILC Articles, art. 8.

<sup>27</sup> Article 4 will not be discussed at length here because Article 4 essentially provides that the government or ruling authority of a State is synonymous with “the State” as a juridical entity. State-owned enterprises rarely if ever act as purely governmental or ruling authorities – insofar as possessing direct legislative, executive, or judicial powers of government. The official conduct of a government clearly gives rise to State responsibility for such conduct under international law. See, e.g., *Case Concerning Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25) available at [http://www.worldcourts.com/pcij/eng/decisions/1925.08.25\\_silesia.htm](http://www.worldcourts.com/pcij/eng/decisions/1925.08.25_silesia.htm) (requiring compensation from the Polish Government to German nationals for the expropriation by a delegate of the Polish Government of a nitrate factory owned by the German nationals in Chorzow, Poland).

<sup>28</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l Law Comm'n 87, at 42, U.N. Doc. A/56/10 (Part 2) available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [hereinafter “ILC Commentary” or “Commentary”].

<sup>29</sup> *Id.* at 43.

<sup>30</sup> *Id.* at 47.



independently examined and it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.<sup>31</sup> Thus, the Commentary states that “[c]ircumstances may arise . . . where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State.”<sup>32</sup> Specifically with regard to state-owned enterprises, the Commentary states:

Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the “corporate veil” is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5 . . . . On the other hand, where there was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.<sup>33</sup>

As the Commentary illustrates, while under customary international law the conduct of corporate entities, though owned by the State, is not generally attributable to the State, this rule clearly has several exceptions under which the conduct of a state-owned enterprise may be attributed to the state. First, the conduct of a state-owned enterprise may be attributed to the State where the corporate entity was constructed merely as a vehicle or device for fraud or evasion. Second, the conduct of a state-owned enterprise may be attributed to the State where the state-owned enterprise exercises elements of governmental authority or a public power. Finally, the conduct of a state-owned enterprise may be attributed to the State where the State was using its ownership interest in or control of the enterprise specifically in order to achieve a

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<sup>31</sup> *Id.* at 48.

<sup>32</sup> *Id.* at 47.

<sup>33</sup> *Id.* at 48 (internal citations omitted).

particular result. Each of these grounds for attributing the conduct of state-owned enterprises to the State is discussed more fully below.

1. *The conduct of a state-owned entity may be attributed to the State where the corporate veil was constructed merely as a device or vehicle for fraud or evasion*

The conduct of the SOE may be attributed to the state if the corporate veil is merely a device or vehicle for fraud or evasion.<sup>34</sup> In *Barcelona Traction, Light and Power Company*, the ICJ found that “‘lifting the corporate veil’ or ‘disregarding the legal entity’ has been found justified and equitable in certain circumstances or for certain purposes, for instance to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.”<sup>35</sup>

These principles were reaffirmed in *Tokios Tokeles v. Ukraine*, in which the Tribunal noted that the International Court of Justice in *Barcelona Traction* did not attempt to define the precise scope of conduct that might prompt a tribunal to pierce the corporate veil, but that “the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law[.]” and that “[t]he wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser,

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<sup>34</sup> See ILC Commentary, at 48.

<sup>35</sup> *Barcelona Traction, Light and Power Company, Limited*, (Belg. v. Spain), 1970 I.C.J. 3, 39 (Feb. 5). *Barcelona Traction* involved the question of whether it was appropriate under international law to lift the corporate veil to allow a state, Belgium, to intervene on behalf of its nationals, who were shareholders of a Canadian corporation operating in Spain, against actions by Spanish authorities which ultimately bankrupted the corporation. The ICJ stated that the general rule of international law authorizes the state, in which the company is legally organized, alone to make a claim – in this case, Canada – unless a bilateral or multilateral agreement exists between the state seeking to make the claim (in this case, Belgium) and the respondent (in this case, Spain) providing such a right to bring the claim. See *id.* at 46-47 (Feb. 5, 1970). The ICJ did not further elaborate on other circumstances under which it would be appropriate, under international law, to pierce the corporate veil so as to attribute the conduct of the corporation to the state such that the ICJ would have jurisdiction over that state as a respondent.

or to prevent the evasion of legal requirements or of obligations.”<sup>36</sup> The Tribunal, however, did not further clarify the requirements of this principle under international law after having found that the case did not present any conduct, which constituted an abuse of legal personality.<sup>37</sup>

Thus, the mere fact that the state initially establishes a corporate entity, whether by a special law or otherwise, is not in and of itself a sufficient basis for the attribution to the State of the subsequent conduct of that entity, but the corporate veil may be lifted under certain circumstances to prevent the misuse of such separate legal personality by the State.

2. *The conduct of a state-owned entity may be attributed to the State where the state-owned enterprise exercises elements of governmental authority or a public power within the meaning of ILC Article 5*

The conduct of a state-owned enterprise may be attributed to the state if the state-owned enterprise exercises elements of governmental authority or a public power within the meaning of ILC Article 5.<sup>38</sup>

*a. Iran-U.S. Claims Tribunal Cases*

For example, in *SEDCO, Inc. v. National Iranian Oil Company*, SEDCO, a U.S.-based oil refining company sued the National Iranian Oil Company (“NIOC”) and the Iranian government in the Iran-U.S. Claims Tribunal to recover the value of expropriated oil rig equipment during the nationalization of Iranian oil in the 1970s.<sup>39</sup> The Tribunal held that insofar as the taking was attributable to the government of Iran, compensation was due under the terms

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<sup>36</sup> See *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, 2005, Decision on Jurisdiction, ¶54 (Apr. 29, 2004), [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&action%20Val=showDoc&docId=DC639\\_En&caseId=C220](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&action%20Val=showDoc&docId=DC639_En&caseId=C220) (quoting *Barcelona Traction* at 39) (internal quotation marks omitted).

<sup>37</sup> See *id.* ¶ 56; see also Feit, *supra* note 23, at 151.

<sup>38</sup> See ILC Commentary, at 48.

<sup>39</sup> See *SEDCO, Inc. v. National Iranian Oil Company*, 15 Iran-U.S. Cl. Trib. Rep. 23, 1987 WL 503885 at \*7 (“There is evidence in the record suggesting that the taking of the rigs may have been part of broader Government policies nationalizing the oil drilling industry, thus amounting in effect to an expropriation of the rigs by Iran.”).

of the Treaty of Amity, Economic Relations, and Consular Rights between the U.S. and Iran,<sup>40</sup> but that “[t]o the extent the taking here alleged is seen as a non-governmental appropriation, general principles of commercial law then become controlling.”<sup>41</sup> The Tribunal found that “[s]ince NIOC clearly is a controlled entity under the Claims Settlement Declaration we need not find that the Government of Iran itself expropriated the rigs in order to grant Claimant compensation for the loss of the rigs.”<sup>42</sup>

Similarly, in *International Technical Products Corporation v. Government of the Islamic Republic of Iran*, International Technical Products Corporation (ITPC) sought to recover compensation for, *inter alia*, the expropriation of real property – namely a building containing eight apartments located in Tehran – by the Government of Iran.<sup>43</sup> The Tribunal’s statement regarding government attribution for the expropriation is worth quoting in full:

