

INTERNATIONAL COURT OF JUSTICE

CERTAIN IRANIAN ASSETS

(ISLAMIC REPUBLIC OF IRAN v. UNITED STATES OF AMERICA)

COUNTER-MEMORIAL

SUBMITTED BY

THE UNITED STATES OF AMERICA

October 14, 2019

ANNEXES

VOLUME VI

Annexes 121 through 140

ANNEX 121

REPORTS OF INTERNATIONAL
ARBITRAL AWARDS

RECUEIL DES SENTENCES
ARBITRALES

VOLUME XII



UNITED NATIONS — NATIONS UNIES

THE AMBATIELOS CLAIM

PARTIES: Greece, United Kingdom of Great Britain and Northern Ireland.

COMPROMIS: Agreement of 24 February 1955.

ARBITRATORS: Commission of Arbitration: R. J. Alfaro; A. J. F. Bagge; M. Bourquin; J. Spiropoulos; Gerald A. Thesiger.

AWARD: 6 March, 1956.

ANNEXES: Various documents relating to the case.

State responsibility — Breach of contractual obligations — Undue delay in presenting claim — Principle of extinctive prescription — Absence of rule of international law laying down time limit — Right of claimant to change legal basis of action in order to obtain settlement of dispute by arbitration — Most-favoured-nation clause — Nature and scope of — “Administration of justice” as allied to “commerce and navigation” — Interpretation of Treaty — Interpretation of expressions “justice”, “right” and “equity” by reference to municipal law — Interpretation of expression “free access to the courts” — Non-exhaustion of legal remedies — Burden of proof — Need to prove existence of remedies not used — Ineffectiveness of local remedies — Failure to call available witness.

Responsabilité de l'Etat — Inobservation des obligations conventionnelles — Retard injustifié pour présenter une réclamation — Principe de la prescription extinctive — Absence d'une règle de droit international fixant la durée de la prescription — Droit de la partie demanderesse de modifier la base juridique de son action pour obtenir un règlement par arbitrage — Clause de la nation la plus favorisée — Nature et portée — « Administration de la justice », considérée comme comprise parmi les matières concernant « le commerce et la navigation » — Interprétation des traités — Interprétation des expressions « justice », « droit » et « équité » en fonction du droit interne — Interprétation de l'expression « libre accès aux tribunaux » — Non-épuisement des voies de recours interne — Charge de la preuve — Nécessité pour l'Etat défendeur de prouver l'existence, dans son système, de droit interne, de recours non utilisés — Inefficacité des voies de recours — Non-citation d'un témoin.

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- International Law Reports*, edited by H. Lauterpacht, 1956, p. 306 [English text of the Award].
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AGREEMENT¹ BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GREEK GOVERNMENT REGARDING THE SUBMISSION TO ARBITRATION OF THE AMBATIELOS CLAIM. SIGNED AT LONDON, ON 24 FEBRUARY 1955

The Government of the United Kingdom of Great Britain and Northern Ireland and the Royal Hellenic Government:

CONSIDERING

(1) That the International Court of Justice, acting in virtue of Article 29 of the Anglo-Greek Treaty of Commerce and Navigation of July 16, 1926,² has decided by a Judgment delivered on May 19, 1953³ that the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter called the United Kingdom Government) are under an obligation to submit the arbitration in accordance with the Anglo-Greek Declaration of July 16, 1926 (hereinafter called the 1926 Declaration) the difference as to the validity under the Anglo-Greek Treaty of Commerce and Navigation of November 10, 1886⁴ (hereinafter called the 1886 Treaty) of the claim presented by the Royal Hellenic Government on behalf of Mr. Nicolas Eustache Ambatielos (hereinafter called the Ambatielos claim);

(2) That the 1926 Declaration provides that any differences which may arise between the two Governments as to the validity of claims on behalf of private persons based on the provisions of the 1886 Treaty shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10, 1886 (hereinafter called the 1886 Protocol) annexed to the 1886 Treaty; and

(3) That the 1886 Protocol provides that any controversies which may arise respecting the interpretation or the execution of the 1886 Treaty, or the consequences of any violation thereof, shall be submitted, when the means of settling them directly by amicable agreement are exhausted, to the decisions of Commissions of Arbitration, the result of such arbitration to be binding upon both Governments, and also that the members of such Commissions shall be selected by the two Governments by common consent:

Have decided to conclude an Agreement with a view to submitting the Ambatielos claim to arbitration in conformity with the above provisions and for that purpose have appointed as their plenipotentiaries:

The United Kingdom Government:

Sir Ivone Kirkpatrick, G.C.M.G., K.C.B., Permanent Under-Secretary of State for Foreign Affairs;

¹ *United Nations Treaty Series*, vol. 209, p. 188.

² *League of Nations, Treaty Series*, vol. LXI, p. 15; vol. LXIII, p. 428; vol. LXXXIII, p. 417; vol. LXXXVIII, p. 356; vol. XCVI, p. 192; vol. C, p. 222; vol. CXXVI, p. 446; vol. CXLVII, p. 343, and vol. CXLVII, p. 333.

³ Ambatielos case (merits to arbitrate), Judgment of May 19th, 1953; I. C. J. *Reports 1953*, p. 10.

⁴ De Martens, *Nouveau Recueil général de Traités*, deuxième série, tome XIII, p. 518.

The Royal Hellenic Government:

His Excellency Monsieur Basile Mostras, Ambassador Extraordinary and Plenipotentiary of Greece in London;

Who, having exhibited their respective full powers, found in good and due form,

Have agreed as follows:

Article 1

(a) The Commission of Arbitration (hereinafter called the Commission) shall be composed of:

Monsieur Ricardo J. Alfaro, Monsieur Algot J. F. Bagge, Monsieur Maurice Bourquin, Monsieur John Spiropoulos, Gerald Thesiger, Esquire, Q.C.

(b) The President of the Commission shall be Monsieur Ricardo J. Alfaro.

(c) Should any Member of the Commission die or become unable to act, the vacancy shall be filled by a new Member appointed by the Government which nominated the Member to be replaced or by agreement between the two Governments, according to the manner of the original appointment.

Article 2

The Commission is requested to determine —

(a) The validity of the Ambatielos claim under the 1886 Treaty having regard to:

- (i) The question raised by the United Kingdom Government of undue delay in the presentation of the claim on the basis of the Treaty;
- (ii) The question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty;
- (iii) The provisions of the Treaty;

(b) In the event of the Commission holding that the claim is valid, whether the United Kingdom Government ought now in all the circumstances to pay compensation to the Royal Hellenic Government; and if so, the amount of such compensation.

Article 3

(a) The Commission shall, subject to the provisions of this Agreement, determine its own procedure and all questions affecting the conduct of the arbitration.

(b) In the absence of unanimity, the decisions of the Commission on all questions, whether of substance or procedure, shall be given by a majority vote of its Members, including all questions relating to the competence of the Commission, the interpretation of this Agreement, and the determination of the issues specified in Article 2 hereof.

Article 4

(a) The Parties shall, within fourteen days of the signature of the present Agreement, each appoint an Agent for the purposes of the arbitration, and shall communicate the name and address of their respective Agents to each other and to the Commission.

(b) Each Agent so appointed shall be entitled, as occasion may require and for such period as he may specify, to nominate a Deputy to act for him, upon making a similar communication of the Deputy's name and address.

Article 5

(a) The proceedings shall be written and oral.

(b) The written proceedings shall consist initially of a Case to be submitted by the Royal Hellenic Government within 4 months of the signature of the present Agreement and of a counter-case to be submitted by the United Kingdom Government within 4 months of the submission of the Hellenic Case.

(c) The Commission shall have power to extend the above time-limits at the request of either Party.

(d) The oral hearing shall follow the written proceedings, and shall be held in private at such place and time as the Commission, after consultation with the two Agents, may determine.

(e) The Parties may be represented at the oral hearing by their Agents and by such Counsel and advisers as they may appoint.

Article 6

(a) The pleadings, written and oral, and the Commission's decisions, shall be either in the French or the English language.

(b) The Commission shall arrange for such translations and interpretations as may be requisite, and shall be entitled to engage all such technical, secretarial and clerical staff, and to make all such arrangements in respect of accommodation and the purchase or hire of equipment, as may be necessary.

Article 7

(a) The Commission shall deliver its decisions in writing, giving the reasons therefor, and shall transmit one signed copy to each Agent.

(b) Any question of subsequent publication of the proceedings shall be decided by agreement between the two contracting Governments.

Article 8

(a) The remuneration of Members of the Commission shall be borne equally by the two contracting Governments.

(b) The general expenses of the arbitration shall be borne equally by the two Governments, but each Government shall bear its own expenses incurred in or for the preparation and presentation of its case.

IN WITNESS WHEREOF the above-mentioned plenipotentiaries have signed the present Agreement.

DONE in duplicate at London, in the English language, the 24th day of February, 1955.

IVONE KIRKPATRICK

B. MOSTRAS

AWARD OF THE COMMISSION OF ARBITRATION ESTABLISHED
BY THE AGREEMENT CONCLUDED ON 24th FEBRUARY 1955
BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM
OF GREAT BRITAIN AND NORTHERN IRELAND AND THE
GOVERNMENT OF GREECE FOR THE ARBITRATION OF THE
AMBATIELOS CLAIM TOGETHER WITH THE ANNEXES TO
THE AWARD, 6 MARCH, 1951 ¹

The facts leading up to the present case are as follows:

On 17th July 1919, the Greek shipowner Nicholas Eustache Ambatielos concluded with the United Kingdom Government represented by Sir Joseph Maclay, the Shipping Controller, a contract for the purchase of nine steamships, then building in the dockyards of Hong Kong and Shanghai, at a price of £40 per ton for vessels of 5,000 tons and of £36 per ton for vessels of 8,000 tons, the total purchase price amounting to £2,275,000.

The negotiations resulting in this contract were conducted on behalf of the United Kingdom Ministry of Shipping by Major Bryan Laing and on behalf of Mr. Ambatielos by his brother, Mr. G. E. Ambatielos.

Paragraphs 2, 3 and 7 of the contract of 17th July, 1919, which is set out in full in Annex 2 ² to this award, contain the following provisions:

2. The purchase money for the said steamers and engines shall be paid as follows:

A deposit of ten per cent in cash payable as to £100,000 thereof upon signing this Agreement and as to the balance of the said deposit within one month thereafter and the balance in cash in London in exchange for a Legal Bill of Sale or Builders' certificate within 72 hours of written notice of the steamers' readiness for delivery being given to the Purchaser or his Agent, such delivery to be given at the Contractor's yard.

3. The steamers shall be deemed ready for delivery immediately after they have been accepted by the Vendor from the Contractors.

7. If default be made by the Purchaser in the payment of the purchase money the deposit shall be forfeited and the steamers may be re-sold by public or private sale and all loss and expense arising from the re-sale be borne by the Purchaser, who shall pay interest thereon at the rate of five pounds per cent per annum. If default be made by the Vendor in the execution of Legal Bills of Sale or in the delivery of the steamers in the manner and within the time agreed, the Vendor shall return to the Purchaser the deposit paid with interest at the rate of five pounds per cent per annum.

¹ Foreign Office, *Award of the Commission of Arbitration established by the Agreement concluded on 24th February 1955 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Greece for the arbitration of the Ambatielos Claim together with the Annexes to the Award*, London.

² See p. 138.

The Greek Government claims that the words "within the time agreed" indicate that definite delivery dates had been fixed, whereas the United Kingdom Government claims that the contract is complete without any reference to special delivery dates and denies on various grounds that any delivery date had been agreed upon.

The Greek Government, in support of its claim concerning fixed dates for delivery, has produced a letter of 3rd July, 1919, from Mr. N. Ambatielos to his brother in London giving him written instructions for the transaction with the Ministry of Shipping, including fixed dates. In a telegram of 12th July, 1919, to the Shipping Controller, confirmed by a letter of the same date, Mr. Ambatielos stated that the only person authorized to act for him was his brother, Mr. G. Ambatielos, who had written authority to buy seven B. type ships "building in Hong Kong on certain conditions set out in the authority given to him".

One of the B. type ships not being available, the written contract finally signed was concerned with six B. type and three C. type ships, without any dates being inserted. When Mr. Nicholas Ambatielos found that the contract did not contain specific dates he, according to his subsequent evidence, told his brother that he was going to repudiate the contract. However, Major Laing called on Mr. Ambatielos in Paris at the end of August, 1919, and assured Mr. Ambatielos that the ships would be delivered on dates certain which had been written down on a buff slip of paper. This buff slip of paper, the existence of which was never in dispute, contained dates certain. They were obtained by a Mr. Bamber, an official of the Ministry, from his records which contained reports from the dockyards. The Greek Government claims that the contract refers to this buff slip of paper and that fixed dates were definitely agreed upon as part of the contract. The United Kingdom Government claims that the dates written down on the buff slip of paper were merely indications of the time when the ships could be expected to be ready for delivery.

The Greek Government contends — quoting in support of their contention a statutory declaration by Major Laing, sworn in 1934 (which is set out in Annex 7¹ to this award) — that Major Laing had induced Mr. Ambatielos to pay half a million pounds more than the price then ruling for vessels of the same type because he, Major Laing, had been able to give fixed dates. The United Kingdom Government contends that the prices were not unduly high for ships of that kind and that the price could certainly be accounted for by the privilege granted to Mr. Ambatielos for "free charter-parties" not subject to the regulations of the United Kingdom Government, by Mr. Ambatielos's being able to sail the ships under the Greek flag and by the favourable freight rates he would be able to obtain, the ships being stationed in the Far East where freight rates were very high.

By way of further proof of fixed delivery dates the Greek Government relied upon a telegram sent on 31st October, 1919, in the name of Sir John Esplen, who was Major Laing's superior in the Ministry of Shipping, to the Far Eastern representative of the Ministry of Shipping, and which was in the following terms:

From Esplen Shipminder, London — To Britannia, Hong Kong. Following for Dodwell, War Trooper. As the steamer was sold to buyers for delivery not later than November it is of the utmost importance that she should be completed by that date stop Cable immediately progress of construction (*Signed*) M. J. Straker.

The existence of this telegram is not in dispute between the Parties, but the Parties are not agreed as to the circumstances in which it was sent. It is, further-

¹ See p. 150.

more, common ground between the Parties that the ships were delivered later than had been anticipated. According to the Greek claim, the ship *Cephalonia* should have been delivered on 31st August, 1919, the second ship, the *Ambatielos*, on 30th September, 1919, and so on down to the last ship, the *Mellon*, of which delivery had to be made at latest on 15th March, 1920. The two first-named ships were delivered after a certain delay, and the others after delays of varying length extending to as much as eight months. Freight rates having fallen heavily during that time, considerable loss was suffered by the purchaser.

In November, 1920, the purchaser, Mr. N. E. Ambaticlos, was indebted to the United Kingdom Government in a large sum of money. For the purpose of guaranteeing this debt he executed mortgage deeds and covenants on 4th November, 1920, on seven ships. (See Annex 3¹ to this award.) The last two ships, the *Mellon* and the *Stathis*, were never delivered to Mr. Ambatielos. The contract for these two ships was not cancelled, and the ships were laid up from the date when they should have been delivered until the date of Mr. Justice Hill's judgment hereinafter referred to. During that time the cost of insurance and other expenses were charged to Mr. Ambatielos. The Greek Government now claims that it was wrong to cancel the contract as from the date of judgment, instead of cancelling it as from 4th November, 1920, when the mortgage deeds were signed. This is the claim contained in claim C.

In February, 1921, Mr. Ambatielos, through his brother, proposed that the purchase of these two ships be cancelled (see Annex 4² to this award), but his offer was refused by the United Kingdom authorities.

According to the Greek case, Mr. Ambatielos wanted to go to London to negotiate with the Ministry of Shipping in order to reach a compromise. However, he was, so the Greek Government alleges, prevented from going to London because the United Kingdom Government preferred a claim against him for a sum of £250,000 in respect of non-payment of taxes which might render him liable to imprisonment, and it was only after the United Kingdom Government had withdrawn this claim as being unfounded that Mr. Ambatielos was able to proceed to London to protect his interests. The United Kingdom Government does not admit that any such claim was made or that any threat was made to imprison Mr. Ambatielos.

Mr. Ambatielos went to London in May, 1921, and engaged in negotiations with Sir Ernest Glover, representative of the Ministry of Shipping who, according to Mr. Ambatielos, showed a conciliatory attitude. The Greek Government contends that Sir Ernest Glover consented to reduce the agreed price by £500,000 but the United Kingdom Government denies that any agreement was concluded. Meanwhile, Mr. Ambatielos had claimed arbitration under Clause 12 of the contract of 17th July, 1919, and arbitrators had been appointed.

The Board of Trade, as successors to the Ministry of Shipping, however, instituted proceedings in the Court of Admiralty on the mortgage deeds, and in consequence, by agreement between the parties, the claim of Mr. Ambatielos was put forward by way of defence to these proceedings, instead of being dealt with by arbitration. Mr. Justice Hill heard the case in November, 1922, and on 15th January, 1923, gave judgment for the United Kingdom Government for possession and sale of certain vessels which had been delivered, and for principal and interest due under the mortgage deeds.

During those proceedings the United Kingdom Government, in accordance

¹ See p. 140.

