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## Public International Law

Trade and investment transactions that transcend national boundaries are often affected by issues of public international law, which deals with the relations between and among nation states.

Issues of public international law tend to be more difficult to anticipate, and more subtle and complex to resolve, than issues of private law. Where such an issue involves a conflict between a private party and a national sovereign, the private party can encounter substantial barriers to vindicating its rights, and may often need to resort to unconventional or creative vehicles for protecting its interests.

Step toe & Johnson LLP is a leader among US law firms in counseling and assisting clients in handling public international law matters. Since 1962, Step toe has been counsel to the Rule of Law Committee, a group made up of senior legal representatives of large US multinational corporations with a common interest in monitoring, responding to, and shaping critical issues in the area of public international law. Step toe has, over the years, worked strenuously to make national governments, including our own, more responsive to the rule of law and to develop better legal protection for private parties operating in the international forum.

The firm not only has assisted clients in resolving complex controversies (such as expropriation and international boundary disputes), but also has represented clients before governmental agencies on broad public law issues that affect competitiveness in the global market (such as extraterritorial jurisdiction, conflict of laws, and discriminatory treatment).

### International Claims

A long-standing focus of Step toe's public international law practice, and a core concern of the Rule of Law Committee, has been international claims, particularly claims that arise from an expropriation of private property by a national sovereign. Our long-standing experience in this area is an asset to our corporate clients.

In the forefront of this area of law, Step toe was active in drafting and testifying in support of the Cuba Claims Act of 1964 and the China Claims Act of 1966, which provided relief to US companies seeking compensation from foreign governments. The firm was also instrumental in shaping the structure and procedures of the UN Claims Commission for the resolution of claims arising from the Persian Gulf conflict.

Step toe attorneys worked directly with US State Department officials in formulating the mechanisms for ensuring that claims would be processed without undue procedural delays, and that funds for paying such claims would

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ultimately be made available. These were essential elements in maintaining the integrity and viability of the international claims procedure.

Step toe has also petitioned the United States government to secure a favorable result in negotiations on claims between the United States and foreign sovereigns. For example, Step toe lobbied the US government on behalf of corporate clients with expropriation claims against the government of Vietnam to ensure that any arrangement normalizing relations between the United States and Vietnam guaranteed the settlement of these private claims. When relations were eventually normalized in 1992, Step toe clients received full compensation with interest.

Where a tribunal has been authorized to adjudicate international claims, Step toe has frequently represented claimants in preparing, filing, and litigating their claims. Step toe has represented claimants with claims against the following:

- The governments of Cuba and Vietnam before the US Foreign Claims Settlement Commission
- The government of Iran in US courts and before the US-Iran Claims Tribunal
- The government of Iran in ad hoc arbitrations involving claims against Libya, Venezuela, and Egypt
- Numerous claims between private and state-owned companies.

Step toe has also prepared and filed claims against the government of Iraq before the United Nations Compensation Commission.

### Extraterritorial Jurisdiction

Because many governments, including the United States, assert the extraterritorial reach of their domestic laws, companies often find themselves the subject of an enforcement action by a government other than the sovereign of the territory where they are doing business.

Indeed, on occasion, US companies have found themselves the subject of conflicting directives by a territorial sovereign and the US government. The United States has been especially vigorous in asserting the extraterritorial reach of certain US statutes, most notably its export control laws (including anti-boycott legislation), its trade embargo laws, its antitrust laws, and its labor laws.

Step toe has been at the cutting edge of policy and legal advocacy in this issue. We have filed amicus briefs before the US Supreme Court, explaining and

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advocating the international law limitations on extraterritorial assertions of US employment laws. We have prepared and presented detailed advocacy papers for senior US government officials, intended to explain and establish the international law constraints on US regulatory control and enforcement jurisdiction over foreign subsidiaries of US companies.

Because of our in-depth knowledge of this issue, we are well prepared to assist clients with challenging situations involving extraterritorial jurisdiction.

### Sovereignty and Immunity

Private entities seeking to resolve conflicts involving issues of public international law frequently face difficult issues of sovereign immunity and the Act of State Doctrine.

Steptoe has a long history of dealing with these issues in the context of influencing governmental policy, shaping national laws, and advising on the drafting of international treaties or codes of conduct.

We also help clients manage the risks associated with sovereign immunity and acts of state through the use of individual commercial arrangements between investors and national governmental authorities.

Our firm's attorneys were deeply involved in the formulation of the US Foreign Sovereign Immunity Act, the legislation that codified and limited the ability of foreign sovereigns to assert immunity from claims brought by private parties under US law.