This claim is directed against the Government of Iran on the basis of an allegation of expropriation or taking in violation of international law. It is uncontested that the alleged taking of the building did not occur through formal expropriation. This, however, does not exclude the possibility of an expropriation having taken place. In other cases the Tribunal has ruled “that a taking of property may occur under international law even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of property.” Harza Engineering Company and The Islamic Republic of Iran, Award No. 19-98-2 at 9 (30 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 499, 504. A basic condition for a finding of expropriation through “unreasonable interference” is that such interference be attributable to the Government. In the present case it is Bank Tejarat that took control of the building and ultimately became its legal owner. To find the Government liable would presuppose either (1) that when acquiring the property Bank Tejarat itself acted in the capacity of a state organ [citing ILC Article 5], or (2) that the Government or one or another of its organs was an accessory to the transfer of the property. Bank Tejarat is a government owned bank with a separate legal personality. Although in some respects it may be said to perform governmental functions, i.e., to be a “state organ,” for the most part it appears to act in a private commercial capacity. One normally would assume that when acquiring real property Bank Tejarat acts in the latter role. In the present case the evidence does not suggest that Bank Tejarat when taking possession of the building acted on instructions of the

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<sup>40</sup> Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899, 284 U.N.T.S. 93.

<sup>41</sup> See *SEDCO* at \*4.

<sup>42</sup> *Id.* at \*7 (noting that “NIOC played a major role in implementing significant economic and political policies of the Government” and that “the Government had expressly announced its intention to nationalize the drilling industry, and had formed the National Iranian Drilling Company to take over the work formerly performed by SEDCO”).

<sup>43</sup> See *Int’l Tech. Prods. Corp. v. Gov’t of the Islamic Republic of Iran*, 9 Iran-U.S. Cl. Trib. Rep. 206, 1985 WL 324064 at \*16 (alleging “the building was appropriated through actions of Bank Tejarat with ‘the formal approval and active participation of the Government of the Islamic Republic of Iran . . . .’”).

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Government or otherwise performed governmental functions. Therefore, even if it were found that the Bank came into possession of the building in an illegal manner, this would not automatically establish responsibility of the Government under international law. Rather it must be established additionally that some other government organ (acting in that capacity) through acts or omissions participated in the transfer of the property to Bank Tejarat, thereby depriving Claimants of their property in violation of international law. . . . On balance the Tribunal is not convinced that acts or omissions on the part of the Iranian Government arguably engaging its international responsibility occurred within the period necessary to our jurisdiction.<sup>44</sup>

Though the Tribunal ultimately found that the expropriation by Bank Tejarat was not attributable to the Government of Iran, it clearly enunciated the possibility of state attribution for the acts of state-owned entities where there is evidence that the entity, in conducting the act in question, is performing a public or governmental function or is otherwise operating as a state organ.

Similarly, in *Flexi-Van Leasing, Inc. v. Government of the Islamic Republic of Iran*, U.S.-based Flexi-Van sued the Iranian government in the Iran-U.S. Claims Tribunal to recover the value of leasing agreements for marine transport equipment that it had made with Star Line and Iran Express – two companies involved in the shipping business in Iran, control of which was overtaken by the government of Iran between 1979 and 1980.<sup>45</sup> The government of Iran argued that “[e]ven if [it] had expropriated the two companies, only the position of the shareholders would have changed and not the company’s juridical personality. These juridical persons were themselves liable for their debts and obligations, not the Government.”<sup>46</sup> While the Tribunal ultimately concluded that Flexi-Van had not provided sufficient evidence to establish “Government interference of a nature that would constitute an expropriation of the contract rights” between Flexi-Van and Star Line, the Tribunal clarified as follows:

[A]ssumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law . . . . In the present Case, the property, in respect of which the Claimant must establish government interference for its expropriation claim to succeed, are Flexi-Van’s rights under the lease agreements. The mere fact that the Government . . . controls Star Line does not as such encompass an expropriation of the Claimant’s rights that derive from its

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<sup>44</sup> *Int’l Tech. Prods. Corp.*, 9 Iran-U.S. Cl. Trib. Rep., at \*23-4.

<sup>45</sup> See *Flexi-Van Leasing, Inc. v. Government of the Islamic Republic of Iran*, 12 Iran-U.S. Cl. Trib. Rep. 335, 1986 WL 424345, at \*1-3.

<sup>46</sup> *Id.* at \*5.

lease agreements with Star Line. Expropriation of the Claimant's contract rights can only be found in case of interference with these contract rights themselves, and a basic condition for such a finding is that such interference be attributable to the Government.<sup>47</sup>

“To give rise to an expropriation claim this would require that, from the time it came under the control of the [Government], Star Line had acted under orders, directives, recommendations or instructions from the . . . Government when it did not pay rentals or return the leased equipment to the Claimant.”<sup>48</sup> The Tribunal held similarly with regard to Iran Express.<sup>49</sup> The Tribunal concluded:

[T]he Government of Iran is not automatically liable for contractual obligations belonging to a company which is considered to be controlled by it . . . . [] Flexi-Van has failed to present proof of any action of the Government that caused either [Star Line or Iran Express] to breach the lease agreements. Absent such proof, the Government cannot be held liable for breaches of the lease agreements by Star Line and Iran Express.<sup>50</sup>

Though the Tribunal here reached the opposite result of *SEDCO*, and found similarly to *International Technical Products*, it again clearly set forth that the state might be liable for the actions of a state-owned entity if the entity carries out such acts pursuant to governmental authority.

In *Phillips Petroleum Company Iran v. Islamic Republic of Iran*, Phillips sued the Government of Iran for compensation for, *inter alia*, the alleged taking in 1979 of rights under a 1965 contract with the National Iranian Oil Company (“NIOC”) for the exploration and exploitation of the petroleum resources of a certain area offshore in the Persian Gulf.<sup>51</sup> “As the Tribunal has held in a number of cases, expropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether

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<sup>47</sup> *Id.* at \*10. (noting further that “Star Line remained a separate legal entity, and surely did not become an organ or department of the Government”).

<sup>48</sup> *Id.*

<sup>49</sup> *See id.* at \*10 (noting that while “the Tribunal is satisfied that from early 1980 on Iran Express came under Government control[,]” no evidence “demonstrated Government acts unreasonably interfering with Flexi-Van’s contract rights sufficient to constitute an expropriation”).

<sup>50</sup> *Id.* at \*12.