² See p. 147.

with the practice of Ministries, refused to produce certain inter-departmental minutes. The Greek Government claims that this was an unwarranted abuse of Crown privilege. Furthermore, letters exchanged in July, 1922, between the former Controller of Shipping, Sir Joseph Maclay, and Major Laing, referring to assurances said to have been given by the latter to Mr. Ambatielos about delivery dates, were not produced in court. These letters are set out in Annex 5¹ to this award. Major Laing and Sir Joseph Maclay were not heard as witnesses although Major Laing is alleged to have been subpoenaed by the Ministry of Shipping. The Greek Government claims that the withholding of this evidence was also an abuse of right which amounted to a denial of justice.

The United Kingdom Government claims that this correspondence was exempt from production in accordance with English law of procedure which exempts from production any document prepared for the purpose of the proceedings. Before the case was heard in the Court of Admiralty, Major Laing had indicated to Mr. Ambatielos that these letters were in existence. He did not, however, transmit copies of the correspondence to Mr. Ambatielos before the trial.

Mr. Ambatielos appealed against the judgment of Mr. Justice Hill and asked the Court of Appeal for leave to call Major Laing as a witness. This, however, was refused by the Court of Appeal, the Court holding that it was against precedent to allow a party to call a witness in the Court of Appeal when that party could have called the witness in the court of first instance. After the Court of Appeal had given its judgment in 1923 Mr. Ambatielos did not proceed with his general appeal, nor did he try to obtain a reversal of the decision of the Court of Appeal by appealing further to the House of Lords. When, later that year, the Crown brought another claim against Mr. Ambatielos for an account and possession of the *Keramies*, the Defendant did not appear; nor was he represented by Counsel. The case which was heard on 20th July, 1923, was in all respects similar to the case previously before Mr. Justice Hill. The judgment of July, 1923, was not appealed against by Mr. Ambatielos. Thus the proceedings before the United Kingdom courts came to an end, and the diplomatic phase of the case began. It began with a Note from the Greek Legation in London to the Secretary of State for Foreign Affairs on 12th September, 1925. The case was taken up again in a new Note from the Greek Legation to the Secretary of State for Foreign Affairs on 7th February, 1933. Further Notes were sent in 1934, 1936, 1939 and 1940. The case was then in abeyance from 1940 until 11th May, 1949. It was finally brought before the International Court of Justice on 9th April, 1951.

On 9th April, 1951, the Greek Minister in the Netherlands, duly authorised by his Government, filed in the Registry of the International Court of Justice an Application instituting proceedings before that Court.

The Greek Application referred to the Treaty of Commerce and Navigation between Greece and Great Britain, signed in Athens on 10th November, 1886, which is set out as Annex 1² to this award, and to the Treaty of Commerce and Navigation between the same Contracting Parties signed in London on 16th July, 1926, including a Declaration of the same date. The Declaration is set out as Annex 6³ to this award. The Application requested the Court:

To declare that it has jurisdiction:

To adjudge and declare . . .

¹ See p. 148.

² See p. 132.

³ See p. 150.

1. That the arbitral procedure referred to in the Final Protocol of the Treaty of 1886 must receive application in the present case;
2. That the Commission of Arbitration provided for in the said Protocol shall be constituted within a reasonable period, to be fixed by the Court.

The Memorial of the Greek Government contained the following Submissions:

... the Hellenic Government requests the Court to adjudge and declare:

- (1) That the United Kingdom Government is under an obligation to agree to refer its present dispute with the Hellenic Government to arbitration, and to carry out the Judgment which will be delivered;
- (2) that the arbitral procedure instituted by the Protocol of the Greco-British Treaty of Commerce and Navigation of 1886, or alternatively, that of the Treaty of Commerce of 1926, must be applied in this case;
- (3) that any refusal by the United Kingdom Government to accept the arbitration provided for in those Treaties would constitute a denial of justice (Anglo-Iranian Oil Company case, Order of July 5th, 1951: I. C. J. Reports, 1951, p. 89);
- (4) that the Hellenic Government is entitled to seize the Court of the merits of the dispute between the two Governments without even being bound to resort beforehand to the arbitration mentioned under submissions 1 and 2 above;
- (5) alternatively, that the United Kingdom Government is under an obligation, as a Member of the United Nations, to conform to the provisions of Article 1, paragraph 1, of the Charter of the United Nations, one of whose principal purposes is: "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations", and to those of Article 36, paragraph 3, of the Charter, according to which "legal disputes should, as a general rule, be referred by the Parties to the International Court of Justice". There is no doubt that the dispute between the Hellenic Government and the United Kingdom Government is a legal dispute susceptible of adjudication by the Court.

The Government of the United Kingdom filed a Counter-Memorial in which, whilst setting out its arguments and submissions on the merits of the case, it requested the Court to adjudge and declare that it had no jurisdiction:

- (a) to entertain a request by the Hellenic Government that it should order the United Kingdom Government to submit to arbitration a claim by the Hellenic Government based on Article XV or any other Article of the Treaty of 1886, or
- (b) itself to decide on the merits of such a claim,

and that, likewise, it has no jurisdiction:

- (a) to entertain a request by the Hellenic Government that it should order the United Kingdom Government to submit to arbitration a claim by the Hellenic Government for denial of justice based on the general principles of international law or for unjust enrichment, or
- (b) itself to decide upon the merits of such a claim.

* * *

On 1st July, 1952, the International Court of Justice, by thirteen votes to two, found "that it is without jurisdiction to decide on the merits of the Ambatielos claim," and by ten votes to five, "that it has jurisdiction to decide whether the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim, in so far as this claim is based on the Treaty of 1886."

* * *

During the second stage of the proceedings before the International Court of Justice subsequent to the above mentioned judgment the Greek Government presented the following submissions:

May it please the Court:

1. To hold that the Ambatielos claim, based upon the provisions of the Treaty of 1886, does not *prima facie* appear to be unconnected with those provisions.
2. As a consequence, to decide that the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim.
3. To declare that the Court will assume the functions of the arbitral tribunal in this case in the event of the Parties accepting its jurisdiction in their final submissions.
4. To fix time-limits for the filing by the Parties of the Reply and Rejoinder upon the merits of the dispute.

The United Kingdom Government formulated the following submissions:

1. That the United Kingdom Government is under no obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim, *unless* this claim is based on the Treaty of 1886.
2. That the Hellenic Government's contention that the Ambatielos claim is based on the Treaty of 1886, within the meaning of the Declaration of 1926, because it is a claim formulated on the basis of the Treaty of 1886 and not obviously unrelated to that Treaty, is ill-founded.
3. That, even if the above Hellenic contention be correct in law, the Court should still not order arbitration in respect of the Ambatielos claim, because the Ambatielos claim is in fact obviously unrelated to the Treaty of 1886.
4. That the Ambatielos claim is not a claim based on the Treaty of 1886, unless it is a claim the substantive foundation of which lies in the Treaty of 1886.
5. That, having regard to (4) above, the Ambatielos claim is not a claim the substantive foundation of which lies in the Treaty of 1886, for one or other or all of the following reasons:
 - (a) the Ambatielos claim does not come within the scope of the Treaty;
 - (b) even if all the facts alleged by the Hellenic Government were true, no violation of the Treaty would have occurred;
 - (c) local remedies were not exhausted;
 - (d) the Ambatielos claim — in so far as it has any validity at all, which the United Kingdom Government denies — is based on the general principles of international law and these principles are not incorporated in the Treaty of 1886.
6. That if, contrary to (4) and (5) above, the Ambatielos claim be held to be based on the Treaty of 1886, the United Kingdom Government is not obliged to submit to arbitration the difference as to the validity of the claim for one or other or all of the following reasons:

- (a) non-exhaustion of local remedies;
- (b) undue delay in preferring the claim on its present alleged basis;
- (c) undue delay and abuse of the process of the Court in that, although reference of the dispute to the compulsory jurisdiction of the Court has been continuously possible since the 10th December, 1926, no such reference took place until the 9th April, 1951.

Accordingly, the United Kingdom Government prays the Court

To adjudge and declare

That the United Kingdom Government is not obliged to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim.

On 19th May, 1953, the Court held by ten votes to four " that the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity, under the Treaty of 1886, of the Ambatielos claim".

* * *

On 24th February, 1955, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Greece concluded an Agreement regarding the Submission to Arbitration of the Ambatielos Claim.

Article 1 of this Agreement stated:

- (a) The Commission of Arbitration (hereinafter called the Commission) shall be composed of:

Monsieur Ricardo J. Alfaro
Monsieur Algot J. F. Bagge
Monsieur Maurice Bourquin
Monsieur John Spiropoulos
Gerald Thesiger, Q.C.

- (b) The President of the Commission shall be Monsieur Ricardo J. Alfaro.
- (c) Should any Member of the Commission die or become unable to act, the vacancy shall be filled by a new Member appointed by the Government which nominated the Member to be replaced or by agreement between the two Governments, according to the manner of the original appointment.

According to Article 2 the Commission was requested to determine:

- (a) the validity of the Ambatielos claim under the 1886 Treaty having regard to:
 - (i) the question raised by the United Kingdom Government of undue delay in the presentation of the claim on the basis of the Treaty;
 - (ii) the question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty;
 - (iii) the provisions of the Treaty;
- (b) in the event of the Commission holding that the claim is valid, whether the United Kingdom Government ought now in all the circumstances to pay compensation to the Royal Hellenic Government; and if so, the amount of such compensation.

* * *

The Greek Government appointed as its Agent Monsieur Georges Bensis, Counsellor of the Royal Greek Embassy in London, and the United Kingdom

Government appointed as its Agent Mr. F. A. Vallat, C.M.G., Deputy Legal Adviser of the Foreign Office.

Pursuant to Article 5 of the Agreement of 24th February, 1955, the written proceedings consisted of a Case presented by the Greek Government on 17th May, 1955, and a Counter-Case submitted by the United Kingdom Government before the expiry of the time limit fixed for 17th September, 1955.

The Commission appointed as their Registrar: Dr. Edvard Hambro.
The hearings were opened in London on 25th January, 1956.

The Greek Agent was assisted by the following Counsel:

The Rt. Hon. Sir Frank Soskice, Q.C.
Professor Henri Rolin
Dr. C. John Colombos, Q.C., LL.D.
Mr. Frank Gahan, Q.C.
Mr. Mervyn Heald

and the United Kingdom Agent was assisted by the following Counsel:

Sir Harry Hylton-Foster, Q.C., M.P. (Solicitor-General)
Mr. John Foster, Q.C., M.P.
Sir Gerald Fitzmaurice, K.C.M.G.
Mr. Alan Orr, C.B.E.
Mr. D. H. N. Johnson

The Commission held hearings on 25th, 26th, 27th, 30th and 31st January and on 1st, 2nd, 3rd, 7th, 8th, 9th, 10th, 14th and 16th February.

During these hearings the Commission heard arguments by Sir Frank Soskice, Q.C., Mr. John Colombos, Q.C., Professor Henri Rolin and Mr. Frank Gahan, Q.C., on behalf of the Greek Government, and by Sir Harry Hylton-Foster, Q.C., M.P., Mr. John Foster, Q.C., M.P., Sir Gerald Fitzmaurice, K.C.M.G., and Mr. F. A. Vallat, C.M.G., on behalf of the United Kingdom Government.

In the Greek Case the submissions of that Government are set out as follows:

The Greek Government's contentions on the three questions so submitted to the Commission of Arbitration, as more particularly set out hereafter, are as follows:

- (i) With regard to the question of undue delay raised by the United Kingdom Government in the presentation of the Ambatielos claim, the facts are that the first Note of the Greek Government asking the United Kingdom Government "to cause a careful examination of the case" was presented to the British Foreign Office in September, 1925, viz., approximately two-and-a-half years from the date of the judgment of the English Court of Appeal, and from 1933 onwards (apart from the war period) continuous requests for international arbitration were being made to the United Kingdom Government by the Greek Government. These requests were met by stubborn refusals to negotiate in any way whatever;
- (ii) On the question raised by the United Kingdom Government of non-exhaustion of the legal remedies by Mr. Ambatielos in the English Court, there are two points, namely: (a) failure to appeal to the House of Lords against the refusal of the Court of Appeal to admit fresh evidence on appeal from the judgment of the English Court of Admiralty and (b) failure to prosecute an appeal from the said judgment;

As to (a), the short answer is that in refusing Mr. Ambatielos's request for the production of fresh evidence, the Court of Appeal was exercising its discretion in a matter of practice and procedure and that an appeal to the House of Lords had no prospects of success.

As to (b), in the absence of the fresh evidence referred to in (a), the

prospect of success on appeal was so slight as to be "ineffective" within the meaning of international law;

- (iii) On the question of the validity of the Ambatielos claim under the provisions of the Treaty, the Greek Government contends that its national did not receive at the hands of the United Kingdom the treatment to which Greek nationals are entitled under the provisions of the Treaty and generally under the rules of international law, justice, right, and equity applicable thereto. As argued by Sir Frank Soskice before the International Court of Justice in March, 1953: — "The plain, unvarnished truth here is that the Greek Government complain of the fact that one of their nationals paid £1,600,000 for nine ships, got no ships, got nothing for his money: £500,000 of that £1,600,000 was specifically paid in order to ensure that the ships should be delivered at a certain time; they were not delivered at that time; the British executive authorities then kept back evidence which prevented Mr. Ambatielos getting relief from the British Courts. He got no relief but was ordered to pay some £350,000 instead."

At the end of the Case the actual claims are set out as follows:

The main claim A, consisting of £8,059,488 11s. 0d., as compensation for breach of the contract of sale, an alternative claim B, based on unjust enrichment amounting to £4,140,075, and another alternative claim C, in connection with the cancelling date of the purchase of the *Mellon* and the *Stathis* amounting to £4,409,242.

At the end of the oral proceedings the Greek claims were put as follows:

A. Under the claim based on Article X of the Anglo-Greek Treaty of Commerce and Navigation, 1886, read in conjunction with Article 16 of the Treaty of Peace and Commerce between Great Britain and Denmark of 1660 (1661); Article 24 of the like treaty of 1670; Article III of the Anglo-Spanish Treaty of 1667; Article 6 of the Treaty of Peace and Commerce between Great Britain and Sweden, 1661; Article 7 of the Anglo-Peruvian Treaty, 1830; Article I of the Anglo-Japanese Treaty, 1911; and Article X of the Anglo-Bolivian Treaty, 1911.

- | <i>No.</i> | <i>Facts</i> |
|------------|---|
| 1. | British Government contracted in 1919 to sell to Mr. Ambatielos nine ships to be delivered at or before definitely agreed dates. |
| 2. | British Government broke that contract by not delivering the ships within those agreed dates. |
| 3. | As an incident of that contract, the contract price was boosted to the extent of £500,000 because the dates of delivery were agreed. |
| 4. | By reason of delivery not having been made within the time agreed, Mr. Ambatielos received nothing for that £500,000. |
| 5. | The breaches of the contract inevitably placed Mr. Ambatielos in a position of acute financial embarrassment. |
| 6. | If Mr. Ambatielos had been able to come to London in 1920 he might have saved the wreck of his fortune and so have avoided ruin by negotiating a practicable settlement; but the British Government by an unfounded claim for income tax (which claim involved the possibility of his imprisonment if he came to the United Kingdom) prevented him from coming to London. |
| 7. | When in May, 1921, Mr. Ambatielos was able without danger to come to London, the claim for income tax was abandoned and Mr. Ambatielos arranged terms with Sir Ernest Glover reducing the price outstanding by £500,000 and submitting the matters in dispute to arbitration, but the |

Board of Trade, arbitrarily and without any consideration as to the merits and fairness of the case, frustrated those negotiations by insisting upon resorting to action for the purpose of enforcing their mortgages.

8. In the circumstances obtaining, common equity and fairness required that the British Government should have handed over to Mr. Ambatielos the *Stathis* and the *Mellon* in order that Mr. Ambatielos could trade with them; but the British Government (whether acting within or outside its strict legal rights) refused to hand over those ships, thereby occasioning further serious loss to Mr. Ambatielos and making his ruin certain.
9. If Mr. Ambatielos had been able to establish, by way of defence and counter-claim in the action before Mr. Justice Hill, his claim to damages for late delivery, he would have prevented the seizure and sale of the ships and, in addition, he would have been awarded substantial compensation; but the British Government, by its manoeuvres before and in the proceedings before Mr. Justice Hill, procured a miscarriage of justice in that it procured Mr. Justice Hill to reach an erroneous conclusion of fact, namely that there were no agreed dates of delivery.
10. The manoeuvres mentioned in 9 consisted in:
 - (a) The Board of Trade abused the privileges available to it as a department of the British Government in that the Board of Trade under cover of state privilege withheld crucial and essential minutes and other departmental documents, whereas a proper exercise of state privilege would have required that those documents should all have been placed before the court.
 - (b) The Board of Trade and those responsible for preparing its case in the proceedings before Mr. Justice Hill failed to make available, either to the court or to Mr. Ambatielos's advisers in reasonable time before or at the proceedings, the correspondence which had passed between Sir Joseph Maclay and Major Laing in July, 1922.
 - (c) With knowledge that Major Laing could give vitally material evidence in support of Mr. Ambatielos's case and that Mr. Ambatielos's advisers were unlikely to have access to that evidence (since it related to Major Laing's actions while a government servant), the Board of Trade and those responsible for preparing its case nevertheless kept that evidence from the court by:
 - (i) not calling Major Laing as a witness;
 - (ii) not informing Mr. Ambatielos or his advisers in good time before or at the trial that the evidence was available and could be given by Major Laing;
 - (iii) allowing their counsel to present before Mr. Justice Hill a version of the facts and an argument in respect of the Board of Trade's case which was contrary to the documents which they had or must have had in their possession (namely the July, 1922, correspondence, and a proof or written statement of the evidence which Lord, formerly Sir Joseph, Maclay and Major Laing were prepared to give) with the result that Mr. Justice Hill was allowed to arrive at a decision which amounted to a miscarriage of justice.
11. When Mr. Ambatielos, through his advisers, applied to the Court of Appeal for leave to call further evidence the Board of Trade ought to have consented to and indeed ought to have assisted that application, but instead the Board of Trade opposed it and persuaded the Court of Appeal to reject the application.