We also have developed and advocated positions on the customary law of sovereign immunity, international institution immunity, diplomatic immunity and head of state immunity. Typically, we advise US entities on how to deal with sovereign commercial partners (such as the leasing of property for embassy operations), we advocate measures to protect international commodity flows (such as the immunity of UN-brokered oil transactions), or we counsel foreign government officials on exposure to suit while in the United States (such as immunity from alleged criminal conspiracy or civil damages charges).

We have also defended US persons against US government enforcement actions by asserting the defense of foreign sovereign compulsion in response to allegations of deliberate non-compliance with US law.

### Law of the Sea

The United Nations Convention of the Law of the Sea, which entered into force in 1994, governs questions relating to the high seas and the seabed. These include issues of fishing rights, mineral rights, oil and gas rights, navigation

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rights, jurisdiction over wrecks and historic artifacts on the seabed, and the limits of territorial sovereignty. Companies operating in coastal waters, especially those engaged in mineral or oil and gas exploration, frequently encounter law of the sea issues.

Our clients rely on our extensive experience and institutional knowledge on these issues. During the phase of treaty formation and negotiation, Steptoe attorneys at that time served on the State Department's Advisory Committee on the Law of the Sea. We have prepared extensive briefs and legal argumentation on law of the sea principles in connection with advocating a private investor's claim against a major allied government. The claim involved disputed property outside the country's territorial waters.

### **Investment Protection**

A company that operates outside the United States may face investment risks which it does not face in the United States and which vary in severity from country to country.

A country's legal regime may, for example, prevent a foreign investor from earning a fair rate of return on its investment, from competing on an equal footing with indigenous companies, or from repatriating its profits. In the worst case, it may face the outright expropriation of its assets. In addition, its investment may be at risk from so-called "political risk," which includes not only the risk of expropriation but also the risks attendant on war and revolution.

To best assist clients, Steptoe draws on its extensive experience with issues of investment protection, a principal focus of the Rule of Law Committee. The firm has drafted legislation, petitioned and advised the US government, and counseled and represented clients on investment protection issues throughout the world. Steptoe attorneys have advised government officials on the scope and interpretation of key terminology contained in the US model Bilateral Investment Treaty.

Other examples of how we have assisted client efforts follow:

- When a foreign government passed legislation effecting a taking of US foreign investment in the hydrocarbon industry, Steptoe attorneys developed an expropriation claim that the US government advocated in bilateral negotiations, which ultimately led to a repeal of the offending foreign legislation.

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- In the aftermath of a decision by a chamber of the International Court of Justice, Steptoe attorneys identified a potentially disastrous collateral inroad on US treaty protections and developed a remedy for use by US government negotiators.
- In a series of international arbitrations involving the largest private claims presented to the US-Iran Claims Tribunal, Steptoe attorneys defended and advanced the customary international law norm of prompt, adequate, and effective compensation for expropriation on behalf of its client.
- Numerous cases before ICSID and NAFTA tribunals advancing clients' claims for breaches of investment treaties and public international law.

### Treaty Law and Practice

Many public international law issues turn on questions of treaty interpretation. Such interpretation issues can have a direct and dramatic impact on the rights of private parties. For example, a company's ability to vindicate its rights against a foreign sovereign in an investment dispute may turn on the interpretation of the remedies or arbitration clause in the bilateral investment treaty between the United States and the foreign sovereign.

The firm's lawyers bring to this demanding practice an extensive fund of practical experience in solving problems that resist the adjudicative solutions typically found in cases of purely private law.

### Protection of Human Rights

An important facet of Steptoe's pro bono practice involves the protection of human rights in the international forum.

Steptoe has for many years advocated political asylum cases. We have a very active cadre of immigration and litigation attorneys that handle asylum and refugee matters. Many of these cases involve novel issues of fact and law.

For example, Steptoe was one of the first firms to persuade the INS that persecution based on sexual orientation fell within the scope of human rights protection. The firm has been especially active in the work of the Washington-based International Human Rights Law Group.

The firm has also advocated human rights concerns in international law. Steptoe attorneys handled a unique wrongful death action before the US-Iran Claims Tribunal, and have advocated on behalf of a large foreign ethnic community and its right to self-determination.

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Another Steptoe attorney was actively involved in the first US court litigation under the Alien Tort Claims Act, finding that torture was a cognizable claim as an offense against the law of nations.

Steptoe has also taken an active role in policy matters in this area. For example, a member of the firm served as the chair of the American Bar Association's Task Force on War Crimes in the Former Republic of Yugoslavia. This experience heightens our knowledge and the range of options we are able to offer clients involved in these cases.