<sup>51</sup> *See Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79, 1989 WL 663903 at \*1.

the expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as the contract rights involved in the present Case.”<sup>52</sup>

The Tribunal stated that it is “clear that NIOC is one of the instruments by which the Government of Iran conducted and currently conducts the country’s national oil policy.”<sup>53</sup> The Tribunal further stated:

International law recognizes that a State may act through organs or entities not part of its formal structure. The conduct of such entities is considered as an act of the State when undertaken in the governmental capacity granted to it under the internal law. See Article 7(2) of the Draft Articles on State Responsibility adopted by the International Law Commission, Yearbook International Law Commission 2 (1975), at p. 60. The 1974 Petroleum Law of Iran explicitly vests in NIOC “the exercise and ownership right of the Iranian nation on the Iranian Petroleum Resources.”<sup>54</sup>

The Tribunal also observed that:

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.<sup>55</sup>

The Tribunal concluded that “where the effects of actions are consistent with a policy to nationalize a whole industry and to that end expropriate particular alien property interests, and are not merely the incidental consequences of an action or policy designed for an unrelated purpose, the conclusion that a taking has occurred is . . . evident.”<sup>56</sup> The Tribunal also noted that the conclusion that the Claimant was deprived of its property by conduct attributable to the Government of Iran, including NIOC, “rests on a series of concrete actions rather than any particular formal decree, as the formal acts merely ratified and legitimized the existing state of

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<sup>52</sup> *Id.* at \*20 (citations omitted).

<sup>53</sup> *Id.* at \*24, n.22 (citing Oil Field of Texas, Inc. and The Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 10-43-FT, 1 Iran-U.S. Cl. Trib. Rep. 347, 1982 WL 229382).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at \*27.

<sup>56</sup> *Id.* (noting that “[a]lthough a government’s liability to compensate for expropriation of alien property does not depend on proof that the expropriation was intentional, there seems little doubt in this Case that the new Islamic Republic intended to bring the [joint agreement between Phillips and NIOC] to an end and to place NIOC fully in charge of all oil production and sales”).

affairs.”<sup>57</sup> This decision demonstrates that where the state-owned enterprise – in this case, NIOC – exercises a public power – in this case, the power to conduct nationalized oil production – the conduct of the enterprise may be attributed to the State – in this case, the Government of Iran.

Similarly, in *Petrolane, Inc. v. Government of the Islamic Republic of Iran*, Petrolane and its subsidiaries sued the Government of Iran for compensation for, *inter alia*, preventing the re-export of an oil production service plant which it claimed “deprived [it] of the effective use, benefit and control of the equipment” such that it constituted an “expropriation for which the Government of Iran bears responsibility.”<sup>58</sup> The Tribunal agreed, finding that “[the] 1974 Petroleum Law of Iran explicitly vests in NIOC the exercise and ownership right of the Iranian nation on the Iranian Petroleum Resources,” that “International Law recognizes that a State may act through organs or entities not part of its formal structure,” and that “[t]he conduct of such entities is considered as an act of the State when undertaken in the governmental capacity granted to it under internal law.”<sup>59</sup> The Government of Iran was thus liable for NIOC’s interference with Petrolane’s ability to re-export its oil production equipment, which the Tribunal found constituted an expropriation of the equipment requiring just compensation.<sup>60</sup>

#### *b. ICSID Cases*

The International Centre for Settlement of Investment Disputes (“ICSID”) has explicitly asserted jurisdiction over states for the actions of its state-owned enterprises. Under article 25(1) of the ICSID Convention, the jurisdiction of ICSID only extends to disputes between a

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<sup>57</sup> *Id.* at \*27.

<sup>58</sup> *See Petrolane, Inc. v. Government of the Islamic Republic of Iran*, 27 Iran-U.S. Cl. Trib. Rep. 64, 1991 WL 859023, at \*24.

<sup>59</sup> *Id.* at \*24 n.9.

<sup>60</sup> *See id.* at \*24-25.



contracting state and a national of another contracting state.<sup>61</sup> Under the ICSID Convention, one party to a dispute must be a state and the other a private party that is a national of another contracting state.<sup>62</sup> Generally, the investor will seek to submit its claim to ICSID if he believes that the courts in the host state will not adjudicate the dispute impartially and independently.<sup>63</sup> Thus, in order to satisfy the jurisdictional requirements of ICSID, the investor must demonstrate that the State is responsible for the acts of the foreign entity giving rise to the claims.<sup>64</sup>

In *Maffezzini v. Kingdom of Spain*, ICSID determined that the private investor must only make a *prima facie* case that the acts of the state-owned entity are attributable to the State in order to establish jurisdiction over the State, and that each act of the state-owned entity must be examined individually to determine whether the State is ultimately liable for the act.<sup>65</sup> The “*prima facie* test” has also been applied in non-ICSID tribunals.<sup>66</sup>

In *Maffezzini*, The ICSID Tribunal applied both a “structural test” and a “functional test” to determine whether SODIGA, the corporation involved in the dispute, was a state entity acting on behalf of the State in committing the alleged wrongful acts.<sup>67</sup> Under the structural test, the Tribunal examined SODIGA’s legal personality as established under internal law. The Tribunal

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<sup>61</sup> See International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25(1), Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter “ICSID Convention”].

<sup>62</sup> See Feit, *supra* note 23, at 144.

<sup>63</sup> *Id.* at 143.

<sup>64</sup> See *id.* (noting that “the substantive question of direct state responsibility has important strategic and practical ramifications. Against this background it becomes clear why the investor will often argue that the host state itself is responsible for the breach of contract committed by one of its entities. The respondent state, in turn, can be expected to deny its responsibility by pointing out that the contract was concluded with an entity which enjoys its own legal personality.”).

<sup>65</sup> See *Maffezzini v. Kingdom of Spain*, Award on Jurisdiction, ICSID Case No. ARB/97/7, ¶ 89 (Jan. 25, 2000); see also *CMS Gas Transmission Company v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/01/8, ¶¶ 22, 35 (July 17, 2003) (using the *prima facie* test to establish jurisdiction over a state for actions of its state-owned enterprise); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on Jurisdiction, ICSID Case No. ARB/02/6, ¶¶ 26, 157 (Jan. 29, 2004) (same); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, Decision on Jurisdiction, ICSID Case No. ARB/02/13, ¶ 151 (Nov. 9, 2004) (same); Feit, *supra* note 23, at 145.

<sup>66</sup> See, e.g., *United Parcel Service v. Canada*, Award on Jurisdiction, UNCITRAL (NAFTA), ¶¶ 30-37 (Nov. 22, 2002).

<sup>67</sup> See *Maffezzini*, ¶ 46.

found that under the structural test, SODIGA was in a “mixed category of public entities with private law regimes,” which although governed domestically by private law, “could exercise some public functions under public law.”<sup>68</sup> Despite this mix of authority and function, the

Tribunal stated:

The structural test, however, is but one element to be taken into account. Other elements to which international law looks are, in particular, the control of the company by the State or State entities and the objectives and functions for which the company was created. As the Tribunal emphasized in its Decision on jurisdiction, many of these elements point in the instant case to its public nature . . . . [In determining whether the acts and omissions of the Complainant are attributable to the State, the Tribunal] must establish whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the Spanish State, while governmental acts should be so attributed.<sup>69</sup>

Thus, the Tribunal also applied a “functional test” under which it examined the actual functions and role of SODIGA. The Tribunal noted that SODIGA was incorporated in 1972 at a time when the Spanish State pursued an active policy of industrial promotion, particularly in depressed areas of the country, and that this policy was specifically designed by the public sector to encourage the industrial development of Spain.<sup>70</sup> In the 1990’s these entities became active participants in a flourishing market economy.<sup>71</sup> The Tribunal found:

While originally a number of SODIGA’s functions were closer to being governmental in nature, they must today be considered commercial in nature. But at the time of transition, there was in fact a combination of both, some to be regarded as functions essentially governmental in nature and others essentially commercial in character. As mentioned above, this is the dividing line between those acts or omissions that can be attributed to the Spanish State and those that cannot. The Tribunal must accordingly categorize the various acts or omissions giving rise to the instant dispute.<sup>72</sup>

While the Tribunal found that neither SODIGO, as a private entity, or the State of Spain was responsible for certain claims alleged by the Complainant, the Tribunal concluded that Spain was responsible for an unauthorized transfer of funds made by SODIGO from

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<sup>68</sup> *Id.* ¶ 48-49.