12. The totality of the facts above set out, or of such of them as the Commission may find to have been established.

The Greek Government contends that:

1. The above facts constitute a breach of Article X of the 1886 Treaty under which Greece and Greek subjects have the benefit of other treaties into which the United Kingdom had entered in that:

- (i) In breach of Article 16 of the Anglo-Danish Treaty of Peace and Commerce, 1660 (1661) the British Government, having broken its contract with Mr. Ambatielos and having put difficulties in his way, when his cause came before Mr. Justice Hill, caused to be administered to Mr. Ambatielos not justice and right, but injustice and wrong.
- (ii) Likewise in breach of Article 24 of the Anglo-Danish Treaty of Peace and Commerce, 1670, the British Government failed to cause justice and equity to be done, and caused injustice to be done.
- (iii) Likewise in breach of Article 3 of the Anglo-Spanish Treaty of Peace and Friendship, 1667, the British Government failed to abstain from force, violence and wrong, and did injury to Mr. Ambatielos against common right; when justice was sought in the ordinary course of law it was not followed, but justice was denied; and when the Greek Government asked for justice, and for Commissioners to receive and hear the matter, the British Government refused and delayed justice.
- (iv) Likewise in breach of Article 6 of the Anglo-Swedish Treaty of Peace and Commerce, 1661, when Mr. Ambatielos stood in need of the Magistrate's help it was not granted to him readily and in friendly manner according to the equity of his cause, and justice was not administered to him but injustice.
- (v) Likewise in breach of Article 7 of the Anglo-Peruvian Treaty, 1830, Mr. Ambatielos did not in England enjoy full and perfect protection of his person and property and did not have free and open access to the courts of justice for the prosecution and defence of his just rights. On the contrary the British Government threatened his person by an unfounded income tax claim; injured his property and procured the doing of injustice in the proceedings before Mr. Justice Hill.
- (vi) Likewise in breach of Article 1, paragraph 6, of the Anglo-Japanese Treaty, 1911, the British Government did not afford Mr. Ambatielos complete security for his person and property, but endangered his person by an unfounded income tax claim, and denuded him of his property.
- (vii) Likewise in breach of Article 10 of the Anglo-Bolivian Treaty, 1911, justice was denied to Mr. Ambatielos, and the principles of international law were violated in that Mr. Ambatielos was subjected to arbitrary and unfair treatment and an unjust court decision was procured against him.

The damage from these breaches is set out in Claim A in the Greek Case.

2. Alternatively if, contrary to the Greek Government's contention, the Commission should hold that there was not a contract for delivery of the ships on or before fixed dates, it is clear that Mr. Ambatielos paid an additional £500,000 because of the most specific assurances about early deliveries. By reason of these assurances being broken, the British Government, in violation of the principles of international law and in breach of Article 10 of the Anglo-Bolivian Treaty, 1911, and the other treaties mentioned at the outset of this chart as incorporated by Article X of the Anglo-Greek Treaty of 1886, has been unjustly enriched.

The damage thereby suffered by Mr. Ambatielos is set out in Claim B in the Greek Case.

3. Alternatively, if regard is had only to the proceedings before Mr. Justice Hill and to the British Government's manoeuvres in relation thereto (facts No. 9, 10 and 11), the British Government procured a denial of justice to Mr. Ambatielos in breach of the above-cited Articles of Treaties between the United Kingdom and Denmark, Spain, Sweden and Bolivia.

The damage thereby suffered is set out in Claim A in the Greek Case.

4. Alternatively to Contentions 1 and 3, equity and fair dealing required that the sale of the *Mellon* and *Stathis* should have been treated as cancelled about November, 1920, and not later than 3rd February, 1921 (see the penultimate paragraph of Exhibit 4F to the Greek Case). The failure to do as equity and fair dealing required and the aggravation of damage to Mr. Ambatielos was a breach of the Treaty Articles cited.

The damage thereby suffered by Mr. Ambatielos is set out in Claim C in the Greek Case.

B. Under the claim based on Article XV of the Anglo-Greek Treaty of Commerce and Navigation, 1886.

1. The British Government put forward a case before Mr. Justice Hill contrary to documents in their possession.

2. The British Government withheld those documents, thereby preventing Mr. Ambatielos knowing that they were putting forward a case of that kind, namely a case known to be false.

3. The British Government did so in circumstances in which they knew that Mr. Ambatielos had no power to compel them to disclose those documents, they having the right to refuse to disclose them.

The Greek submission was that these three alleged facts constituted denial of free access to the Courts.

The United Kingdom submissions which were retained at the end of the oral proceedings are as follows:

In the light of the facts, considerations and contentions set out in the present Counter-Case, the United Kingdom Government asks the Commission to adjudge and declare the Greek Claim to be invalid, because

- (1) there has been undue delay in presenting the claim on the basis of the 1886 Treaty;
- (2) the Claimant failed to exhaust his legal remedies in the English Courts;
- (3) the Claim discloses no breach of the 1886 Treaty, direct or indirect.

* * *

The Commission will begin the determination of the issues submitted to it by examining the question raised by the United Kingdom Government of undue delay in the presentation of the claim on the basis of the 1886 Treaty.

The Commission thinks it desirable thereafter to determine the question of the validity of the Ambatielos claim under the 1886 Treaty. Finally, the Commission will determine the question whether the legal remedies in the English Courts were exhausted by Mr. Ambatielos.

THE QUESTION OF UNDUE DELAY IN THE PRESENTATION OF THE CLAIM
ON THE BASIS OF THE TREATY OF 1886

The Government of the United Kingdom contends that the claim of the Greek Government ought to be rejected by reason of the delay in its presentation.

It is generally admitted that the principle of extinctive prescription applies to the right to bring an action before an international tribunal. International tribunals have so held in numerous cases (Oppenheim — Lauterpacht — *International Law*, 7th Edition, I, paragraph 155c; Ralston — *The Law and Procedure of International Tribunals*, paragraphs 683-698, and *Supplement*, paragraphs 683 (a) and 687 (a)). L'Institut de Droit international expressed a view to this effect at its session at The Hague in 1925.

There is no doubt that there is no rule of international law which lays down a time limit with regard to prescription, except in the case of special agreements to that effect, and accordingly, as L'Institut de Droit international pointed out in its 1925 Resolutions, the determination of this question is "left to the unfettered discretion of the international tribunal which, if it is to accept any argument based on lapse of time, must be able to detect in the facts of the case before it the existence of one of the grounds which are indispensable to cause prescription to operate".

The Commission does not find in the circumstances of the present case any reason which would justify the application of the principle of prescription to the claim of the Greek Government.

The diplomatic correspondence produced by the Parties shows that the Greek Government intervened from 1925 onwards in order to exercise its diplomatic protection on behalf of Mr. Ambatielos, and that, since then, it has made repeated representations at intervals which cannot be regarded as abnormal in the particular circumstances of the case.

It should also be noted that the Government of the United Kingdom has not, before the Commission, persisted in the argument which it put forward before the International Court of Justice in support of its allegation of "undue delay". Before the International Court the Government of the United Kingdom contended that the Greek Government had been dilatory in taking up the Ambatielos Claim initially, and in prosecuting it generally. Before the Commission it abandoned this complaint. (United Kingdom Counter-Case, paragraphs 168 and 169).

In the arguments addressed to the Commission, the undue delay imputed to the Greek Government did not relate to the diplomatic representations made and pursued by that Government, but to the use the latter made of the Treaty of 1886 as being the basis of its action.

It is a fact that until 1939 the claim of the Greek Government seemed to be based solely on general international law, and that it was in the Note of 21st November, 1939, addressed by the Greek Legation in London to the Secretary of State for Foreign affairs of the United Kingdom (International Court of Justice, Ambatielos Case, Pleadings pp. 96-98) that the Treaty of 1886 was for the first time relied upon to support the claim.

The Government of the United Kingdom explains this change of attitude as being due to the anxiety of the Greek Government to submit the dispute to arbitration. So long as the dispute remained within the sphere of general international law, there was no obligation on the United Kingdom to submit to arbitration or judicial settlement. On the other hand, by linking the dispute with the Treaty of 1886, the Greek Government could, by virtue of the Declaration which the two Governments had signed on 16th July, 1926, rely upon the obli-

gation provided for in this Declaration, to the effect that "claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886" were to be submitted to arbitration.

This explanation is a plausible one, but it is difficult to see what effect it can have on prescription.

The Greek Government, by changing the legal basis of its action in order to obtain a settlement of the dispute by arbitration, only exercised the right to which it was entitled. If it did not adopt this attitude until 1939 when its initial diplomatic intervention dates back to 1925, that fact cannot be held against it in so far as concerns the operation of prescription, unless it brought about results which, *in themselves*, would justify the operation of prescription — such, for instance, as the difficulties of the United Kingdom in assembling the elements of proof requisite for or useful to its defence.

Furthermore, it is not very clear from the United Kingdom Counter-Case whether the allegation against the Greek Government is directed to that Government's having waited until 1939 to decide upon the present legal basis for its action, or whether it is not rather directed to the Greek Government's having waited until 1951 to institute the legal proceedings which it was open to it to "institute, compulsorily, as early as, at the latest, 1926". (Counter-Case, paragraph 168.)

In the latter case the alleged delay would be concerned not with the fact that reliance was placed on the Treaty of 1886, but that *legal action* was taken on the basis of that Treaty.

The Government of the United Kingdom desires it to be understood that if the Greek Government had acted earlier, the evaluation and appreciation of the events in dispute would have been simpler and more certain. (Counter-Case, paragraph 169). This contention, however, does not find support in any specific fact, and it would seem to be all the more difficult to accept because — even though *the legal basis* of the claim has been changed during the diplomatic exchanges — *the facts* which constitute its substance have remained the same from the beginning, and from the point of view of difficulty of proof these facts are, above all, important.

The Commission is therefore of opinion that the objection of "undue delay" raised by the Government of the United Kingdom is not well-founded, in so far as it is intended to cause the claim of the Greek Government to be rejected.

But the Government of the United Kingdom would appear to draw a further conclusion from the delay which it imputes to the Greek Government. It contends, in fact, that as the Greek Government invoked the Treaty of 1886 as the basis of its claim only belatedly, there would, for this reason, be a presumption unfavourable to its case. (Counter-Case, paragraphs 175 and 176.)

This consideration, however, is irrelevant to prescription, and could have a bearing only on the requirements of proof.

THE VALIDITY OF THE AMBATIELOS CLAIM UNDER THE 1886 TREATY

As stated in the Greek Case (paragraph 6, iii) "the Greek Government contends that its national (Mr. Ambatielos) did not receive at the hands of the United Kingdom Government the treatment to which Greek nationals are entitled under the provisions of the Treaty, and generally under the rules of international law, justice, right and equity applicable thereto."

Further on, the part of the Case dealing specifically with the question of "the validity of the Ambatielos claim under the provisions of the 1886 Treaty" (paragraph 58), reads as follows: "The Greek Government contends that there has been a breach by the United Kingdom of all or any of the following provisions

of the Anglo-Greek Treaty of Commerce and Navigation of November 10, 1886, to wit: ". Articles I, X, XII and XV of the Treaty are then quoted in full in paragraphs 58, 59, 78 and 80 of the Case, respectively, and comments are made on each of the aforesaid provisions, in support of the Greek contention, in paragraphs 58 to 90 of the Case.

The position of the Greek Government as outlined above and as it presented itself when the oral hearing began, was subsequently changed. The Commission requested Counsel for the Greek Government at the end of the 6th meeting, held on 1st February, to indicate at the conclusion of their arguments *and in a precise manner* :

- (1) the facts which in the opinion of that Government resulted in the international responsibility of the British Government;
- (2) the Article or Articles of the Treaty of 1886 to which each of these facts, according to the Greek Government, was referable.

In accordance with this request, Sir Frank Soskice, Chief Counsel for the Greek Government, at the 8th meeting of the Commission, held on 3rd February, made the following statement:

I accept that in order to succeed in this claim the Greek Government must be able to establish that there was a breach of some provision, some Article of the 1886 Anglo-Greek Treaty. The only Articles which, in the submission of the Greek Government, were breached, were Article X and Article XV . . . It is not asserted any longer that there was a breach of Article I.

After this statement Sir Frank Soskice set out the facts and claims which have been enumerated above.

In paragraph 12 of those submissions Chief Counsel for the Greek Government, Sir Frank Soskice, stated:

The totality of the facts above set out or of such of them as the Commission may find to have been established the Greek Government contends . . . constitute a breach of Article X of the 1886 Treaty.

Furthermore, Counsel for the Greek Government at the 6th meeting withdrew the contents of paragraphs 70, 71 and 74 of the Greek Case; and at the 8th meeting the previous allegation in respect of a breach of Article XII of the Treaty of 1886 was also withdrawn.

These paragraphs and a Statement made on their withdrawal are set out in Annex 8¹ to this award.

Furthermore, Counsel for the Greek Government asserted that Article XV of the above-mentioned Treaty had been violated in the manner specified in the three particulars set out at the very end of the final submissions, and which will be the subject of consideration in connection with Article XV.

On the other hand, the Government of the United Kingdom, in paragraph 178 of the Counter-Case, maintains that " no breach of the Treaty could be established, even if the Greek version of the facts were accepted as correct ".

It is apparent, therefore, that the essential task of the Commission is to determine, in the light of such facts as it may consider duly established by the Claimant Government on whom the burden of proof obviously lies whether or not Articles X and XV of the Treaty of 1886, or either of them, have been violated by the Government of the United Kingdom.

* * *

¹ See p. 152.

THE INTERPRETATION OF ARTICLE X OF THE TREATY OF 1886

Article X of the Treaty of 10th November, 1886, reads as follows:

The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour, or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favoured nation.

* * *

The Greek Government claims that by virtue of the most-favoured-nation clause contained in this Article, it is entitled to claim for its nationals treatment in accordance with "justice", "right", "equity" and the "principles of international law", such treatment having been assured by the United Kingdom to the nationals of other States, by virtue of the Treaties concluded by that country with Denmark, Spain, Sweden, Peru, Costa Rica, Japan and Bolivia. (Greek Case, paragraphs 60-63, and International Court of Justice, *Ambatielos Case*, Pleadings, pp. 509-515.)

* * *

The United Kingdom Government disputes that this is so. It puts forward the following:

- (a) that a most-favoured-nation clause can, in principle, only attract treatment accorded to other countries or their nationals as a *privilege, favour, or immunity*, and not treatment accorded as a right (irrespective of any conventional basis), such as treatment in accordance with the principles of international law;
- (b) that a most-favoured-nation clause can only attract matters belonging to the same category of subject as the clause itself relates to;
- (c) that the most-favoured-nation clause in Article X of the 1886 Treaty only relates to commerce and navigation and not to the administration of justice;
- (d) that even were Article X of the 1886 Treaty so worded as to attract a right to treatment in accordance with the general rules of international law, justice, right and equity, relative to the administration of justice, no such right is in fact conferred by the provisions of the other Treaties cited by the Greek Government. (United Kingdom Counter-Case, paragraphs 237-249.)

* * *

The Commission does not deem it necessary to express a view on the general question as to whether the most-favoured-nation clause can never have the effect of assuring to its beneficiaries treatment in accordance with the general rules of international law, because in the present case the effect of the clause is expressly limited to "any privilege, favour or immunity which either Contracting Party has actually granted or may hereafter grant to the subjects or

citizens of any other State", which would obviously not be the case if the sole object of those provisions were to guarantee to them treatment in accordance with the general rules of international law.

* * *

On the other hand, the Commission holds that the most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates.

The Commission is, however, of opinion that in the present case the application of this rule can lead to conclusions different from those put forward by the United Kingdom Government.

In the Treaty of 1886 the field of application of the most-favoured-nation clause is defined as including "all matters relating to commerce and navigation". It would seem that this expression has not, in itself, a strictly defined meaning. The variety of provisions contained in Treaties of commerce and navigation proves that, in practice, the meaning given to it is fairly flexible. For example, it should be noted that most of these Treaties contain provisions concerning the administration of justice. That is the case, in particular, in the Treaty of 1886 itself, Article XV, paragraph 3, of which guarantees to the subjects of the two Contracting Parties "free access to the Courts of Justice for the prosecution and defence of their rights". That is also the case as regards the other Treaties referred to by the Greek Government in connection with the application of the most-favoured-nation clause.