### Representative Clients

Among the clients that Steptoe has counseled or represented with respect to issues of public international law are the following:

- Major US automobile manufacturers
- Oil companies
- Banks
- Mining companies
- Steel manufacturers
- Electronic companies
- Smaller domestic and foreign companies
- Individuals
- Various foreign governments, including the governments of Chile and the Turkish Republic of Northern Cyprus
- US government officials and representatives of major multilateral institutions

### Representative Matters

- Represented a client against the government of Australia in a dispute over the limits of Australia's territorial sovereignty under the Law of the Sea Convention;
- Prepared an amicus brief to the US Supreme Court in the *Boureslan* litigation addressing the limits on extraterritorial reach of US labor laws;

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- Advised US government on scope and interpretation of US Friendship, Commerce, and Navigation Treaty in connection with Supreme Court litigation in *Sumitomo v. Avagliano*;
- Advised the Turkish Republic of Northern Cyprus with respect to its status in international law and its negotiations in the United Nations as well as its litigation in the United Kingdom and before the European Court of Justice;
- Prepared position on behalf of consortium of US energy companies and advocated this position with US and foreign governments, resulting in successful repeal of foreign legislation expropriating US investment abroad;
- Lead counsel to Corn Products International in a large claim against Mexico arising under Chapter 11 of the NAFTA. *Corn Products International, Inc. v The United Mexican States*. ICSID Additional Facility arbitration.
- Lead counsel to investors in respect of an investment dispute with The Republic of Zimbabwe arising from alleged breaches of a bilateral investment treaty. *Border Timbers Ltd & Ors v The Republic of Zimbabwe*. ICSID arbitration.
- Lead counsel to nine investors in respect of an investment dispute with The Republic of Zimbabwe arising from alleged breaches of a bilateral investment treaty. *Bernhard von Pezold & Ors v The Republic of Zimbabwe*. ICSID arbitration.
- Lead co-counsel (from 10 September 2008) to investors in respect of an investment dispute arising from alleged breaches of a bilateral investment treaty. *Trans-Global Petroleum Inc. v The Hashemite Kingdom of Jordan*. ICSID arbitration.
- Co-counsel to investors who claimed against a state for various breaches of a bilateral investment treaty, which included expropriation without compensation, failure to accord fair and equitable treatment and full protection and security. An award was issued in favour of the investors. *Funnekotter v The Republic of Zimbabwe*. ICSID arbitration.
- Analyzed ICJ chamber decision in *Elettronica Sicula, S.p.A (ELSI) (US v. Italy)* and advised US government on methodology to preserve investment protection under system of US bilateral investment treaties;

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- Counseled corporate clients on issues of treaty succession following the dissolution of the Soviet Union, and the implications for pre-existing commercial relationships and investments;
- Served on the editorial board of the authoritative second and third Restatement of the Foreign Relations Law of the United States;
- Assisted in developing legal theory for obtaining judicial recognition of torture as a cognizable claim under the 1789 Alien Tort Claims Act as an offense against the "law of nations";
- Reviewed and advised major international institution in the development of a draft code of principles for investment promotion and protection;
- Analyzed, developed and advocated position on behalf of major US multinational regarding sovereignty over subsurface mineral deposits in a concession jointly administered by two sovereigns in the Middle East;
- Represented largest group of claims in the US-Iran Claims Tribunal involving expropriation, contract breach and measure of damages in the Iranian petroleum sector;
- Developed and advocated international claims for wrongful death in connection with terrorist attacks against corporate executive;
- Developed exculpatory defense for US corporate client, based on internationally recognized principles of duress and foreign sovereign compulsion, in response to alleged violations of US economic embargo;
- Prepared comprehensive legal analysis of substantive and procedural issues under international law for the establishment of the UN Compensation Commission to resolve claims arising from the 1991 Persian Gulf Conflict and the mechanism for funding these claims through the sale of Iraqi oil;
- Analyzed due process and international law issues for UN War Crimes Tribunal in connection with rights of an accused to cross-examine and confront witnesses;
- Prepared and advocated within US government major policy and legal analysis on the extraterritorial application of US economic sanctions and problems under established principles of international law; and

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- Coordinated multi-client effort to develop, present and obtain payment for claims against the government of Vietnam for expropriations and abandoned property after the fall of Saigon.

## **Noteworthy**

- Steptoe has, over the years, worked strenuously to make national governments, including our own, more responsive to the rule of law and to develop better legal protection for private parties operating in the international forum.