<sup>69</sup> *Id.* ¶ 50.

<sup>70</sup> *Id.* ¶ 53.

<sup>71</sup> *Id.* ¶ 56.

<sup>72</sup> *Id.* ¶ 57.

the Complainant's bank account.<sup>73</sup> In particular, the Tribunal found that the order to make the transfer was given by a representative of SODIGA working with Mr. Maffezzini, and therefore attributable to SODIGA. The Tribunal then discussed whether such acts should then be attributed to Spain:

Because SODIGA was an entity charged with the implementation of governmental policies relating to industrial promotion, it performed a number of functions not normally open to ordinary commercial companies. Handling the accounts of EAMSA as a participating company, managing its payments and finances and generally intervening on its behalf before the Spanish authorities without being paid for these services, are all elements that responded to SODIGA's public nature and responsibility. Moreover, the manner in which the private banks conducted themselves in this case with regard to the loan, can be explained in large measure only because of their recognition that SODIGA's orders and instructions were entitled to be honored because of the public functions it performed in Galicia . . . . A decision to increase the investment taken not by Mr. Maffezzini but by the entity entrusted by the State to promote the industrialization of Galicia, cannot be considered a commercial activity. Rather, it grew out of the public functions of SODIGA . . . . Because the acts of SODIGA relating to the loan cannot be considered commercial in nature and involve its public functions, responsibility for them should be attributed to the Kingdom of Spain.<sup>74</sup>

As this case demonstrates, ICSID has found that jurisdiction over a State may arise by showing, *prima facie*, state ownership of the foreign enterprise, and that the State may be responsible for the acts of state-owned enterprises where the wrongful act of the enterprise is done in the discharge of a governmental or public function, or in furtherance of a State goal. Other ICSID and non-ICSID arbitral tribunals have also applied these principles, and the principles of the ILC Articles generally, to determine whether the acts of a state organ or of a state-owned entity could be attributed to the state.<sup>75</sup>

Building on the principles discussed in *Maffezzini*, the ICSID Tribunal in *Noble Ventures, Inc. v. Romania*, found that the conduct of state-owned entities involved in the nationalized Romanian steel production industry was attributable to the State of Romania.<sup>76</sup> Specifically, the

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<sup>73</sup> See *id.* ¶¶ 58-83.

<sup>74</sup> *Id.* ¶¶ 78-79, 83.

<sup>75</sup> See Feit, *supra* note 23, at 146 (citing *Noble Ventures, Inc. v. Romania*, Award, ICSID Case No. ARB/01/11, ¶ 69 (Oct. 12, 2005); *Eureko B.V. v. Republic of Poland*, Partial Award and Dissenting Opinion, 33-34 (*ad hoc* arbitration seated in Brussels, Aug. 19, 2005)).

<sup>76</sup> See generally *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005).

dispute arose out of a privatization agreement concerning the acquisition, management, operation and disposition of a steel mill, Combinatul Siderurgic Resita (CSR), located in Resita, Romania.<sup>77</sup> The agreement was made between Noble Ventures and the Romanian State Ownership Fund (SOF), a Romanian “institution of public interest” which had been created in 1992 and had as a function the privatization of Romanian State-owned enterprises.<sup>78</sup> Under the agreement, the SOF transferred the Romanian government’s 95% ownership interest in CSR to Noble Ventures.<sup>79</sup> Several problems arose after the transfer of ownership, including a claim by Noble Ventures that certain measures taken by the SOF and other Romanian entities deprived Noble Ventures of the effective use of its investment, and thus constituted a taking for which just compensation was required.<sup>80</sup> With regard to attribution, Noble Ventures argued that in so far as the purported violations have been committed by the SOF or the Authority for Privatization and Management of the State Ownership (“APAPS”), Romania is responsible because both entities acted as organs of the Romanian State.<sup>81</sup> Noble Ventures asserted that the SOF was “no mere commercial enterprise, but a State agency subordinated directly to the Prime Minister and tasked with the critical public function of transforming Romania’s economy.”<sup>82</sup> The Tribunal found that while not being *de jure* organs of the State, the SOF as well as APAPS “were at all relevant times acting on the basis of Romanian law which defined their competence,” and noted that Article 3(g) of the Privatization Law included SOF in the definition of “empowered public institution.”<sup>83</sup>

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<sup>77</sup> See *id.* at § C.I., ¶ 2.

<sup>78</sup> *Id.*

<sup>79</sup> See *id.* at § C.I., ¶ 2-4.

<sup>80</sup> See *id.* at § C.II., ¶ 24.

<sup>81</sup> *Id.* at § H.I., ¶ 63.

<sup>82</sup> *Id.* at § H.I., ¶ 64.

<sup>83</sup> *Id.* at § H.I., ¶ 70-72.

The Tribunal concluded:

[I]t was not only within the competence of SOF – and APAPS which replaced SOF at the end of 2000 – when acting as the empowered public institution under the Privatization Law, to conclude agreements with investors but also, acting as a *governmental agency*, to manage the whole legal relationship with them, including all acts concerned with the implementation of a specific investment. In the judgment of the Tribunal, no relevant legal distinction is to be drawn between SOF/APAPS, on the one hand, and a government ministry, on the other hand, when the one or the other acted as the empowered public institution under the Privatization Law. . . . All the acts allegedly committed by SOF/APAPS were related to the investment of the Claimant. There is no indication from the parties, and there is no reason to believe, that any act by these institutions was outside the scope of their mandate. Consequently, the Tribunal concludes that SOF and APAPS were entitled by law to represent the Respondent and did so in all of their actions as well as omissions. The acts allegedly in violation of the [Bilateral Investment Treaty between the U.S. and Romania, the “BIT”] are therefore attributable to the Respondent for the purposes of assessment under the BIT.<sup>84</sup>

The Tribunal diverged somewhat, however, from the principle in *Maffezzini* drawing a distinction between commercial and governmental conduct:

[I]n the context of responsibility, it is difficult to see why commercial acts, so called *acta iure gestionis*, should by definition not be attributable while governmental acts, so called *acta iure imperii*, should be attributable. The [ILC Articles] does not maintain or support such a distinction. Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the ILC regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the ILC [ ] Articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor. . . . Accordingly, the Tribunal concludes that the acts of SOF and APAPS which were of relevance in the present case are attributable to the Respondent for the purposes of assessment under the BIT.<sup>85</sup>

The ultimate principle of this case is the same, however: wrongful conduct of an entity empowered by the State to conduct a governmental or public power – in this case, the privatization of the national steel industry – may be attributed to the State for purposes of jurisdiction over and liability of the State for the wrongful conduct.