It is true that "the administration of justice", when viewed in isolation, is a subject-matter other than "commerce and navigation", but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes "all matters relating to commerce and navigation". The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.

Although the wording of Article X does not provide a clear and decisive indication in this respect, the Commission is of opinion that it is difficult to reconcile the narrow interpretation submitted by the Government of the United Kingdom with the indications given in the text, in particular in the last part of the sentence: "it being their (the Contracting Parties') intention that the trade and navigation of each country shall be placed, *in all respects*, by the other on the footing of the most favoured nation".

* * *

Having thus determined the meaning of the most-favoured-nation clause contained in Article X of the Treaty of 1886, the next question is whether this clause effectively brings about the results which the Greek Government believes it does, by relying on the various Treaties concluded by the United Kingdom with other States.

* * *

One of these results, it is contended, would be to incorporate in the Treaty of 1886 the "principles of international law". To justify this argument, the Greek Government relies exclusively on Article 10 of the Treaty of Commerce concluded on 1st August, 1911, between the United Kingdom and Bolivia, which reads as follows:

The High Contracting Parties agree that during the period of existence of this treaty they mutually abstain from diplomatic intervention in cases of claims or complaints on the part of private individuals affecting civil or criminal matters in respect of which legal remedies are provided.

They reserve, however, the right to exercise such intervention in any case in which there may be evidence of delay in legal or judicial proceedings, denial of justice, failure to give effect to a sentence obtained in his favour by one of their nationals or violation of the principles of international law. (International Court of Justice, *Ambatielos Case*, Pleadings, p. 515.)

The Commission cannot agree that a provision such as this has the effect of incorporating the principles of international law in the Anglo-Greek Treaty of 1886 by virtue of the most-favoured-nation clause.

As stated above, the most-favoured-nation clause contained in the Treaty of 1886 applies only to privileges, favours and immunities granted to other countries, and therefore cannot incorporate the principles of international law in the said Treaty. If need be, this observation would suffice to reject the conclusion which the Greek Government considers itself entitled to draw from Article 10 of the Anglo-Bolivian Treaty. There is another decisive reason, however, which corroborates the preceding one: It is the fact that it is in no way the object of this provision to guarantee to the nationals of the Contracting States the principles of international law. Its object is to provide in a special manner, as between Contracting States, for the exercise of diplomatic protection. According to the first paragraph of the Article the Contracting Parties undertake to abstain from any intervention of this kind in respect of claims by private individuals for which local remedies are provided. The second paragraph provides for certain exceptions to this rule, one of which reserves the right to exercise such intervention in case of violation of the principles of international law. It is with regard to this exception that the Article refers to the principles of international law. However, it refers to these principles solely for the purpose of laying down the *condition* which governs this exception, and not for the purpose of guaranteeing the benefit of these principles to the nationals of the Contracting States.

Whichever way the matter is envisaged, it is impossible to accept the proposition that Article 10 of the Anglo-Bolivian Treaty has the effect, by virtue of the most-favoured-nation clause, of incorporating the principles of international law in the Treaty of 1886.

* * *

The provisions of other treaties on which the Greek Government relies are concerned with the *administration of justice*. Several of them date back to the seventeenth century (the Treaties of 13th February, 1660-1661, and of 11th July, 1670, with Denmark; a Treaty of 23rd May, 1667, with Spain; Treaties of 11th April, 1657, and of 21st October, 1661, with Sweden). Naturally, their wording was influenced by the customs of the period, and they must obviously be interpreted in the light of this fact. It is only in these Treaties of the seventeenth century that certain references appear to "justice", "right" and "equity" on which the Greek Government relies in support of its claim that

these concepts have been incorporated as such in the Anglo-Greek Treaty of 1886.

The Commission takes the view that to attribute such significance to these provisions would be to strain their meaning. "Justice", "right" and "equity" are not guaranteed by these provisions as rights independent of and superior to positive law, but simply within the framework of the municipal law of the Contracting States. It was not an ideal system of "justice", "right" and "equity" which the signatory Governments intended to assure to their respective nationals; it was the application of their national laws concerning the administration of justice.

Furthermore, the Treaties concluded with Denmark provide an indication in this respect which leaves no room for doubt: Article 46 of the Treaty of 1660-1661 specifies, "*according to the laws and statutes of each country*", and Article 24 of the Treaty of 1670, "*according to the laws and statutes of either country*".

The same idea is expressed in different fashion in the Treaty of 1667 with Spain: "until such time as Justice is sought and followed *in the ordinary course of Law*"; "to the end that all such differences be compounded in friendship, or *according to Law*".

It is true that the Treaties of 1654 and 1661 with Sweden do not expressly mention municipal law, but there is nothing which permits us to ascribe a different meaning to them. The provision that "in case the people and subjects on either part . . . shall stand in need of the Magistrate's help, the same shall be readily and according to the equity of their cause in friendly manner granted to them and justice shall be administered to them without long . . . delays" must refer to help and equity and justice according to municipal law. Moreover, these Treaties were contemporary with those concluded with Denmark and Spain, to which reference has just been made, and it is difficult to believe that, notwithstanding some discrepancies in wording, the intention of the Contracting Parties was not the same in each case.

The Commission cannot, therefore, accept the argument that the Treaties concluded by the United Kingdom in the seventeenth century with Denmark, Spain and Sweden give the Greek Government the right to claim for Mr. Ambaticlos treatment in accordance with "justice", "right" and "equity" in the ideal sense of those words and independently of the rules of English law.

As for the Treaties which were concluded after the seventeenth century and to which reference is made by the Greek Government, they obviously cannot be relied upon to support this argument because they are limited to guaranteeing equality of treatment with the signatories' own nationals in the matter of the administration of justice.

* * *

To sum up, the Commission is of opinion:

(1) that the Treaty concluded on 1st August, 1911, by the United Kingdom with Bolivia cannot have the effect of incorporating in the Anglo-Greek Treaty of 1886 the "principles of international law", by the application of the most-favoured-nation clause;

(2) that the effects of the most-favoured-nation clause contained in Article X of the said Treaty of 1886 can be extended to the system of the administration of justice in so far as concerns the protection by the courts of the rights of persons engaged in trade and navigation;

(3) that none of the provisions concerning the administration of justice which are contained in the Treaties relied upon by the Greek Government can be

interpreted as assuring to the beneficiaries of the most-favoured-nation clause a system of "justice", "right" and "equity" different from that for which the municipal law of the State concerned provides;

(4) that the object of these provisions corresponds with that of Article XV of the Anglo-Greek Treaty of 1886, and that the only question which arises is, accordingly, whether they include more extensive "privileges", "favours" and "immunities" than those resulting from the said Article XV;

(5) that it follows from the decision summarised in (3) above that Article X of the Treaty does not give to its beneficiaries any remedy based on "unjust enrichment" different from that for which the municipal law of the State provides.

As will be shown below, the Commission is of opinion that "free access to the Courts", which is vouchsafed to Greek nationals in the United Kingdom by Article XV of the Treaty of 1886 includes the right to use the Courts fully and to avail themselves of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.

The Commission is therefore of opinion that the provisions contained in other Treaties relied upon by the Greek Government do not provide for any "privileges, favours or immunities" more extensive than those resulting from the said Article XV, and that accordingly the most-favoured-nation clause contained in Article X has no bearing on the present dispute. In view of this decision as to the proper interpretation of Article X the Commission finds it unnecessary to consider expressly whether any of the 11 allegations of fact which, in their totality, are alleged to constitute a breach of Article X, have been established. Some of the allegations are however disposed of, when relevant, in other parts of this award.

THE INTERPRETATION OF ARTICLE XV OF THE TREATY OF 1886

The submissions relative to breaches of Article XV of the Anglo-Greek Treaty of 1886 will now be examined.

Article XV provides as follows:

The dwellings, manufactories, warehouses and shops of the subjects of each of the Contracting Parties in the dominions and possessions of the other, and all premises appertaining thereto destined for purposes of residence or commerce shall be respected.

It shall not be allowable to proceed to make a search of, or a domiciliary visit to, such dwellings and premises, or to examine and inspect books, papers, or accounts, except under the conditions and with the form prescribed by the laws for subjects of the country.

The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country.

For the purposes of this arbitration the Commission is solely concerned with the third paragraph of this Article and its decision must necessarily hinge upon the interpretation to be given to the phrase "free access to the [English] Courts of Justice", which is used by the Parties to the Treaty.

The Greek Government contends (paragraph 81, Greek Case), that "access to the Courts for the prosecution and defence of their rights is not limited to

allowing a foreign national to go to Court and plead his cause but includes the obligation to make it possible for him to avail himself of all the documents necessary for the defence of his rights. Construed in its natural meaning, the term does not apply only to a material access to the Court, but an access ensuring all rights of defence”.

The United Kingdom Government, on the other hand, maintains (paragraph 223, United Kingdom Counter-Case) that “even if the third paragraph of Article XV were given the extended meaning contended for by the Greek Government there would still be no breach of this provision because in fact the claimant had all the facilities necessary . . .”

In the submission at the end of the oral proceedings referred to above, as formulated by Counsel for the Greek Government at the 8th meeting of the Commission, the following concrete facts were asserted as constituting violations of Article XV of the Treaty of 1886:

1. The British Government put forward a case before Mr. Justice Hill contrary to documents in their possession.
2. The British Government withheld those documents, thereby preventing Mr. Ambatielos *knowing* that they were putting forward a case of that kind, namely a case known to be false.
3. The British Government did so in circumstances in which they knew that Mr. Ambatielos had no power to compel them to disclose those documents, *they having the right to refuse to disclose them*.

The submission therefore is that Mr. Ambatielos was denied “access to the English Courts” by reason of the three facts stated above. Before entering into a separate analysis of the charges implied in the three facts asserted by the Greek Government, the Commission deems it advisable to state its views on the meaning of the term “free access”, as used in the Treaty of 1886.

The modern concept of “free access to the Courts” represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of “free access” is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights. Thus, when “free access to the Courts” is covenanted by a State in favour of the subjects or citizens of another State, the covenant is that the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.

The Commission is of opinion that this is what was agreed upon in paragraph 3 of Article XV of the Anglo-Greek Treaty of 1886. This clause in effect provides, for the benefit of Greek subjects in the United Kingdom, that they “shall have free access to the Courts of Justice for the prosecution and defence of their rights, *without other conditions, restrictions or taxes beyond those imposed on native subjects and shall be at liberty to employ, in all causes, their advocates, attorneys or agents . . .*”

Therefore, there would be a breach of this clause in the present case if it could be proved that when an action was brought against Mr. Ambatielos by

the Board of Trade he was prevented from exercising any procedural right or remedy; or that in some way he was not treated in accordance with English law and practice; or that he was not permitted to employ advocates, attorneys or agents; or that conditions, restrictions or taxes beyond those imposed on British subjects were imposed on him; or that he was in some other way denied access to the English Courts.

In order to determine the existence or non-existence of the facts referred to above, the Commission will examine separately each of the charges preferred by the Greek Government against the United Kingdom Government in the submissions of the former at the end of the hearing. The first is that:

The British Government put forward a case before Mr. Justice Hill contrary to documents in their possession.

In the first place the Commission must determine what is meant by the phrase *a case contrary to documents in the possession* of the United Kingdom Government. The "case", of course, is the "case" put forward by the Board of Trade in a series of actions tried before Mr. Justice Hill in November, 1922, in the Admiralty Division of the High Court of Justice. In this arbitration these actions are generally referred to as "the proceedings before Mr. Justice Hill". These proceedings were brought by the Board of Trade, as successors to the Shipping Controller as Mortgagees under mortgages dated 4th November, 1920, and placed on seven ships purchased by Mr. Nicholas E. Ambatielos, to secure the payment of moneys due on the purchase price. The Board of Trade claimed possession of the ships under the mortgage deeds and under the terms of a certain Indenture or Deed of Covenant executed on the same date.

The action was resisted by the Defendant on several grounds, the principal ground being that the Shipping Controller had agreed to deliver the ships which had been sold, on certain fixed dates, that the ships had not been delivered on these dates and that by reason of the delay the Defendant had suffered damage. The Defence in the *Cephalonia* case (Annex 1A, United Kingdom Counter-Case) alleges the following:

4. In addition to the written terms embodied in the said contract, it was verbally agreed at or about the time at which the said contract was entered into, that the said steamships should be delivered to the Defendant on dates certain. The said verbal agreement was made between Major Bryan Laing on behalf of the Shipping Controller and Mr. G. E. Ambatielos on behalf of the Defendant. The said verbal term of the contract was subsequently confirmed in writing by letters of the 2nd May, 1921, from the Defendant to the said Major Bryan Laing and of the 11th May, 1921, from the said Major Laing to the Defendant.

The essence of the controversy which has led to this arbitration — as the arguments, both written and oral, fully show — is whether the United Kingdom Government, represented by the Shipping Controller, agreed with Mr. Ambatielos to deliver on dates certain the ships which had been sold to him, and the basis of the claim for damages is that the contract was broken by a failure to deliver the ships on the dates alleged to have been agreed upon. The Commission, therefore, must assume that by documents contrary to the claim which was put forward by the United Kingdom Government, the Greek Government means documents which show that fixed dates were agreed upon between the Government and Mr. Ambatielos for the delivery of the ships.

In the opinion of the Commission it cannot be contended successfully that documents known to the advisers of Mr. Ambatielos at the time of the proceedings in 1922 and produced to Mr. Justice Hill were sufficient in themselves to

show so clearly that fixed dates were agreed upon as to establish that the United Kingdom Government was putting forward a case contrary to documents in its possession.

According to the evidence before the Commission, the documents in the possession of the United Kingdom Government at the time when the action was before Mr. Justice Hill (*apart from those which were shown to the advisers of Mr. Ambatielos or produced before Mr. Justice Hill*) must be divided into two categories, namely:

- (a) Documents, the existence of which is assumed, but the contents of which are unknown to the Commission such as the minutes, jackets, inter-departmental communications, files, etc., which are supposed to have been produced in or received by the Ministry of Shipping in connection with the purchase of the ships by Mr. Ambatielos or in connection with his subsequent claim; and
- (b) Documents which were in existence when the trial of 1922 was proceeding and which were made known subsequently and are contained in the Exhibits or Annexes filed with the Greek Case and the United Kingdom Counter-Case.

With regard to documents in the first category, it is obvious that they do not constitute evidence on which the Commission can base a decision, inasmuch as they are not specified or identified and inasmuch as their contents are purely hypothetical. The Greek Government assumes that these unknown documents contain evidence of its main allegation that fixed dates for the delivery of the ships were agreed upon between the Ministry of Shipping and Mr. Ambatielos. As stated above, however, this Commission cannot possibly determine whether or not documents the contents of which are unknown are contrary to proceedings instituted on the basis of documents that are known. In other words, the Commission is unable to reach the conclusion that documents which it has not seen are contrary to the case put forward by the United Kingdom Government against Mr. Ambatielos.

With regard to documents belonging to the second category, it is necessary to examine their contents and determine whether the United Kingdom Government and its legal advisers must have realised that in fact they were contrary to the case put forward by the United Kingdom Government, i.e., whether they were documents showing clearly that that Government, represented by the Shipping Controller, did in fact agree with Mr. Ambatielos to deliver on dates certain the ships which it has sold to him.

The Commission does not find among the documents in the second category and reproduced in the Exhibits and Annexes filed by the Parties to this arbitration any document of a date prior to 24th November, 1922, which would furnish positive evidence that the United Kingdom Government entered into a binding agreement which provided for fixed delivery dates. Only such evidence would enable the Commission to hold that the United Kingdom Government or its advisers put forward a case which they knew to be contrary to documents in their possession.

The contract of sale of 17th July, 1919, does not, in any of its clauses, expressly provide for fixed dates. Article 7 thereof refers to delivery "*within the time agreed*". Article 3 stipulates that "the steamers shall be deemed ready for delivery immediately after they have been accepted by the Vendor from the Contractors." Finally, article 9 contemplates the case of default in delivery as between the Contractors (i.e. the builders of the ships) and the Vendor (i.e. the Shipping Controller).

The phrase "*within the time agreed*" in article 7 of the contract leads to the

inference that a time certain was agreed upon somewhere, in some manner, by the Contracting Parties. The Commission, however, does not find in the evidence before it any document distinct from the written contract which contains proof of the verbal agreement said to have been made with regard to fixed delivery dates, and which would thus prove that the United Kingdom Government put forward a case contrary to documents in its possession. As the pleadings of Mr. Ambatielos in the proceedings before Mr. Justice Hill, paragraph 4 of which is set out above, show, his defence was that in addition to the written terms of the contract, "it was verbally agreed . . . that the said steamships should be delivered to the Defendant on dates certain," and that "the said verbal agreement was made between Major Bryan Laing on behalf of the Shipping Controller and Mr. G. E. Ambatielos on behalf of the Defendant." It was further alleged in the Defence that "the said verbal agreement was subsequently confirmed in writing by letters of the 2nd May, 1921, from the Defendant to the said Major Laing and of the 11th May, 1921, from the said Major Laing to the Defendant." These letters read as follows:

2nd May, 1921.