The cases discussed above thus make clear that under generally accepted principles of customary international law, the actions of a state-owned enterprise may be attributed to the

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<sup>84</sup> *Id.* at § H.I., ¶ 79-80.

<sup>85</sup> *Id.* at § H.I., ¶ 82-83.

State where the state-owned enterprise exercises elements of governmental authority or a public power.

3. *The conduct of a state-owned entity may be attributed to the State where the State was using its ownership interest in or control of the state-owned enterprise to achieve a particular result*

The conduct of a state-owned enterprise may be attributed to the State if the State was using its ownership interest in or control of the state-owned enterprise specifically in order to achieve a particular result.<sup>86</sup> The Commentary elaborates:

It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms “instructions”, “direction” and “control” are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.<sup>87</sup>

*a. Iran-U.S. Claims Tribunal Cases*

Several Iran-U.S. Claims Tribunal cases found that the Government of Iran was responsible for the acts of state-owned entities where the Government instructed, directed, or controlled the SOE in carrying out certain acts of expropriation for which just compensation was required. In *Foremost Tehran, Inc. v. Government of the Islamic Republic of Iran*, Foremost alleged, *inter alia*, expropriation of a 31% equity interest held by certain of the Foremost companies in Sherkat Sahami Labaniat Pasteurize Pak (“Pak Dairy”), an Iranian joint stock company.<sup>88</sup> Specifically, Foremost alleged that starting in late 1978 and acting in concert, various Iranian governmental entities with shares in Pak Dairy implemented a series of decisions, which effectively deprived Foremost of the use and benefit of its 31% interest in the company.<sup>89</sup> The Tribunal noted that “on 14 October 1979, and from that point on, a strong and inexorable

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<sup>86</sup> See U.N. GAOR, 56th Sess., Supp. No. 10, at 48, ¶ 7, U.N. Doc. A/56/10 (2001).

<sup>87</sup> *Id.*

<sup>88</sup> See *Foremost Tehran, Inc. v. Iran*, 10 Iran-U.S. Cl. Trib. Rep. 228, 1986 WL 424309, \*2 (1986).

<sup>89</sup> *Id.* at 5.

shift can be traced in the attitudes of the board of directors, which inclined more and more towards the implementation of the policies of the new Government.”<sup>90</sup> The Tribunal found that:

The only significant act on the part of Pak Dairy’s controlling organs which appears to have been done with the object of discriminating against Foremost was the withholding of declared cash dividends for two successive years. This constituted a serious infringement of Foremost’s right to enjoy the fruits of its holding in Pak Dairy. This is also the only act which can be attributed beyond doubt to the State.<sup>91</sup>

The Tribunal also noted that after a board election during which three directors were replaced with directors representing the Iranian government’s Foundation for the Oppressed, one of the new directors stated, “the main objective [of the company] is . . . to protect the interests of the country . . . and the Board of Directors has done all in its power to achieve this end.”<sup>92</sup> The Tribunal found that because of the control exerted over Pak Dairy by directors that were installed by organs of the Iranian government, the government was responsible for compensating Foremost for lost dividends resulting from the actions of the Pak Dairy board of directors.<sup>93</sup>

In *American Bell International, Inc. v. Islamic Republic of Iran*, American Bell – a subsidiary of AT&T formed to coordinate the modernization of Iran’s military and civilian telecommunications system (the “Seek Switch Program”) – sued the Government of Iran for, *inter alia*, expropriating a bank account jointly held by American Bell and the Telecommunications Company of Iran (TCI) with an Iranian national bank.<sup>94</sup> On August 10, 1980 the Iranian Minister of Post, Telephone, and Telegraph in a letter personally forwarded by a TCI representative to American Bell’s Iranian representative, requested that American Bell

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<sup>90</sup> *Id.* at 12 (noting that on that date, two new members of the Pak Dairy board of directors were elected who were representatives of the Financial Organization, an Iranian governmental organ).

<sup>91</sup> *Id.* at 15.

<sup>92</sup> *Id.* at 14.

<sup>93</sup> *See id.* at 14, 17 (noting that while Foremost still owned 31% of Pak Dairy shares, “[i]t could not, as a minority shareholder, have expected successfully to oppose the trend on the part of the majority towards the adoption of policies in line with those of the new revolutionary Government” and that “[s]uch interference, attributable to the Iranian Government or other state organs of Iran, while not amounting to an expropriation, gives rise to a right to compensation for the loss of enjoyment of the property in question.”).

<sup>94</sup> *See American Bell Int’l, Inc. v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 170, 1986 WL 424339, at \*33 (1986).

transfer the jointly-held funds to a separate TCI account at the bank.<sup>95</sup> The American Bell representative reported that he was informed that “non-compliance with the payment request would have serious personal consequences for [him] and would in any case not stop TCI obtaining access to [American Bell’s] funds.”<sup>96</sup> The representative then authorized the transfer after which time American Bell had no access to the funds.<sup>97</sup> The Tribunal noted:

[I]n the circumstances of the present case there is no need to discuss the applicable law at length. Where, as here, both the purpose and effect of the acts are totally to deprive one of funds without one’s voluntarily given consent, the finding of a compensable taking or appropriation under any applicable law -- international or domestic -- is inevitable, unless there is clear justification for the seizure [for which the Tribunal found there was none].<sup>98</sup>

Thus, in this case, the actions of TCI in expropriating the funds jointly held by American Bell and TCI was attributed to the Government of Iran, since the expropriation occurred at the direction of an Iranian Government official through TCI, an organ controlled by the State, during the term of American Bell’s contractual relationship with the Iranian government.<sup>99</sup>

*b. European Court of Human Rights Cases*

In *X v. Ireland*, the anonymous complainant, who worked as an electrician for “the Board” at various power generating stations in Ireland, sought to hold the Government of Ireland liable pursuant to the European Convention on Human Rights (the “Convention”) for various

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<sup>95</sup> *See id.* at 33.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> The Tribunal indicated that:

[T]he [Statement of Work between American Bell and the Iranian Government] provided that the Government of Iran was to be “responsible for providing the necessary resources, supervision, manpower, timely decisions, approvals or disapprovals, acceptances or non-acceptances, etc., and, in general, for exercising its total authority and effective control over the Seek Switch Program in a manner which enables and facilitates implementation of the Seek Switch Program and of the implementation tasks of this Statement of Work.” The Iranian Government agencies principally involved were the Communications and Electronics Organization of the Ministry of War (“CEO”) and TCI. The former had overall project supervision and control, whereas TCI was responsible for the technical management and review.

American Bell Int’l, Inc. v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 170, 1986 WL 424339, at \*3 (1986).



actions of the Board related to his work and work environment.<sup>100</sup> Though the Commission ultimately found that the Government was not responsible for acts of the Board under the circumstances of this case, it implicitly left open the possibility that a government could be responsible for the acts of such bodies under certain circumstances. The Commission stated:

Whereas the Commission does not find it necessary in the present case to determine generally the question as to what extent acts of the Board or its officers could entail the responsibility of the respondent Government under the Convention; whereas for the present purposes it is sufficient to note that, while the Government exercises, at least, general supervision over the policy of the Board, the day to day administration is solely in the hands of the Board; whereas the Commission considers that the acts alleged by the applicant clearly fall within the domain of such day to day administration for which the Government is not directly responsible . . . .<sup>101</sup>

In *Young, James and Webster v. United Kingdom*, the court found that the United Kingdom was responsible for actions of the nationalized railway body. In that case, the three complainants were former employees of the British Railways Board, who charged that their dismissal from the Board upon refusing to join a trade union violated Articles 9, 10, 11 and 13 of the Convention.<sup>102</sup> The Court stated, “Before the substance of the matter is examined, it must be considered whether responsibility can be attributed to the respondent State, the United Kingdom.”<sup>103</sup> The Government conceded that, should the court find that the termination of the applicants’ contracts of employment constituted a relevant interference with their rights under Article 11<sup>104</sup> and that this interference could properly be regarded as a direct consequence of

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<sup>100</sup> See generally *X v. Ireland*, App. No. 4125/69, 37 Eur. Comm’n H.R. Dec. & Rep. 42 (1971) (summarizing the applicant’s charges at page 190-92).

<sup>101</sup> *Id.* at 218 (implying that had the State exercised more direct control over the day-to-day administration of the Board, or alternatively if the actions of the Board were taken directly pursuant to the general policies governing the Board’s actions, the State may have been responsible for the actions of the Board).

<sup>102</sup> See *Young, James and Webster v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A) at 50 (1981).

<sup>103</sup> *Id.* at 52.

<sup>104</sup> Article 11 is the most relevant provision to the applicants’ claims in this case. Article 11 provides:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the

certain domestic legislation in force that permitted the acts comprising the violation, the responsibility of the respondent State would be engaged by virtue of the enactment of that legislation.<sup>105</sup> More broadly stated, if a violation of one of the rights or freedoms provided under the Convention is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged.<sup>106</sup>

The Court found that “[a]lthough the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis.”<sup>107</sup> The court therefore did not examine whether, as the applicants argued, the State might also be responsible on the ground that it should be regarded as employer or that British Rail was under its control.<sup>108</sup>

While the European Court of Human Rights did not definitively articulate the principle that a State would be responsible for the acts of a state-owned entity where the State exerts control over the entity, the United Nations Human Rights Committee explicitly recognized this principle in *Hertzberg v. Finland*. In that case, five authors complained that censorship of their depictions of homosexual behavior by the Finnish Broadcasting Company violated their right to

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protection of the rights and freedoms of others. This Article (art. 11) shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

*See* Young, James and Webster v. United Kingdom, 44 Eur. Ct. H.R. (ser. A) at 52 (1981). The Court determined that this provision embodies the corollary “negative right” to be able to refuse association or refuse to join trade unions.

<sup>105</sup> *See* Young, James and Webster, at 52.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* (implying, however, that Government control over British Rail could also give rise to State responsibility for the actions of British Rail).

free expression as provided under the Convention.<sup>109</sup> The Committee explicitly found that “[i]n considering the merits of the communication, the Human Rights Committee starts from the premise that the State party is responsible for actions of the Finnish Broadcasting Company (FBC), in which the State holds a dominant stake (90 per cent) and which is placed under specific government control.”<sup>110</sup>

The abovementioned cases make clear that it is a generally recognized principle of customary international law that the conduct of a state-owned or sponsored enterprise may be attributed to the State where the State instructs, directs, and/or controls the entity so as to achieve a particular result.

While state-owned enterprises are generally considered separate legal entities such that their actions are not attributable to the State under international law, there are a number of broad exceptions recognized in customary international law under which the actions of state-owned enterprises may be attributed to the State. As discussed above, the conduct of a state-owned enterprise may be attributed to the State where the state-owned enterprise’s corporate veil was constructed merely as a vehicle for fraud or evasion, where the state-owned enterprise carries out a governmental or public function, or where the State was using its ownership interest in or control of the state-owned enterprise to achieve a particular result. Under these circumstances, certain international legal bodies have explicitly recognized jurisdiction over States for the actions of state-owned entities of the State, and have held the State liable for certain wrongful acts of the state-owned enterprise.

*B. Does trade secret misappropriation constitute an act of expropriation of property requiring compensation under international law?*

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<sup>109</sup> Hertzberg v. Finland, U.N. GAOR, 37th Sess., Supp. No. 40, Annex XIV, Comm. No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124, ¶ 2.1 (1982).

<sup>110</sup> *Id.* at ¶ 9.1.

### *1. Compensation for Expropriation of Property*

As alluded to in earlier sections of this Article, where a State expropriates foreign-owned property, it is required to pay “just compensation” under principles of customary international law.<sup>111</sup> In the context of international law, “property” refers to both tangible and intangible property.<sup>112</sup> In *German Interests in Polish Upper Silesia – the Chorzow Factory* case– the Permanent Court of International Justice, the predecessor to the International Court of Justice, found that the seizure by the Polish government of a factory plant and machinery was also an expropriation of the closely interrelated patents and contracts of the management company, although the Polish government at no time claimed to expropriate these.<sup>113</sup> To resolve this dispute, the court interpreted Article 6 of the Geneva Convention Concerning Upper Silesia which provided:

Poland may expropriate in Polish Upper Silesia, in conformity with the provisions of Articles 7 to 23, undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in these clauses, the property, rights and interests of German nationals or of companies controlled by German nationals may not be liquidated in Polish Upper Silesia.<sup>114</sup>

In particular, the court stated, “The question is whether, by taking possession of the Chorzów factory on July 3rd, 1922, and, by operating it, making use of the experiments, patents and licences, etc. of the Bayerische [the German company who owned and operated the factory],

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<sup>111</sup> L. OPPENHEIM, 1 INTERNATIONAL LAW § 155d, at 351-52 (Lauterpacht, 8th ed. 1955); Neville, *The Present Status of Compensation by Foreign States for the Taking of Alien-Owned Property*, 13 VAND. J. TRANSNAT'L L. 51, 63-66 (1980); *Certain German Interests in Polish Upper Silesia – The Chorzow Factory Case* (Ger. v. Pol.), 1928 P.C.I.J., ser. A., No. 13, at 47 (Judgment of Sept. 13); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 166, 185, 187-190 (1965).

<sup>112</sup> OECD, ““Indirect Expropriation” and the “Right to Regulate” in International Investment Law”, *OECD Working Papers on International Investment*, 3, n.6 (2004), [http://www.oecd.org/daf/inv/investment-policy/WP-2004\\_4.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf) (noting that most Bilateral Investment Treaties contain a relatively standard definition of “investment” that covers intangible forms of property including intellectual property and contractual rights).

<sup>113</sup> *Certain German Interests in Polish Upper Silesia – The Chorzow Factory Case* (Ger. v. Pol.), 1928 P.C.I.J., (ser. A.) No. 13, at 47 (Judgment of Sept. 13).

<sup>114</sup> Geneva Convention Concerning Upper Silesia, Ger.-Pol., May 15, 1922.