Dear Major Laing,

You may remember calling on me in Paris about the end of August 1919 regarding the purchase of nine boats, negotiated by my brother from the Ministry of Shipping. In the course of conversation we had, I remember emphasizing to you that I attached the utmost importance to the dates of delivery which you had given to my brother and which appear in my letter to him of the 3rd July, and those dates you assured me you were satisfied could be relied upon.

You explained to me that I was justified in paying the apparently high figures I had paid because you were selling and I was buying the then position, deliveries and freights in connection with the steamers rather than the steamers alone.

I should be much obliged if you would let me know whether your recollection of our interview coincides with mine.

Yours very truly,

(Signed) N. E. AMBATIELOS
73, St. James's Street,
London, S.W.
11th May, 1921.

Dear Mr. Ambatielos,

I am in receipt of your letter of the 2nd May. I understand you have been away for some little time, otherwise I would have replied earlier.

I have read your letter through very carefully and so far as I can recollect your letter states what took place at the interview to which you refer.

Yours faithfully,

(Signed) BRYAN LAING

Nicolas Ambatielos, Esq.

18, Cavendish Square, London, W.

The Commission is of opinion that these two letters fail to constitute evidence confirming the alleged verbal agreement, inasmuch as the statement made by Mr. Ambatielos was: ". . . those dates you assured me *could be relied upon*." And Major Laing in his reply agreed to the statement, saying: "so far as I can recollect". The language of the two letters expresses an *expectation*, not an agreement.

The principal document, the contents of which are known to the Commission and which was in the possession of the Government at the time when the proceedings were before Mr. Justice Hill, and which dealt with the question of fixed delivery dates and which was not disclosed to the advisers of Mr. Ambatie-

los or produced to Mr. Justice Hill, was the letter addressed by Major Laing to Sir Joseph Maclay, the former Shipping Controller, on 20th July, 1922.

This letter was written in reply to one in which Sir Joseph Maclay had asked Major Laing for information concerning the sale of ships to Mr. Ambatielos, and Sir Joseph wrote in this connection:

At the time the sale was being negotiated you will remember you were in constant touch with me, but so far as I remember, nothing was ever said about guaranteeing dates of delivery, which, of course, it was impossible to do. I presume you told purchaser that the Ministry would do anything it could to hasten delivery and hoped-for dates might be mentioned, but nothing beyond this.

The pertinent paragraphs of the answer by Major Laing were the following:

I was of the opinion that it was most essential to dispose of the ships building at Hong Kong, and I had cables sent to our agents who were responsible for the building and completion, and they cabled back dates which they considered quite safe, and it was on this information that I was enabled to put forward a proposition to you.

The Eastern freight market at that time being very high, I came to the conclusion, and laid my deduction before yourself and the Committee of the Ministry of Shipping, that, provided these ships could be delivered at the times stated by our agents on behalf of the builders, they were worth, with their position, owing to the freight they could earn, another £500,000, and this I added to what I considered an outside price for the ships. *It was only by this argument that I INDUCED Mr. Ambatielos to purchase the ships.*

It will be seen that this letter was not sufficiently concrete and to the point to constitute evidence strong enough to convince the United Kingdom Government and its advisers of the fact that a legally binding agreement obliging the Government to adhere to fixed delivery dates was concluded by Major Laing, on behalf of the Government, with Mr. Ambatielos. It is worthy of note that Major Laing in his letter does not refer to an *agreement* with Mr. Ambatielos or even to a *promise* made to him, but an "*argument*" by means of which he INDUCED him to purchase the ships. The overall context of the letter and especially the two paragraphs quoted above are evidence of Major Laing's primary purpose, viz. to "reduce the liability against the Ministry of Shipping as rapidly as possible" and to secure a purchaser for the ships then building at Hong Kong. In furtherance of this purpose, by emphasising the economic advantages of the location of the ships and of a "free charter-party", and evidently convincing Mr. G. Ambatielos that the delivery dates given by the builders could be depended upon, Major Laing, as the letter states, INDUCED him to purchase the ships on behalf of his brother.

The letter has to be considered in connection with the evidence, chiefly the testimony of Mr. G. Ambatielos, that Major Laing invariably refused to insert fixed dates in the written contract. The Commission is of opinion that this attitude of Major Laing could be regarded by the United Kingdom Government as corroborating its case that there was no binding agreement for fixed dates. The Commission is unable to understand why the two parties, having agreed on a transaction which was to take the form of a written contract, should have made a vital and essential condition of that transaction the subject of a verbal agreement operating concurrently with the written contract.

The lack of evidential value of the Laing letter is corroborated by the affidavit of Mr. N. E. Ambatielos read in the Court of Appeal on 5th March, 1923, wherein he said:

Before the trial of this action I had a conversation with Major Laing concerning matters in question in this action. . . . Major Laing mentioned the existence of

certain confidential letters . . . Mr. Laing read me *a part* of the contents of the letters, but refused to show me the letters or to give me copies thereof . . . I did not receive from the extracts read to me or from the conversation which I held with Major Laing a correct impression as to the meaning of the letters. *In particular, I did not understand that they confirmed my case as to the delivery of the vessels on dates certain.*

A similar statement was made in another affidavit read on the same occasion viz. an affidavit by Mr. F. P. D. Gaspar, a member of the law firm of William A. Crump & Son, solicitors for Mr. Nicholas E. Ambatielos. In paragraph 3 of his affidavit Mr. Gaspar said:

The defendant contended that in addition to the written terms embodied in the said contract it was verbally agreed by the said Major Laing *at the time at which the said contract was entered into*, that the said steamships should be delivered to the defendant on dates certain.

Then in the final paragraph the deponent declares: "Major Laing refused to give me any statement or proof at any time either before or during the trial."

Why Major Laing refused to make clear his position prior to the proceedings before Mr. Justice Hill, with the result that he awakened fear or suspicion as to what he would say in evidence, particularly in cross-examination, and consequently was not called as a witness by Mr. Ambatielos, is something which, in the opinion of the Commission, can easily be explained. He would have found it very difficult to tell the Court why he had refused to put dates into the written contract (as testified by Mr. G. Ambatielos and other witnesses) and had at the same time said that he was binding the United Kingdom Government to deliver ships on fixed dates. He also would have found it very difficult to explain why he had pretended (as Mr. Nicholas Ambatielos testified) to make an agreement on behalf of the Ministry of Shipping in August, 1919, about sharing losses on freights.

Another document in the possession of the United Kingdom Government and one to which the Greek Government attached great weight is the cablegram relative to the S.S. *War Trooper*, renamed *Ambatielos*, referred to as having been sent by Sir John Esplen, a member of the Committee of the Ministry of Shipping on 31st October, 1919. According to the Greek Case this ship was to be delivered on or before 30th September, 1919. (Greek Case, paragraph 24.) The cablegram reads as follows:

From Esplen, Shipminder to Britannia, Hong Kong. Following for Dodwell, *War Trooper*. As the steamer was sold to buyers for delivery not later than November it is of utmost importance that she should be completed by that date stop Cable immediately progress of construction.

(Signed) M. J. STRAKER.

In the Statutory Declaration made by Major Laing on 19th January, 1934, he said with regard to this telegram:

This was sent because the Committee was becoming worried at the continual delay and they foresaw either cancellation of the contract or a claim being made against them.

The story of how that cable message was produced is told in a different manner by Mr. G. E. Ambatielos in his evidence before Mr. Justice Hill. His version was that the cablegram was not sent by order of either Sir John Esplen or the Committee, but on the personal instructions of Major Laing. Here is the relevant part of the evidence:

- Q. Were you there when he gave the instructions?
- A. Yes; I was there when the instructions were given; but I was not there when the telegram was sent.
- Q. What instructions did he give? Did he call in a clerk?
- A. He called this Miss Straker, who was acting as his secretary as well as the secretary to Sir John Esplen.
- Q. What did he say to her?
- A. He said: "You must immediately wire that definite date has been agreed in respect to the steamer *War Trooper*, and that steamer must be delivered by that date", and he turned round to me and said: "I cannot make it any stronger", and he left.

In conformity with the facts and considerations set forth above, the Commission finds that none of the documents which are known to have been in the possession of the United Kingdom Government at the time of the 1922 proceedings and which were not shown to the advisers of Mr. Ambatielos or produced to Mr. Justice Hill (i.e. documents in category (b)) was necessarily inconsistent with the case put forward by the United Kingdom Government. It is the view of the Commission that none of the said documents constituted evidence strong enough to satisfy the United Kingdom Government and its legal advisers that a binding oral agreement had been entered into guaranteeing fixed dates for the delivery of the vessels and supplementing the written contract of 17th July, 1919.

After this finding of fact the Commission will consider the point of law involved in the first submission of the Greek Government hereinbefore examined, to wit: whether a Government which institutes an action contrary to documents in its possession does thereby deny "free access to the Courts" to an alien defendant. The Commission is of opinion that "free access" is something entirely different from the question whether cases put forward in Courts by Governments are right or wrong, and that denial of "free access" can only be established by proving concrete facts which constitute a violation of that right as understood and defined in this award. The Commission finds, therefore, that in putting forward the case herein referred to, the United Kingdom Government did not deprive Mr. Nicholas E. Ambatielos of his right of free access to the Courts afforded to him by Article XV of the Treaty of 1886.

The second submission is that:

The British Government withheld those documents, thereby preventing Mr. Ambatielos knowing that they were putting forward a case of that kind, namely, a case known to be false.

The line of reasoning developed in connection with the first submission is applicable to the second. The notion of "free access to the Courts" does not comprise an obligation on the part of Governments to disclose to an opponent in litigation, before or during the trial, all documents in its possession. If it were held, as intimated at the hearing, that considerations of equity and fairness impose upon the State an obligation to make known to an alien opponent all documents that have or may have a bearing on the case, even if they are favourable to the alien, such considerations would be of no avail in the present controversy, which can only be decided on legal grounds. No provision in Article XV of the Treaty of 1886 imposes such an obligation on the Contracting Parties. The non-disclosure here alleged would constitute a denial of "free access" if it could be shown that the act of non-disclosure does not conform with English law or that that law gives to British subjects, and not to foreigners, a right to discovery, thereby establishing a discrimination between nationals and foreigners. No evidence to that effect has been produced in the present case.

Accordingly, the Commission finds that the withholding of certain documents in the action brought against Mr. Nicholas E. Ambatielos by the United Kingdom Government did not prevent the defendant from exercising his right of free access to the Courts guaranteed to him by Article XV of the Treaty of 1886.

The third submission is that:

The British Government did so in circumstances in which they knew that Mr. Ambatielos had no power to compel them to disclose those documents, they having the right to refuse to disclose them.

This submission, as set out, virtually decides by itself the question raised. Once it is recognised that the Government had a right to refuse to disclose the documents, and hence, that the non-disclosure was in conformity with English law and practice, the fact stated above does not constitute a violation of the right of free access to the Courts. Moreover, if the Government knew that Mr. Ambatielos had no power to compel it to disclose the documents because the Government was entitled to refuse discovery, such a knowledge was a natural consequence of the exercise of the right to refuse, and not a wrongful act. The Commission, therefore, finds that the fact set out in the third submission was not a violation of the right of Mr. Nicholas E. Ambatielos to have free access to the English Courts as defendant in the action brought against him by the Government of the United Kingdom. The Commission thinks it right to add that the reason for the words "they having the right to refuse to disclose them", which are used by the Greek Government in the third submission quoted above, was that the Maclay-Laing letters clearly fell within the class of documents privileged from disclosure or production in English law as documents coming into existence solely for the purpose of enabling legal advisers to prepare a case for trial. The departmental minutes and files fall within a class of documents which, if and when expressly called for in the appropriate manner, may, under English law, be withheld on the ground that the production of that class of document is contrary to the public interest.

If any contention that any documents were withheld contrary to English law, had been made and persisted in, which was not the case, the Commission would have had to consider the effect of that circumstance on the application of the rule of non-exhaustion of legal remedies.

NON-EXHAUSTION OF LOCAL REMEDIES

In countering the claim of the Greek Government the Government of the United Kingdom relies on the non-exhaustion by Mr. Ambatielos of the legal remedies which English law put at his disposal.

One of the questions which the Commission is requested to determine is "The question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty." The Commission notes that the question raised by the United Kingdom Government covers all the acts *alleged* to constitute breaches of the Treaty.

The Commission will therefore examine the validity of the United Kingdom objection independently of the conclusions it has reached concerning the validity of the Ambatielos claim under the Treaty of 1886.

The rule thus invoked by the United Kingdom Government is well established in international law. Nor is its existence contested by the Greek Government. It means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if

the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken of all local remedies before the matters in dispute are taken up on the international level by the State of which the persons alleged to have been injured are nationals.

In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used. The views expressed by writers and in judicial precedents, however, coincide in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule. Remedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action.

The Greek Government contends that in the present case the remedies which English law offered to Mr. Ambatielos were ineffective and that, accordingly, the rule is not applicable.

The ineffectiveness of local remedies may result clearly from the municipal law itself. That is the case, for example, when a Court of Appeal is not competent to reconsider the judgment given by a Court of first instance on matters of fact, and when, failing such reconsideration, no redress can be obtained. In such a case there is no doubt that local remedies are ineffective.

Furthermore, however, it is generally considered that the ineffectiveness of available remedies, without being legally certain, may also result from circumstances which do not permit any hope of redress to be placed in the use of those remedies. But in a case of that kind it is essential that such remedies, if they had been resorted to, would have proved to be *obviously futile*.

Here a question of considerable practical importance arises.

If the rule of exhaustion of local remedies is relied upon against the action of the claimant State, what is the test to be applied by an international tribunal for the purpose of determining the applicability of the rule?

As the arbitrator ruled in the *Finnish Vessels Case* of 9th May, 1934, the only possible test is to assume the truth of the facts on which the claimant State bases its claim. As will be shown below, any departure from this assumption would lead to inadmissible results.

In the *Finnish Vessels Case* the issue was whether a means of *appeal* which had not been used by the claimants ought to be regarded as ineffective.

In the *Ambatielos Case*, failure to use certain means of appeal is likewise relied upon by the United Kingdom Government, but reliance is also placed on the failure of Mr. Ambatielos to adduce before Mr. Justice Hill evidence which it is now said would have been essential to establish his claims. There is no doubt that the exhaustion of local remedies requires the use of the means of procedure which are essential to redress the situation complained of by the person who is alleged to have been injured.

In paragraph 109 of its Counter-Case, the United Kingdom Government says the following concerning this point:

The "local remedies" rule . . . finds its principal field of application in the two requirements (a) that the complainant should have availed himself of any right given him by the local law to take legal proceedings in the local courts; and (b) that having done so, he should have exhausted the possibilities of appealing to a higher court against any adverse decision of a lower one. The application of the rule is not, however, confined to these two cases. It also requires that during the *progress*, and for the purposes of any particular proceedings in one of the local courts, the complainant should have availed himself of all such *procedural facilities* in the way of calling witnesses, procuring documentation, etc., as the local system provides.

The Commission shares this view in principle. At the same time it feels that it must add some clarifications and reservations to it. Although this question has hardly been studied by writers and although it does not seem, hitherto, to have been the subject of judicial decisions, it is hardly possible to limit the scope of the rule of prior exhaustion of local remedies to recourse to local courts.

The rule requires that "local remedies" shall have been exhausted before an international action can be brought. These "local remedies" include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane. In this sense the statement in paragraph 109 of the Counter-Case seems to be sound.

It is clear, however, that it cannot be strained too far. Taken literally, it would imply that the fact of having neglected to make use of some means of procedure — even one which is not important to the defence of the action — would suffice to allow a defendant State to claim that local remedies have not been exhausted, and that, therefore, an international action cannot be brought. This would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable.

In the view of the Commission the non-utilisation of certain means of procedure can be accepted as constituting a gap in the exhaustion of local remedies only if the use of these means of procedure were essential to establish the claimant's case before the municipal courts.

It is on the assumption that the statements of the claimant Government are correct that the international tribunal will be able to say whether the non-utilisation of this or that method of procedure makes it possible to raise against a claim a plea of inadmissibility on the ground of non-exhaustion of local remedies.

Have the local remedies been exhausted with regard to Claim A?

Claim A is a claim for compensation for breach of the contract of sale by the United Kingdom Government. The breach alleged is that the vessels which Mr. Ambatielos bought at an agreed price and on condition that they were to be delivered to him on certain fixed dates, which had been agreed upon between the Parties, were not in fact delivered on those dates. Compensation is claimed for the damage caused to Mr. Ambatielos as a result of this breach of contract.

The United Kingdom Government has raised the question of the non-exhaustion of local remedies in the English Courts in so far as concerns the acts which are alleged to constitute breaches of the Treaty of 1886.

The principal act which is alleged by the Greek Government to constitute a breach of that Treaty is the alleged breach of contract aforesaid.

As regards Claim A, the questions of the non-exhaustion of local remedies thus raised are:

(1) In the 1922 proceedings Mr. Ambatielos failed to call (as he could have done) the witnesses who, as he now says, were essential to establish his case.