Poland has unlawfully expropriated the contractual rights of that Company.”<sup>115</sup> The court stated that “it is clear that the rights of the Bayerische to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents, licences, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland.”<sup>116</sup> Therefore, the court found that Poland had violated Article 6 and was thus required to provide compensation to the German nationals for the unlawful taking.<sup>117</sup>

Since the *Chorzow Factory* case was decided, however, the Industrialized World and the Third World have developed dichotomous positions regarding the compensation requirement.<sup>118</sup> Generally, industrialized nations assert that “prompt, adequate, and effective compensation” is required under customary international law where a State expropriates any foreign-owned property.<sup>119</sup> Conversely, developing nations assert that compensation for expropriation of foreign-owned property must be given in accordance with the domestic law of the taking State, taking into consideration the socioeconomic necessity of the taking; in effect, these States argue that partial or no compensation would be required if the taking is justified by a significant socioeconomic goal.<sup>120</sup> This position begs the question of whether basic economic development is a sufficient ground to avoid full and fair compensation for a taking; it further begs the question

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<sup>115</sup> Certain German Interests in Polish Upper Silesia – The Chorzow Factory Case (Ger. v. Pol.), Judgment No. 7, 25 May 1925, Merits, ¶ 136 available at [http://www.worldcourts.com/pcij/eng/decisions/1926.05.25\\_silesia.htm](http://www.worldcourts.com/pcij/eng/decisions/1926.05.25_silesia.htm) [hereinafter *Chorzow Factory*].

<sup>116</sup> *Id.*

<sup>117</sup> *See id.* at ¶ 293(1)-(2).

<sup>118</sup> *See* Lee A. O’Connor, *The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State*, 6 LO. L.A. INT’L & COMP. L. REV. 355, 357-58 (1983) (noting that the U.S. has expressed the position that a nation may expropriate foreign-owned property so long as the taking is “non-discriminatory, for a public purpose, and accompanied by prompt, adequate, and effective compensation” while the Third World’s position is that “although international law imposes an obligation on the expropriating state to provide compensation, the measure of such compensation is governed entirely by the domestic law of the taking state”).

<sup>119</sup> *See id.*

<sup>120</sup> *See id.* at 358-59.

of what current customary international law exists governing the compensation by a State for takings of foreign-owned property.<sup>121</sup>

In 1962, the United Nations General Assembly<sup>122</sup> adopted Resolution 1803 (XVII) which requires that compensation be paid in the event of an expropriation, but that the measure of such compensation is to be made “in accordance with the rules in force in the State” performing the taking and “in accordance with international law.”<sup>123</sup> In 1974, however, the U.N. passed Resolution 3281 (XXIX), known as the Charter of Economic Rights and Duties of States, which merely provide that compensation “should” be paid and that the expropriating State has exclusive authority to decide how much compensation shall be tendered.<sup>124</sup> In light of this markedly different approach to the question of compensation, scholars and international courts have considered whether the 1974 Resolution modified traditional international law, as embodied in the 1962 Resolution.<sup>125</sup>

In *Texaco Overseas Petroleum Co. v. Libya*, for example, an international arbitration body concluded that the 1974 Resolution did not modify the traditional principle that compensation is required for any State expropriation of foreign-owned property.<sup>126</sup> According to

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<sup>121</sup> See *id.* at 359-60 (noting that “because [developing States] were excluded from the creation of the traditional standard of compensation and because this standard has subsequently been rejected by a large segment of the international community, the traditional standard of compensation no longer represents the consensual norm of international law”).

<sup>122</sup> See O’Connor, *supra* note 118, at 360 (resolutions of the General Assembly of the United Nations are “evidence of custom[ary international law]”).

<sup>123</sup> See G.A. Res. 1803 (XVII), 17 U.N. GAOR, Supp. No. 17, U.N. Doc. A/5217, at 15 (1962) [hereinafter 1962 Resolution]; see also O’Connor, *supra* note 118, at 360-61.

<sup>124</sup> See G.A. Res. 3281 (XXIX), 29 U.N. GAOR, Supp. No. 31, U.N. Doc. A/9631, at 50 (1974) [hereinafter 1974 Resolution]; see also O’Connor, *supra* note 118, at 361-62.

<sup>125</sup> See O’Connor, *supra* note 118, at 362.

<sup>126</sup> See *Texaco Overseas Petroleum Co. v. Libya*, 53 I.L.R. 389 (1979), *reprinted in* 17 I.L.M. 1 (1978) (noting that the 1962 Resolution was assented to by “a great many States representing not only all geographical areas but also all economic systems” and thus that “consensus by a majority of States . . . indicates . . . universal recognition of the rules incorporated in the [1962 Resolution]” while on the other hand, even though the 1974 Resolution was also adopted by a very large majority, “all industrialized countries with market economies [had] abstained or . . . voted against it”); see also O’Connor, *supra* note 118, at 362-63 (noting that the lack of support of the 1974 Resolution by industrialized countries substantially detracted from the notion that the 1974 Resolution modified international law or was legally binding, and further noting that the *Texaco* panel concluded that to the extent the 1974 Resolution

the Panel, the 1974 Resolution was “inconsistent with international investment practice, which imposes a compensation requirement and a duty to submit a dispute to review by an international tribunal.”<sup>127</sup> Later international arbitral tribunals have agreed with the principle that full compensation is required for a State expropriation of foreign-owned property.<sup>128</sup> Nevertheless, some scholars have argued, and the text of the 1962 Resolution appears to support the notion that current international law does not necessarily require “full” compensation for an expropriation but rather compensation that is merely “fair and reasonable given the circumstances of the taking.”<sup>129</sup> Regardless of whether compensation for an expropriation of foreign-owned property must be full or merely appropriate given the circumstances, it is clear that some level of compensation is due where a State has expropriated foreign-owned property; in other words, a State may not expropriate foreign-owned property, regardless of its reasons for doing so, without compensating the foreign owner to some extent – even if not the full value of the expropriated property.<sup>130</sup>

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“purported to abolish the international minimum standard of compensation, it conflicted with customary international law”).

<sup>127</sup> See *Texaco Overseas Petroleum Co.*, 53 I.L.R. at 493, 17 I.L.M. at 30 (“[A] great many investment agreements entered into between industrial States or their nationals, on the one hand, and developing countries, on the other, state, in an objective way, the standards of compensation and further provide, in case of dispute regarding the level of such compensation, the possibility of resorting to an international tribunal.”).

<sup>128</sup> See, e.g., *Partial Award In Amoco Int’l Finance Corp. v. Islamic Republic of Iran*, 27 I.L.M. 1314 (1988) (finding that despite the UN General Assembly resolution in 1974, the prompt payment of just compensation is an obligation which is accepted as a general rule of customary international law); see also Kevin Smith, *The Law of Compensation for Expropriated Companies and the Valuation Methods Used to Achieve That Compensation*, Law & Valuation (2001), <http://www.wfu.edu/~palmitar/Law&Valuation/Papers/2001/Smith.htm> (noting that the U.S.-Iran Claims Tribunal included standards of “just” compensation as well as “full” compensation).

<sup>129</sup> See O’Connor, *supra* note 118, at 365-66; 1962 Resolution, *supra* note 123 (using the term “appropriate” to describe the compensation required for a taking rather than “full” or “prompt, adequate and effective”).