With regard to Major Laing, the Greek Government has primarily contended that Mr. Ambatielos was prevented from calling Major Laing as a witness before Mr. Justice Hill because Major Laing — though not heard — had been

subpoenaed to appear as a witness for the Crown. In the course of the proceedings before the Commission, however, the Parties agreed that the fact that Major Laing had been subpoenaed by the Crown would not, under English law, have precluded Mr. Ambatielos from calling Major Laing as a witness before Mr. Justice Hill.

The Greek Government further contends that if Mr. Ambatielos had called Major Laing as a witness, the decision of Mr. Justice Hill would have been favourable to him; this is a contention which is disputed by the United Kingdom Government.

It is not possible for the Commission to decide on the evidence before it the question whether the case would have been decided in favour of Mr. Ambatielos if Major Laing had been heard as a witness. The Commission has not heard the witnesses called before Mr. Justice Hill and cannot solely on the documentary evidence put before the Commission form an opinion whether the testimony of Major Laing would have been successful in establishing the claim of Mr. Ambatielos before Mr. Justice Hill. The Commission cannot put itself in the position of Mr. Justice Hill in this respect.

The test as regards the question whether the testimony of Major Laing was essential must therefore be what the claimant Government in this respect has contended, viz. that the testimony of Major Laing would have had the effect of establishing the claim put forward by Mr. Ambatielos before Mr. Justice Hill.

Under English law Mr. Ambatielos was not precluded from calling Major Laing as a witness.

In so far as concerns Claim A, the failure of Mr. Ambatielos to call Major Laing as a witness at the hearing before Mr. Justice Hill must therefore be held to amount to non-exhaustion of the local remedy available to him in the proceedings before Mr. Justice Hill.

It may be that the decision of Mr. Ambatielos not to call Major Laing as a witness, with the result that he did not exhaust local remedies, was dictated by reasons of expediency — quite understandable in themselves — in putting his case before Mr. Justice Hill. This, however, is not the question to be determined. The Commission is not concerned with the question as to whether he was right or wrong in acting as he did. He took his decision at his own risk.

The testimony of Major Laing must be assumed to have been essential for the success of the action of Mr. Ambatielos before Mr. Justice Hill. It could have been adduced by Mr. Ambatielos but was not in fact adduced. Mr. Ambatielos has therefore not exhausted the local remedies available to him in the proceedings before Mr. Justice Hill.

The Commission, having accepted the contention of the Greek Government that the evidence adduced by Major Laing if he had been heard as a witness would have resulted in a decision of Mr. Justice Hill favourable to Mr. Ambatielos, the question whether Mr. Ambatielos was prevented by the United Kingdom Government from adducing other evidence which might have led to the same result does not seem to be relevant to the question whether the failure of Mr. Ambatielos to call Major Laing as a witness must be considered as amounting to a non-exhaustion of the local remedy available to him in the first instance. If a man can secure help by taking course A *or* course B and is prevented from taking course A, he fails to exhaust his remedies if he refrains from taking course B.

(2) The second question as to non-exhaustion raised by the United Kingdom Government is the failure of Mr. Ambatielos to make use of or exhaust his appellate rights.

As the Commission has assumed, for the purposes of the test which it has accepted, that the testimony of Major Laing was essential to establish the claim of Mr. Ambatielos before Mr. Justice Hill, and as it has decided that the omission to produce that evidence constituted a failure to exhaust the remedy available to Mr. Ambatielos in the proceedings before Mr. Justice Hill, it might seem superfluous to consider the second question which has been raised.

Nevertheless it may be pertinent to state that the failure of Mr. Ambatielos to prosecute the general appeal which he had lodged against the decision of Mr. Justice Hill would ordinarily be considered a failure to exhaust local remedies. Such failure requires some excuse or explanation.

The refusal of the Court of Appeal to give leave to adduce the evidence of Major Laing did not, of course, in itself prevent this general appeal from being proceeded with.

The Greek Government argues by way of explanation that to proceed with the general appeal once the decision of the Court of Appeal not to admit the Laing evidence had been given would have been futile because the Laing evidence was essential to enable the Court to arrive at a decision favourable to Mr. Ambatielos.

The reason why Mr. Ambatielos was not allowed to call Major Laing in the Court of Appeal was, in the words of Lord Justice Scrutton, that "One of the principal rules which this Court adopts is that it will not give leave to adduce further evidence which might have been adduced with reasonable care at the trial of the action".

Accordingly, the failure of Mr. Ambatielos to exhaust the local remedy before Mr. Justice Hill, by not calling Major Laing as a witness, is the reason why it was futile for him to prosecute his appeal.

It would be wrong to hold that a party who, by failing to exhaust his opportunities in the Court of first instance, has caused an appeal to become futile should be allowed to rely on this fact in order to rid himself of the rule of exhaustion of local remedies.

It may be added that Mr. Ambatielos did not submit to the Court of Appeal any argument suggesting, or any evidence to show, that any illegal or improper manoeuvres by his opponents had prevented him from calling Major Laing or producing any documents.

In so far as concerns the appeal to the House of Lords, it is of course unlikely that that Court would have differed from the decision of the Court of Appeal, refusing to allow Major Laing to be called as a witness in the latter Court. If it is held that such an appeal would *not* have been obviously futile, the failure of Mr. Ambatielos to appeal to the House of Lords must be regarded as a failure to exhaust local remedies. If, on the other hand, it is held that an appeal to the House of Lords *would* have been obviously futile, Mr. Ambatielos must likewise be held to have lost his hope of a successful appeal, by reason of his failure to call Major Laing.

Have the local remedies been exhausted with regard to Claim B?

It it were to be held that, contrary to the contention of the Greek Government, the contract did not contain any provision binding the United Kingdom Government regarding agreed dates for the delivery of the ships which had been sold to Mr. Ambatielos, the Greek Government claims in the alternative the return of £500,000 which, according to the contention of the Greek Government, was paid by Mr. Ambatielos in consideration of agreed dates of delivery.

The Greek Government claims this sum on the ground of " unjust enrichment ", together with all damages, interest and costs resulting therefrom.

This claim has not been before an English Court.

The Greek Government contends that it would have been futile to submit such a claim to an English Court, on the ground that English law does not recognise unjust enrichment as a valid basis for a claim.

The Commission is of opinion that it must first examine whether the claim as defined by the Greek Government can be said to constitute a claim for unjust enrichment.

The Commission finds that this is not the case. Claim B is not, as the Greek Government contends, a " quasi contractual " claim. The claimed sum of £500,000 was only part of the price which Mr. Ambatielos was to pay for the ships (together with advantages of position and " free charter-parties ") in accordance with the contract. Furthermore the full purchase price was not received by the United Kingdom Government. If however Claim B *had* been based on unjust enrichment, and had thus been independent of and alternative to claim A, the Commission is of opinion that Claim B would have failed, in so far as remedies *were* available in English law, on the ground that such remedies had not been tried — much less exhausted. The Commission has already decided that the Treaty of 1886 did not secure, for Greek subjects, remedies *not* available in English law.

Were the local remedies exhausted as regards Claim C?

Claim C refers to the position of Mr. Ambatielos on 4th November, 1920 (the date of the signature of the Mortgage Deeds), and rests on the argument that the sale of the *Mellon* and the *Stathis* should have been cancelled on that date, and not on the date of Mr. Justice Hill's judgment, viz. on 15th January, 1923.

According to the Greek Government this claim is an alternative claim to Claim A.

The claim was not before Mr. Justice Hill. The claim before Mr. Justice Hill concerning the *Mellon* and the *Stathis* was a claim by Mr. Ambatielos for damages for *non-delivery* of these two ships. Claim C is a claim for damages based on the contention that the United Kingdom Government, by *not cancelling the sale* of the *Mellon* and the *Stathis* on the date of the Mortgage Deeds, 4th November, 1920, but only at the trial of the action before Mr. Justice Hill, has caused Mr. Ambatielos damage in the amount stated in Claim C. It is the converse of the claim put forward before Mr. Justice Hill.

The Greek Government has never contended that there was any obstacle to a recourse to local remedies in regard to this claim. But no claim was ever put forward before the English Courts. The Commission, therefore, finds that there has been, in regard to this claim, a non-exhaustion of local remedies.

For these reasons,

THE COMMISSION

rejects the United Kingdom contention that there has been undue delay in the presentation of the Greek claim on the basis of the Treaty of 1886; finds that the claim is not valid having regard to the question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty; finds that the claim is not valid having regard to the provisions of the Treaty of 1886.

DONE in London this sixth day of March, nineteen hundred and fifty six in three copies one of which is transmitted to each of the Governments of Greece

and the United Kingdom of Great Britain and Northern Ireland and a third to the Archives of the Permanent Court of Arbitration at The Hague.

(Signed) Ricardo J. ALFARO
President

(Signed) Algot J. F. BAGGE

(Signed) Maurice BOURQUIN

(Signed) J. SPIROPOULOS

(Signed) Gerald A. THESIGER

(Signed) E. HAMBRO
Registrar

* * *

President Alfaro did not concur in the part of the award which deals with the question of non-exhaustion of legal remedies with regard to Claim A, and has appended to the award his individual opinion.

Professor J. Spiropoulos who is unable to concur in the award has appended to the award his dissenting opinion.

(Initialled) R. J. A.
E. H.

* * *

INDIVIDUAL OPINION OF DR. RICARDO J. ALFARO

The Commission has found, in relation to Claim A put forward by the Greek Government, that the claimant failed to exhaust the local remedies because Major Bryan Laing was not called by Mr. Nicholas E. Ambatielos to testify in the proceedings before Mr. Justice Hill. I regret that I am unable to agree with this finding for the reasons hereafter set forth.

1. The judgment of the Commission, with regard to the rule of exhaustion of local remedies, contains the following statement in which I concur:

“The rule requires that ‘local remedies’ shall have been exhausted before an international action can be brought. These ‘local remedies’ include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane . . .

“It is clear, however, that it cannot be strained too far. Taken literally, it would imply that the fact of having neglected to make use of some means of procedure — even one which is not important to the defence of the action — would suffice to allow a defendant State to claim that local remedies have not been exhausted, and that, therefore, an international action cannot be brought. This would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable.”

2. The “local remedies” rule, as enunciated in the preceding lines, means in my opinion that when a claimant appears before municipal courts, either as plaintiff or defendant, he must exhaust the procedural remedies made available to him by the law of the land before each of the several courts in which the case may be tried. The concept of *procedural remedies* must be taken in its general sense. Thus, a claimant may be held not to have exhausted the procedural remedies at his disposal, if he failed, for instance, to adduce evidence despite his necessity to prove the facts of

the case, or if he failed to appear in Court to argue his case at the stage of the trial in which he had to argue.

3. But the rule cannot be carried so far as to interfere with the actual or concrete use of a given procedural remedy. Thus, a claimant who availed himself of the procedural remedy of adducing evidence, should not be held by an international tribunal to have failed to exhaust local remedies because he did not produce a certain exhibit, or because he did not call a certain witness. Likewise, it would be unfair to apply the sanction of non-exhaustion to a claimant in the international plane, on the ground that his line of reasoning in the argument was not the proper one. This, in the language of the award, "would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable."

4. For the reason stated in the preceding paragraph, I consider that the claimant in this case should not be held to have failed to exhaust local remedies because Major Bryan Laing was not called by Mr. Ambatielos as a witness during the proceedings before Mr. Justice Hill.

5. Whether Mr. Ambatielos or his advisers were right or wrong in not calling Major Laing to testify, I believe is immaterial. Mr. Ambatielos, represented by his advisers, made use of the procedural remedy of adducing evidence in Court. He adduced such evidence as he thought might prove his case. Whether he was clever or made a mistake, whether or not he lost because of an error in handling the instrumentality of evidence, are questions with which an international tribunal cannot concern itself in dealing with the issue of exhaustion or non-exhaustion of local remedies. Such tribunal should not be called upon to pass judgment on the manner in which procedural remedies were used but on the fact that they were used.

6. It is stated in the award that in applying the test adopted by the Commission for the determination of the issue of non-exhaustion, it has been assumed that the Greek Government was right in considering the testimony of Major Laing essential to win the case, and that consequently, Mr. Ambatielos failed to exhaust the procedural remedies, by abstaining from calling a witness whose testimony was essential for the success of his defence.

7. Such an assumption, adopted by the Commission for the determination of the issue, is however contrary to the realities of the case. The evidence before the Commission does abundantly prove that if Major Laing had been called to the witness box, it was extremely doubtful that his testimony, particularly after cross-examination, would have resulted favourably to Mr. Ambatielos. Hence it can hardly be called essential.

8. It is a fact proven by affidavits read in the Court of Appeal on 5th March, 1923, by Mr. Nicholas E. Ambatielos and by his solicitor Mr. F. P. D. Gaspar, as well as by other evidence, that Major Laing was not called to testify because both Mr. Ambatielos and his advisers were not sure that such testimony would be favourable to their cause, chiefly for the reason that at the time of the proceedings before Mr. Justice Hill, Major Laing had refused to make known to them the full contents of his correspondence with Sir Joseph Maclay and had also refused, as Mr. Gaspar said, to give him "any statement or proof at any time either before or during the trial."

9. It seems evident, therefore, that sound considerations of prudence and regard for the interest of their client led the advisers of Mr. Ambatielos while in Court to refrain from calling a witness whose hostile or favourable attitude was decidedly doubtful.

10. It was after a decision was rendered by Mr. Justice Hill that Major Laing made known to Mr. Ambatielos the contents of his correspondence with Sir Joseph

Maclay. It was then that Mr. Ambatielos and his advisers considered the testimony of Major Laing essential to prove his case. It was then that Mr. Ambatielos applied in vain to the Court of Appeal for authority to have the testimony of Major Laing admitted as evidence. Finally, it was after all these events that the Greek Government, in its diplomatic intervention and in subsequent actions before the International Court of Justice and before this Commission contended or affirmed that the testimony of Major Laing was essential.

11. In view of the above stated facts, it seems difficult to maintain that not calling a witness in 1922 because at that time his testimony was not deemed essential, and on the contrary was considered dangerous or at least doubtful, constituted failure to exhaust local remedies because in 1923 the same testimony was considered essential. Non-exhaustion of local remedies must necessarily take place at the time when the local remedy can be resorted to, but not afterwards.

12. It is further declared in the award that Mr. Ambatielos failed also to exhaust the local remedies by not prosecuting the general appeal he had lodged against the decision of Mr. Justice Hill. With regard to this point it is my view that according to the evidence before the Commission, particularly the expert opinion of Lord Porter, it would have been clearly futile for the claimant to prosecute his general appeal.

13. The award states that the failure of Mr. Ambatielos to exhaust the local remedy before Mr. Justice Hill by not calling Major Laing as a witness made it futile for him to prosecute his appeal and that for this reason he could not rid himself of the rule of exhaustion of local remedies.

14. My view regarding this situation is that once it has been established that recourse to appeal is obviously futile, the claimant is exonerated from the responsibility of non-exhaustion of that remedy, without entering into considerations as to the cause of the futility. The two things are separate and distinct. Moreover, if Mr. Ambatielos cannot be held to have failed to exhaust local remedies by not calling Major Laing as a witness, he cannot be held responsible for non-exhaustion on the ground that his decision not to call that witness made the appeal futile.

(Signed) R. J. ALFARO

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DISSENTING OPINION OF PROFESSOR SPIROPOULOS

Commissioner John Spiropoulos, being unable to accept all the views expressed in the award, desires to make the following statement.

EXHAUSTION OF LOCAL REMEDIES

1. The Agreement between the United Kingdom Government and the Greek Government requests the Commission to determine the validity of the Ambatielos claim under the Anglo-Greek Treaty of 1886 having regard to:

- (ii) The question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty (of 1886).

According to my interpretation of the above terms of reference, the Commission would have to examine the question of the exhaustion of local remedies *only* with regard to acts which, if established, would in fact constitute a breach of the Treaty of 1886, and not with regard to any other acts alleged by the Greek Government as constituting a breach of the said Treaty.

It seems to me beyond doubt that, when a plea of non-exhaustion of local remedies is put forward by a party before an international tribunal the latter must begin by considering the law to be applied (general international law or Treaty), and then examine whether the person concerned (the plaintiff) has exhausted the local remedies with regard to the act alleged to be contrary to that law. It does not seem logical to me to go as far as to enquire whether the person concerned (the plaintiff) has exhausted local remedies with regard to an act *alleged* to be contrary to a system of law *alleged to be applicable*.

As the Commission has come to the conclusion that the non-disclosure of the documents by the Crown is the *only* act which, if proved to be contrary to the English law of procedure, would constitute a breach of the Treaty of 1886, the Commission ought to have confined itself to an examination of the question whether Mr. Ambatielos exhausted all remedies available, according to English law, at the trial before Mr. Justice Hill, for the purpose of having the documents put before Mr. Justice Hill. The Commission omitted to examine this question which, in my submission, is the only one it should have examined with regard to the question of exhaustion of local remedies.

Having found that "general international law" is not incorporated in the Treaty of 1886 by virtue of the most-favoured-nation clause, the Commission should not, according to its terms of reference, have examined the question whether local remedies were also exhausted with regard to acts which, if established, would have constituted a violation of general international law, but not of the Treaty of 1886.