<sup>130</sup> See O’Connor, *supra* note 118, at 399 (“Both international tribunals and municipal courts sitting in an international capacity universally state that international law compels the payment of compensation upon nationalization of an alien’s property. What is much less clear, however, is *how much* compensation is required.”) (emphasis in original). The *Chorzow Factory* case, *supra* note 115, enunciated that fair market value was required restitution for the expropriation; however, this case did not concern the amount of indemnity due from an expropriation, but rather the remedies available for an expropriation in violation of a specific agreement – the Geneva Convention Concerning Upper Silesia. See *supra* notes 113-117 and accompanying text; O’Connor, *supra* note 118, at 399. Later international tribunals have approved the fair market value method of determining appropriate compensation for an expropriation. See, e.g., *De Sabla Claim (U.S. v. Pan.)*, 6 R. Int’l Arb. Awards 358 (1933), *reprinted in* 28 Am. J. Int’l L. 602 (1934). Some international tribunals, however, have questioned that

## 2. *Trade Secrets as Property Under International Law*

While it is fairly certain that expropriated property requires compensation under international law, what is less clear is whether trade secrets would be considered “property” such that expropriation of trade secrets would require similar compensation as expropriation of real property.<sup>131</sup> The Agreement on Trade Related Aspects of Intellectual Property (“TRIPS”), one of the foundational agreements of the World Trade Organization (“WTO”), explicitly requires that WTO member States protect “undisclosed information” and “data submitted to governments or governmental agencies.”<sup>132</sup> The Dispute Resolution Body of the WTO has never had

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method. *See e.g.*, Standard Oil Tankers case (Reparations Comm’n v. U.S.), 3 Ann. Dig. 231, 22 Am. J. Int’l L. 404 (1928). “Thus, the international tribunals that have considered the issue of expropriation have tended to declare that full value of the nationalized property is the proper amount of remuneration[; however,] . . . full compensation has not been universally accepted as an international minimum standard by international courts.” O’Connor, *supra* note 118, at 401.

<sup>131</sup> Cf. David D. Friedman et al., *Some Economics of Trade Secret Law*, 5 J. ECON. PERSPECTIVES 61, 61-62 (1991) (“A trade secret is not property in the usual sense--the sense it bears in the law of real and personal property or even in such areas of intellectual property law as copyright--because it is not something that the possessor has the exclusive right to use or enjoy.”).

<sup>132</sup> *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 39, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 401 [hereinafter TRIPS Agreement]. Specifically, TRIPS provides as follows:

Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices (10) so long as such information:

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) has commercial value because it is secret; and
- (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Footnote 10 provides:

For the purpose of this provision, “a manner contrary to honest commercial practices” shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

*Id.*



occasion, however, to interpret this provision of TRIPS.<sup>133</sup> The precursor to TRIPS, the Paris Convention for the Protection of Industrial Property, does not mention trade secrets or otherwise mention any kind of protection for confidential business information;<sup>134</sup> however, the agreement does require “effective protection against unfair competition”<sup>135</sup> – of which trade secret theft or misappropriation may be one variety.<sup>136</sup> Despite a lack of robust trade secret protection in international legal instruments, most countries provide protection for trade secrets in their national laws although such protection might be derived from many diverse sources of law including contract law, tort law, unfair competition law, criminal law, and the laws governing employee/employer and other fiduciary relationships.<sup>137</sup> Thus, because of the trade secret protection required by TRIPS and the ubiquity of trade secret protection in national laws in most countries around the world, it appears clear that there is a general international consensus that trade secrets are a protectable economic interest, which may be enjoyed to the limited exclusion of others. As such, theft or misappropriation of trade secrets is a violation of that limited property right requiring a legal remedy. Therefore, just as with real property, if a State or an entity controlled by a State is the party expropriating the trade secret, then international law would dictate that the owner of the trade secret is entitled to appropriate compensation for the expropriation.<sup>138</sup>

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<sup>133</sup> Only two disputes have been initiated involving Article 39 of TRIPS, and both were settled before a Panel of the Dispute Resolution Body was asked to provide a ruling. See *Argentina – Certain Measures on the Protection of Patents and Test Data*, WT/DS171, WT/DS196 (May 31, 2002); *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS372 (Dec. 4, 2008).

<sup>134</sup> See generally Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 25 Stat. 1372, 828 U.N.T.S. 107 [hereinafter Paris Convention].

<sup>135</sup> See Paris Convention, *supra* note 134, at art. 10*bis*.

<sup>136</sup> See Karen A. Magri, *International Aspects of Trade Secrets Law* 1 (2011), <http://www.myersbigel.com/library/viewdoc.php?id=26> (“Article 10*bis* of the Paris Convention (covering unfair competition) provided a potential source of support for international standards of trade secret protection, but the language of this provision is only poorly-suited for this purpose.”).

<sup>137</sup> See *id.* at 1-2.

<sup>138</sup> See *Chorzow Factory*, *supra* note 115 (finding that the foreign-owned patents and other intellectual property rights expropriated by the Polish government constituted a portion of the property interest for which the Polish

## CONCLUSION

Trade secrets are often an invaluable asset to a company, providing a competitive advantage and allowing companies to make inroads in foreign markets. Conducting business in foreign countries, however, can be arduous and national economic strategies seeking to promote domestic businesses can make foreign enterprises and their know-how vulnerable. For many years, China has pursued an aggressive domestic economic strategy to modernize and grow major sectors of its economy. A component of this strategy has been pairing foreign-owned enterprises with domestic and state-owned enterprises in joint ventures such that the domestic partners gain the technology and know-how of the foreign partner – including its trade secrets. The joint venture is then dissolved and the domestic entity thrives while the foreign-owned enterprise is left unable to compete in the marketplace with its competitive advantage destroyed. Domestic legal remedies – either in the U.S. or China – have not been successful in curbing this type of behavior, which is clearly systematic and driven by the State itself. Thus, for U.S. enterprises seeking to protect their trade secrets while doing business in China, an international law approach, like the one outlined above, may be a viable alternative to litigating in U.S. courts or administrative agencies, or pursuing legal redress in the Chinese domestic legal system. Using the analysis outlined above, the United States government could sue the Chinese government – or any government in which a similar practice of trade secret misappropriation by that State's state-owned enterprise is occurring – in an international court, such as the International Court of Justice, to obtain compensation from the State on behalf of U.S.

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government was required to provide compensation); *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79, 1989 WL 663903 at \*20 (concluding that an obligation to compensate arises “whether the property is tangible, such as real estate, or intangible, such as contract rights.”); *Wena Hotels v. Egypt*, Award, 41 I.L.M. 896, ¶ 98 (Dec. 8, 2000) (expropriation is not limited to tangible property rights); *Methanex Corp. v. United States*, (UNCITRAL) Part II, Ch. B, P 8 (Aug. 3, 2005) (Final Award of the Tribunal on Jurisdiction and Merits)(“the restrictive notion of property as a material ‘thing’ is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing”).

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businesses whose trade secrets were misappropriated by the state-owned enterprise while conducting business in the foreign State.