Only if it had found that general international law was incorporated in the Treaty of 1886 (by virtue of the most-favoured-nation clause), could the Commission have examined the question whether Mr. Ambatielos exhausted the local remedies with regard to acts alleged to constitute a violation of general international law and, accordingly, also of the Treaty of 1886. Thus, to give an example, if the non-delivery of the ships on guaranteed dates had been held to be a violation of general international law by the United Kingdom authorities (and accordingly also of the Treaty of 1886), Mr. Ambatielos would have been under a duty to exhaust all local remedies provided by English law before his claim could have been brought before an international tribunal. In that case the fact whether or not Major Laing was called as a witness might ultimately have been relevant for the determination of the question as to whether or not Mr. Ambatielos had exhausted local remedies.

However, in view of the fact that the Commission has held that general international law is not included in Article X of the Treaty of 1886, the question of exhaustion of local remedies cannot, in my submission, refer to facts which, if established, would constitute a breach of the Treaty of 1886 by a violation of general international law.

2. Let us suppose, however, that general international law is applicable to the present case. On this assumption the question of whether or not Major Laing could have been called might ultimately be relevant to determine whether the local remedies were exhausted by Mr. Ambatielos.

For the following reasons I am unable to follow the Commission in the way in which it applies the rule of non-exhaustion of local remedies to the present case:

Writers on international law deal with the question of non-exhaustion of local remedies from the point of view of the legal means of recourse from a lower to a higher court. As far as I know, the question relevant in the present case, i.e., exhaustion of existing remedies *within one and the same court*, has never been considered by writers or international tribunals.

Now, with regard to the application of the rule of non-exhaustion, the test generally accepted in practice is the "existence" and "effectiveness" of local remedies.

The question of non-exhaustion which confronts the Commission in the present case is specific inasmuch as it is concerned with a case of non-exhaustion (that is the omission to call Major Laing as a witness) *within one and the same court*.

Although writers on international law have hitherto approached the rule of non-exhaustion only from the point of view of possible recourse from a lower to a higher court, I agree with the Commission that the *same* rule must also apply to the exhaustion of local remedies within one and the same court. Whereas, however, in the case of recourse from a lower to a higher court the test to be applied, i.e. the existence and effectiveness, or otherwise, of recourse, is an *objective* one, practical considerations must soften the rigidity of the rule in a case where one and the same court is concerned. The rule then becomes one of determining, having regard to the particular circumstances of the case, what Counsel would have done in the interests of his client. Moreover, the remedy must be such as to affect the course of the proceedings; in other words, it must be an *essential* remedy. But these are, of course, questions which can only be decided by having due regard to the merits of each individual case.

To adopt a more rigid rule would be tantamount to making the rule of exhaustion of local remedies a bar to any international claim, because it is possible, in almost every case, to find some local remedy which has not been used by the claimant.

Having thus established the general principle which, in my opinion, should be applied, I have to enquire whether the fact that Major Laing was not called as a witness can be regarded as a non-exhaustion of the remedies provided by the English law of procedure.

Major Laing was present at the trial before Mr. Justice Hill and he could have been called as a witness, both by the Crown and by Mr. Ambatielos. Without examining whether it was also up to the Crown to call Major Laing as a witness — he was the competent officer of the Ministry of Shipping who had given the delivery dates to Mr. G. Ambatielos — I will assume that it was only up to Mr. Ambatielos to call Major Laing if he wished to avail himself of his evidence in order to prove that dates certain had been promised.

As appears from the affidavit of the solicitors of Mr. Ambatielos, however, Major Laing had been approached by the solicitors, before as well as during the trial before Mr. Justice Hill, and had been asked whether he was willing to make a statement favourable to the case of Mr. Ambatielos. *He had, however, refused to do so.*

According to English practice, Counsel are rarely prepared, in ordinary circumstances, to call a witness who has refused to give a statement to the solicitor. Whatever the reasons which prompted Major Laing to refuse to make a statement — it may be that as a former officer of the Ministry (at the time of the trial he had left the Ministry of Shipping) he may have thought he was bound by an undertaking not to disclose what had occurred in relation to this matter — the fact remains that the solicitors of Mr. Ambatielos were in the dark as to what he might say if called as a witness. As Mr. Ambatielos had called three other witnesses, and as he was relying in particular on the documents which the Crown might have in its possession, it is very difficult to accept the proposition that in the special circumstances of the case the deliberate omission of Mr. Ambatielos's solicitors to call a witness whose testimony was unknown, who had refused to give a statement and whose evidence might ultimately have been detrimental to the interests of Mr. Ambatielos, can be regarded as a failure to exhaust local remedies.

ARTICLE X OF THE TREATY OF 1886

I am of the opinion that as the Commission has rejected Claim A, "justice" and "equity" might have been held to be a suitable basis for Claim B, by applying Article 24 of the Treaty of 1670 with Denmark which the Commission holds to be

incorporated in Article X of the Treaty of 1886, and which, in my submission, allows one to complement the rules of domestic law by considerations of equity. The principle to be applied would be that of "unjust enrichment," which forms part of the general principles of law applicable in international relations.

The Commission would then, of course, have to examine the extent to which the Crown was enriched by the £500,000 paid by Mr. Ambatielos over and above the price payable for the ships purchased by him. In so far as concerns interest, the Commission would have to examine for how long Mr. Ambatielos is entitled to interest, because, though lapse of time has, in principle, no bearing on the right to put forward a claim under international law, claims for interest cannot be run on for indefinite periods.

ARTICLE XV OF THE TREATY OF 1886

1. The main complaint of the Greek Government under Article XV of the Treaty of 1886 was, firstly, that "vital evidence" necessary for the determination of the dates of delivery of the ships was withheld by the Crown, and secondly, that Mr. Justice Hill was guilty of a denial of justice by accepting the claim of privilege without any further enquiry as to whether it could be justified in accordance with English practice.

At the oral hearing on 1st February, Counsel for Greece withdrew the complaint concerning "denial of justice" on the part of the Court of Admiralty, i.e. denial of justice by Mr. Justice Hill, with the result that the only complaint now before the Commission concerns the withholding of documents by the United Kingdom authorities.

Notwithstanding that this complaint, in view of the interpretation adopted by the Commission with regard to Articles X and XV, is now the only complaint on which the Greek Government can base its claim, the award devotes to this question a relatively limited space, thus failing to do full justice to its importance.

Furthermore, it must be emphasised that Counsel for the Greek Government, at the oral hearing on 14th February, expressly acknowledged that according to English law the Crown was not under a duty to produce minutes and interdepartmental documents, such documents being covered by Crown privileges. Counsel for the Greek Government confined himself to the contention that there must have been some other documents in the hands of the United Kingdom authorities which prove that dates certain had been promised by the Crown.

As a result, the award, as stated above, contains only a rather short passage dealing with this basic question of the Ambatielos claim. The Commission has placed on record the agreement of the Parties on this question of English law. It felt that, as an international tribunal, it was not called upon to deal with this problem of municipal law in greater detail. I am inclined to think that the Commission should not have confined itself merely to placing on record the statements of Counsel for the United Kingdom and Greece as to the law to be applied, but that it should have examined, *ex officio*, the question as to the law which is applicable. With regard to this latter question, I would like to make the following comment:

Counsel for the United Kingdom referred to the decision of the House of Lords in the case of *Duncan v. Cammell Laird and Co. Ltd.* (1942) A. C. 624, in order to establish that the Crown is not under a duty to produce the minutes or interdepartmental documents before an English court. This decision was referred to as stating English law on this matter.

I have serious doubts whether this is the right view to take.

According to Viscount Simon, Lord Chancellor, the principle to be applied in the case of Crown privilege is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This requirement, according to Viscount Simon, may be held to be

satisfied where a document is withheld from production, having regard either (a) to its contents, or (b) to the fact that it belongs to a class which, on grounds of public interest, must at all costs be withheld from production.

With regard to the criteria to be adopted in deciding whether a document must or must not be produced, Viscount Simon said:

“It is not a sufficient ground that the documents are ‘State documents,’ or ‘official’ or are marked ‘confidential.’ It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.”

The distinguished judge, in support of the view expressed by him, refers to certain principles enunciated in other cases.

With regard to the case here referred to, I should like to make the following comment:

- (a) First of all, the opinion of Viscount Simon has been subjected to considerable criticism, not because the documents concerned were not clearly excluded from evidence, but because, as a matter of principle, the judge ought to look at the documents before giving his decision on the objection, and ought not to abrogate his function in favour of the executive. (See 16 (1942) 58 L.Q.R. 436; 59 (1943) L.Q.R. 102, quoting 20 (1942) Can. Bar Rev. 805).
- (b) An analysis of the “Cammell Laird” case leads to the conclusion that its importance does not lie in the general conclusions of his Lordship, because on the facts of the case there was little doubt that the documents were privileged. They were concerned with constructional details of a submarine (the *Thetis*), and any disclosure of their contents might therefore have been of value to the enemy. (The case was decided during the last war.)
- (c) All the other cases cited by Viscount Simon in support of his views were concerned only with facts where a real public interest was involved. Not one of these cases was concerned with an ordinary *commercial transaction*.
- (d) Finally, some of the cases mentioned by Viscount Simon expressly state that the Crown must do its utmost to give a defendant full discovery.

Thus, in the case of *Deare v. Attorney General* (1835), 1 Y. and C. (Ex.) 197, 208, and similarly in *Attorney General v. Newcastle-upon-Tyne Corporation* (1897) 2 Q. B. 384, Rigby, L. J. said: “The law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not. That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it Now I know that there has always been the utmost care to give to a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded. Where the Crown is a party to a suit, therefore, discovery of documents cannot

be demanded from it as a right, *though in practice, for reasons of fairness and in the interests of justice, all proper disclosure and production would be made.*"

Moreover, it is important to emphasise again that the privilege of the Crown has never been claimed in any commercial transaction.

Although the significance of the case of *Duncan v. Cammell Laird and Co. Ltd.* cannot be denied, I do not think that it contains anything contrary to the view taken by the Greek Government that in cases of commercial transaction the privilege of the Crown ought to be waived.

The question as to whether the Crown failed to produce documents in its possession at the trial before Mr. Justice Hill must be determined in accordance with the practice prevailing at the time, and not in accordance with rules of law enunciated in cases decided many years later. *This point is of decisive importance.* I should like to make the following comment with regard to this:

In order to ascertain what the practice was at the time of the trial before Mr. Justice Hill, reliance should not be placed on the case of *Duncan v. Cammell Laird and Co. Ltd.*, which was decided in 1942, but on the case of *Robinson v. State of South Australia* (1931) A.C. 704, which was decided by the Privy Council in 1931 and must be regarded as the leading case for the period prior to that year.

In that case, the appellant (Robinson) had brought an action in the Supreme Court of South Australia against the respondent State claiming damages for alleged negligence in the care of wheat placed in the control of the State under the Wheat Harvest Acts, 1915-17. Upon an order for discovery, the respondent State, by an affidavit made by a civil servant, claimed privilege in respect of 1882 documents comprising communications between officers administering the department concerned; there was exhibited to the affidavit a minute by the responsible minister stating (inter alia) that disclosure of the documents would be contrary to the interests of the State and the public.

The *Privy Council* said that it must not be assumed from certain observations of Lord Justice Turner that documents relating to the trading, commercial or contractual activities of a State can never be claimed as being protected under this head of privilege. It is conceivable that even in connection with the production of such documents there may be "some plain overruling principle of public interest concerned which cannot be disregarded." But cases in which this is so, must, in view of the sole object of the privilege, and especially in time of peace, *be rare indeed*, and the distinction drawn by the Lord Justice remains instructive and illuminating.

The *Privy Council* referred to the case of *Queensland Pine Co. v. the Commonwealth of Australia* which was decided in 1920. The following passage appears in that case:

"... notwithstanding a certificate from the Minister of State of the Commonwealth claiming protection for documents on this occasion in terms direct and unambiguous, the learned Judge at the trial inspected them, and having done so, expressed the opinion that the facts discoverable by inspection would not be detrimental or prejudicial to the public welfare, and he ordered that inspection of all the documents should be given to the Plaintiff."

The *Privy Council*, in its judgment in the case of *Robinson v. State of South Australia*, then advised His Majesty to discharge the order appealed from and to remit the case to the Supreme Court of South Australia with a direction that it was one proper for the exercise of the Court's power of inspecting the documents for which privilege was claimed, in order to determine whether the facts discoverable by their production would be prejudicial or detrimental to the public welfare in any justifiable sense.

2. In so far as concerns the question of exhaustion of local remedies, I am of opinion that the relevant passage at pages 94-95 of the transcript of the proceedings before Mr. Justice Hill does not leave much room for doubt that Mr. Ambatielos

must be held to have exhausted the local remedies in a reasonable manner, in connection with the failure of the Crown to produce the documents.

3. A passage in a Note of the Foreign Office, dated 7th November, 1934, would not have been without relevance to the decision of the Commission. This Note was a reply to a Note of the Greek Government of 3rd August, 1933, which accused the Crown of not having given to Mr. Ambatielos the same treatment that would have been accorded to a British National. The Greek Note says:

“Again it was admitted at the trial that files were kept at the Ministry of Shipping in which particulars of the contracts discussed by the Shipping Control Committee were entered, but when Mr. Ambatielos called for these files the privilege of the Crown was claimed and they were not produced.” The Foreign Office replied as follows:

“Such complaint could only properly be made if the Greek Government were in a position to show that there is an obligation on Governments when engaged in litigation before their own Courts to produce the minutes written in the Government Department concerned, and in particular that such is the regular practice of the Greek Government itself.”

The above correspondence shows an admission by the United Kingdom Government that the United Kingdom authorities were under a duty to produce, at the trial before Mr. Justice Hill, the documents which the Ministry of Shipping had in its possession.

4. The Commission has not, of course, any means of knowing (a) whether the Crown had any documents relating to the verbal agreement between Mr. G. Ambatielos (who acted on behalf of his brother, Mr. N. Ambatielos) and Major Laing, and (b) whether these documents would have established satisfactorily that the Ministry of Shipping was bound by fixed delivery dates.

In these circumstances I think that the Commission ought to have examined the question whether the award should not be based on the *assumption* that fixed delivery dates had been agreed. The leading case justifying such an assumption is the well-known case of *Armory and Delamirie* which is referred to in Smith's Leading Cases, 13th Edition, and which lays down the rule: *Omnia praesumuntur contra spoliato-rem*. This rule is to the effect that if a man, by his own tortious act, had withheld the evidence to prove the nature of his case, *all presumptions will be against him*.

5. The Commission having held that the non-production of the documents by the Crown *does not constitute a breach* of Article XV of the Treaty of 1886, I may confine myself to the above comments, without going more fully into the substance of the matter which involves a great deal of responsibility, since my conclusion on the issue of production of documents would not be of any practical purpose.

(Signed) J. SPIROPOULOS

ANNEX 1

TREATY OF COMMERCE AND NAVIGATION BETWEEN GREAT BRITAIN AND GREECE OF NOVEMBER 10th, 1886

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, and His Majesty the King of the Hellenes, being desirous to extend and facilitate the relations of commerce between their respective subjects and dominions, have determined to conclude a new treaty with this object, and they have appointed their respective Plenipotentiaries, that is to say:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, Sir Horace Rumbold, A Baronet of Great Britain, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, and Her Envoy Extraordinary and Minister Plenipotentiary to His Majesty the King of the Hellenes;

And His Majesty the King of the Hellenes, M. Stephen Dragoumi, Minister for Foreign Affairs;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles;

Article I

There shall be between the dominions and possessions of the two High Contracting Parties reciprocal freedom of commerce and navigation. The subjects of each of the two parties shall have liberty freely to come, with their ships and cargoes, to all places, ports and rivers in the dominions and possessions of the other to which native subjects generally are or may be permitted to come, and shall enjoy respectively the same rights, privileges, liberties, favours, immunities and exemptions in matters of commerce and navigation which are or may be enjoyed by native subjects without having to pay any tax or impost greater than those paid by the same, and they shall be subject to the laws and regulations in force.

Article II

No other or higher duties shall be imposed on the importation into the dominions and possessions of Her Britannic Majesty of any article, the produce or manufacture of the dominions and possessions of His Majesty the King of the Hellenes, from whatever place arriving, and no other or higher duties shall be imposed on the importation into the dominions and possessions of His Majesty the King of the Hellenes of any article, the produce or manufacture of Her Britannic Majesty's dominions and possessions, from whatever place arriving, than on articles produced and manufactured in any other foreign country; nor shall any prohibition be maintained or imposed on the importation of any article, the produce or manufacture of the dominions and possessions of either of the Contracting Parties, into the dominions and possessions of the other, from whatever place arriving, which shall not equally extend to the importation of the like articles being the produce or manufacture of any other country. This last provision is not applicable to the sanitary and other prohibitions occasioned by the necessity of protecting the safety of persons or of cattle, or of plants useful to agriculture.

Article III

No other or higher duties or charges shall be imposed in the dominions and possessions of either of the Contracting Parties on the exportation of any article to the dominions and possessions of the other than such as are or may be payable on the exportation of the like article to any other foreign country; nor shall any prohibition be imposed on the exportation of any article from the dominions and possessions of either of the two Contracting Parties to the dominions and possessions of the other which shall not equally extend to the exportation of the like article to any other country.

Article IV

The subjects of each of the Contracting Parties shall enjoy, in the dominions and possessions of the other, exemption from all transit duties, and a perfect equality of treatment with native subjects in all that relates to warehousing, bounties, facilities, and drawbacks.

Article V

All articles which are or may be legally imported into the ports of the dominions and possessions of Her Britannic Majesty in British vessels may likewise be imported into those ports in Hellenic vessels, without being liable to any other or higher duties or charges of whatever denomination than if such articles were imported in British vessels; and reciprocally all articles which are or may be legally imported into the ports of the dominions and possessions of His Majesty the King of the Hellenes in Hellenic vessels may likewise be imported into those ports in British vessels, without being liable to any other or higher duties or charges of whatever denomination than if such articles were imported in Hellenic vessels. Such reciprocal equality of treatment shall take effect without distinction whether such articles come directly from the place of origin or from any other place.

In the same manner, there shall be perfect equality of treatment in regard to exportation, so that the same export duties shall be paid, and the same bounties and drawbacks allowed, in the dominions and possessions of either of the Contracting Parties on the exportation of any article which is or may be legally exported therefrom, whether exportation shall take place in Hellenic or in British vessels, and whatever may be the place of destination, whether a port of either of the Contracting Parties or of any third Power.

Article VI

No duties of tonnage, harbour, pilotage, lighthouse, quarantine, or other similar or corresponding duties of whatever nature, or under whatever denomination, levied in the name or for the profit of the Government, public functionaries, private individuals, corporations, or establishments of any kind, shall be imposed in the ports of the dominions and possessions of either country which shall not equally and under the same conditions be imposed in the like cases on national vessels in general. Such equality of treatment shall apply reciprocally to the respective vessels, from whatever port or place they may arrive, and whatever may be their place of destination.

Article VII

In all that regards the coasting trade, the stationing, loading and unloading of the vessels in the ports, basins, docks, roadsteads, harbours or rivers of the dominions and possessions of the two countries, no privilege shall be granted to national vessels which shall not be equally granted to vessels of the other country; the intention of the Contracting Parties being that in these respects also the respective vessels shall be treated on the footing of perfect equality.

Article VIII

Any ship of war or merchant-vessel of either of the Contracting Parties which may be compelled by stress of weather, or by accident, to take shelter in a port of the other, shall be at liberty to refit therein, to procure all necessary stores and to put to sea again, without paying any dues other than such as would be payable in a similar case by a national vessel. In case, however, the master of a merchant-vessel should be under the necessity of disposing of a part of his merchandise in order to defray his expenses, he shall be bound to conform to the regulations and tariff of the place to which he may have come.

If any ship of war or merchant-vessel of one of the Contracting Parties should run aground or be wrecked upon the coasts of the other, such ship or vessel, and all parts thereof, and all furniture and appurtenances thereunto, and all goods and merchandise saved therefrom, including any which may have been cast into

the sea, or the proceeds thereof if sold, as well as all papers found on board such stranded or wrecked ship or vessel, shall be given up to the owners when claimed by them. If there are no such owners or their agents on the spot, then the same shall be delivered to the British or Hellenic Consul-General, Consul, Vice-Consul, or Consular Agent in whose district the wreck or stranding may have taken place upon being claimed by him within the period fixed by the laws of the country; and such Consuls, owners, or agents shall pay only the expenses incurred in the preservation of the property, together with the salvage or other expenses which would have been payable in the like case of a wreck of a national vessel.

The goods and merchandise saved from the wreck shall be exempt from all duties of Customs, unless cleared for consumption, in which case they shall pay the same rate of duty as if they had been imported in a national vessel.

In the case either of a vessel being driven in by stress of weather, run aground, or wrecked, the respective Consuls-General, Consuls, Vice-Consuls, and Consular Agents, shall, if the owner or master or other agent of the owner is not present, or is present and requires it, be authorized to interpose in order to afford the necessary assistance to their fellow-countrymen.

Article IX

All vessels which, according to British law, are to be deemed British vessels, and all vessels which, according to Hellenic law, are to be deemed Hellenic vessels, shall for the purposes of this Treaty, be deemed British and Hellenic vessels respectively.

Article X

The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour, or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most-favoured-nation.

Article XI

It shall be free to each of the Contracting Parties to appoint Consuls-General, Consuls, Vice-Consuls, and Consular Agents to reside in the towns and ports of the dominions and possessions of the other. Such Consuls-General, Consuls, Vice-Consuls and Consular Agents, however, shall not enter upon their functions until after they shall have been approved and admitted in the usual form by the government to which they are sent. They shall enjoy all the facilities, privileges, exemptions and immunities of every kind which are or shall be granted to Consuls of the most favoured nation.

Article XII

The subjects of each of the Contracting Parties who shall conform themselves to the laws of the country:

1. Shall have full liberty, with their families, to enter, travel or reside in any part of the dominions or possessions of the Contracting Party.
2. They shall be permitted to hire or possess the houses, manufactories, warehouses, shops and premises which may be necessary for them.
3. They may carry on their commerce either in person or by any agents they may think fit to employ.

4. They shall not be subject in respect of their persons or property, or in respect of passports, nor in respect of their commerce or industry, to any taxes, whether general or local, or to imposts or obligations of any kind whatsoever other or greater than those which are or may be imposed upon native subjects.

Article XIII

The subjects of each of the Contracting Parties in the dominions and possessions of the other shall be exempted from all compulsory military service whatever, whether in the army, navy, or national guard or militia. They shall be equally exempted from all judicial and municipal functions whatever other than those imposed by the laws relating to juries, as well as from all contributions, whether pecuniary or in kind, imposed as a compensation for personal service, and finally from every species of function or military requisition, as well as from forced loans and other charges which may be imposed for purposes of war, or as a result of other extraordinary circumstances. The duties and charges connected with the ownership or leasing of lands and other real property are, however, excepted, as well as all exactions or military requisitions to which all subjects of the country may be liable as owners or lessees of real property.

Article XIV

The subjects of each of the Contracting Parties in the dominions and possessions of the other shall be at full liberty to exercise civil rights, and therefore to acquire, possess, and dispose of every description of property, movable and immovable. They may acquire and transmit the same to others whether by purchase, sale, donation, exchange, marriage, testament, succession ab intestato, and in any other manner, under the same conditions as national subjects. Their heirs may succeed to and take possession of it, either in person or by procurators, in the same manner and in the same legal forms as subjects of the country; and in the case of subjects of either of the Contracting Parties dying intestate, their property shall be administered to by their respective Consuls or Vice-Consuls as far as is consistent with the laws of both countries.

In none of these respects shall they pay upon the value of such property any other or higher impost, duty or charge than is payable by subjects of the country. In every case the subjects of the Contracting Parties shall be permitted to export their property, or the proceeds thereof if sold, on the same conditions as subjects of the country.

Article XV

The dwellings, manufactories, warehouses and shops of the subjects of each of the Contracting Parties in the dominions and possessions of the other, and all premises appertaining thereto destined for purposes of residence or commerce shall be respected.

It shall not be allowable to proceed to make a search of, or a domiciliary visit to, such dwellings and premises, or to examine and inspect books, papers, or accounts, except under the conditions and with the form prescribed by the laws for subjects of the country.

The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country.

Article XVI

The Consuls-General, Consuls, Vice-Consuls, and Consular Agents of each of the Contracting Parties, residing in the dominions and possessions of the other, shall receive from the local authorities such assistance as can by law be given to them for the recovery of deserters from the vessels of their respective countries.

Article XVII

The stipulations of the present Treaty shall be applicable, as far as the laws permit, to all the colonies and foreign possessions of Her Britannic Majesty, excepting to those hereinafter named, that is to say, except to :

India, The Dominion of Canada, Newfoundland, The Cape, New South Wales, Natal, Victoria, Queensland, Tasmania, South Australia, Western Australia, New Zealand.

Provided always that the stipulations of the present Treaty shall be made applicable to any of the above-named colonies or foreign possessions on whose behalf notice to that effect shall have been given by Her Britannic Majesty's Representative at the Court of Greece to the Hellenic Minister for Foreign Affairs, within one year from the date of the exchange of the ratifications of the present Treaty.

Article XVIII

The present Treaty shall apply to any countries or territories which may hereafter unite in a Customs union one or other of the High Contracting Parties.

Article XIX

The present Treaty shall come into force on the exchange of the ratifications, and shall remain in force for ten years, and thereafter until the expiration of a year from the day in which one or other of the Contracting Parties shall have repudiated it.

Each of the Contracting Parties reserves, however, the right of causing it to terminate upon 12 months notice being given previously.

It is understood that the Treaty of Commerce and Navigation concluded between Great Britain and Greece on the 4th October, 1837, is abrogated by the present Treaty.

Article XX

The present Treaty shall be ratified by the two Contracting Parties, and the ratifications thereof shall be exchanged at Athens as soon as possible.

IN FAITH WHEREOF the Plenipotentiaries of the Contracting Parties have signed the present Treaty in duplicate, in the English and Greek languages, and thereto affixed their respective seals.

DONE in Athens this 10th day of November, in the year 1886.

[L.S.] HORACE RUMBOLD

[L.S.] S. DRAGOUMI

PROTOCOL

At the moment of proceeding this day to the signature of the Treaty of Commerce and Navigation between Great Britain and Greece, the Plenipotentiaries of the two High Contracting Parties have declared as follows :

Any controversies which may arise respecting the interpretation or the execution of the present Treaty, or the consequences of any violation thereof, shall be sub-

mitted, when the means of settling them directly by amicable agreement are exhausted, to the decision of Commissions of Arbitration, and the result of such arbitration shall be binding upon both Governments.

The members of such Commissions shall be selected by the two Governments by common consent, failing which each of the Parties shall nominate an Arbitrator, or an equal number of Arbitrators, and the Arbitrators thus appointed shall select an Umpire.

The procedure of the Arbitration shall in each case be determined by the Contracting Parties, failing which the Commission of Arbitration shall be itself entitled to determine it beforehand.

The undersigned Plenipotentiaries have agreed that this Protocol shall be submitted to the two High Contracting Parties at the same time as the Treaty, and that when the Treaty is ratified, the agreements contained in the Protocol shall also equally be considered as approved, without the necessity of a further formal ratification.

IN FAITH WHEREOF, the two Plenipotentiaries have signed the present Protocol, and thereto affixed their respective seals.

DONE at Athens, this 10th day of November, in the year 1886.

[L.S.] Horace RUMBOLD

[L.S.] S. DRAGOUMI

ANNEX 2

CONTRACT OF JULY 17, 1919, BETWEEN THE MINISTRY
OF SHIPPING AND MR. N. E. AMBATIELOS

AN AGREEMENT made the 17th July, 1919, between THE SHIPPING CONTROLLER on behalf of His Majesty the King (thereinafter called "the Vendor") of the one part, and Nicholas E. AMBATIELOS, of Argostoli, Cephalonia, Greece (thereinafter called "the Purchaser"), of the other part.

1. The Vendor agrees to sell and the Purchaser agrees to purchase for the total sum of £2,275,000 the nine steamers more particularly described in the schedule hereto now being built for the Vendor by the Contractors whose names are set out in the said schedule and numbered in the shipbuilding yard of the Contractors as also set out in the said schedule.

2. The purchase money for the said steamers and engines shall be paid as follows:

A deposit of ten per cent in cash payable as to £100,000 thereof upon signing this Agreement and as to the balance of the said deposit within one month thereafter and the balance in cash in London in exchange for a Legal Bill of Sale or Builders' certificate within 72 hours of written notice of the steamer's readiness for delivery being given to the Purchaser or his Agent, such delivery to be given at the Contractor's yard.

3. The steamers shall be deemed ready for delivery immediately after they have been accepted by the Vendor from the Contractors.

4. The Purchaser or any person appointed by him and approved by the Vendor shall have access to the premises of the Contractors at all times during business hours, and shall have all proper facilities afforded with a view to making inspections.

The Purchaser shall have no power of rejecting work or material but may make representations in respect thereof to the Vendor, who shall thereupon decide whether the same is or is not in accordance with the terms of the Contract between the Vendor and the Contractor and shall approve or reject the same accordingly.

5. All classifications, anchor and chain certificates relating to the steamers shall be handed to the Purchaser on delivery of the steamers and also copies of the type specifications and plan.

All the spare gear boats and outfit, provided for in the specifications of the steamers and engines and deliveries by the Contractors to the Vendor, shall be delivered to the Purchaser on delivery of the steamers. The guns fitting and ammunition on board the said steamers are not included in this contract and shall be removed by the Vendor before delivery.

6. On payment of the balance of the purchase money as aforesaid a legal bill of sale free from incumbrance for the whole of the shares in each of the steamers or the Builder's certificates for each of the steamers shall be handed to the Purchaser at the Vendor's expense and the steamers shall thereafter be at the expense and risk of the Purchaser.

The steamers with their spare gear and outfit shall be taken with all faults and errors of description without any allowance or abatement.

7. If default be made by the Purchaser in the payment of the purchase money the deposit shall be forfeited and the steamers may be re-sold by public or private sale and all loss and expense arising from the re-sale be borne by the Purchaser, who shall pay interest thereon at the rate of five pounds per cent per annum. If default be made by the Vendor in the execution of Legal Bills of Sale or in the delivery of the steamers in the manner and "within the time agreed," the Vendor shall return to the Purchaser the deposit paid with interest at the rate of five pounds per cent per annum.

8. If any of the steamers became an actual or constructive total loss before they are at the risk of the Purchaser, this Agreement shall be null and void as to such steamer and the deposit paid in respect thereof shall be returned by the Vendor to the Purchaser but without interest.

9. If default be made by the Contractors in the delivery of any of the steamers to the Vendor then the Vendor may at his option either cancel this Agreement in respect of such steamer or steamers and return the deposit paid in respect thereof to the Purchaser, or may substitute for the steamer or steamers hereby agreed to be purchased another steamer or steamers of the same type and expected to be ready at or about the same date, and this Agreement shall apply *mutatis mutandis* to the purchase of the new steamer or steamers.

10. The steamers shall not be subject to any trading restrictions whatsoever.

11. The wireless apparatuses are not the property of the Vendor, and are not included in this contract, and the Purchaser undertakes to make his own arrangements with the Marconi Company in connection therewith and in default of such arrangements being made shall indemnify the Vendor in respect of any claim by the Marconi Company against the Vendor.

12. Any dispute arising under this Agreement shall be referred under the provisions of the Arbitration Act 1889 to the Arbitration of two persons in London, one to be nominated by the Vendor and one by the Purchaser, and in the event of their being unable to agree, to an umpire to be appointed by them whose decision shall be final and binding upon both parties hereto.

13. A Commission of one and one-half pounds per cent upon the purchase price shall be paid by the Vendor to Messrs. Fergusson & Law upon delivery of the steamers to the Purchaser provided that in the event of this Agreement becoming void or being cancelled no commission shall be payable.

14. The Vendor undertakes to obtain the consent of the Board of Trade to the transfer of the said steamers or any steamer or steamers substituted therefor to the

Greek flag upon delivery and at the expense of the Purchaser to do all that may be necessary on his part to enable the steamers to be so transferred.

This schedule above referred to :

<i>Contractors</i>	<i>Yard No.</i>	<i>Price</i>		
		<i>£</i>	<i>s.</i>	<i>d.</i>
Taikoo Dockyard Hong Kong	180	289,166	13	4
Taikoo Dockyard Hong Kong	177	289,166	13	4
Taikoo Dockyard Hong Kong	181	289,166	13	4
Hongkong and Wampoa Dock	564	289,166	13	4
Hongkong and Wampoa Dock	565	289,166	13	4
Hongkong and Wampoa Dock	570	289,166	13	4
Shanghai Dock and Engineering Co.	1505	180,000	0	0
Shanghai Dock and Engineering Co.	1506	180,000	0	0
Shanghai Dock and Engineering Co.	1507	180,000	0	0
		£2,275,000	0	0

For and on behalf of Nicholas E. Ambatielos :

(Signed) FERGUSSON & LAW

As Agents

17th July, 1919.

CERTIFIED that this is a true copy of the original contract retained in the possession of the Ministry of Shipping.

(Signed) J. O'BYRNE

For Accountant General Ministry of Shipping

ANNEX 3

MORTGAGE DEED AND COVENANT DATED NOVEMBER 4, 1920, BETWEEN MR. N. E. AMBATIELOS AND THE SHIPPING CONTROLLER

THIS INDENTURE made the fourth day of November one thousand nine hundred and twenty between Nicholas Eustace AMBATIELOS, of Argostoli, Cephalonia, in the Kingdom of Greece, but temporarily residing at 56, rue de Varenne, Paris, in the Republic of France, Shipowner (hereinafter called the Mortgagor, which expression shall include his executors, administrators and assigns where the context so admits) of the one part and HIS MAJESTY THE KING, represented by the Shipping Controller (who and whose successor or successors in office are hereinafter called the Controller) of the other part.

WHEREAS the Mortgagor is the owner of 100/100th shares of and in all the steamships or vessels more particularly described in the Schedule hereto.

AND WHEREAS the said vessels are sailing under Greek flag but have not been registered yet at their declared port of registry.

AND WHEREAS the said declared port of registry is the port of Argostoli, Cephalonia, in the aforesaid Kingdom of Greece.

AND WHEREAS the Mortgagor has by a mortgage in the statutory form (hereinafter called "the statutory mortgage") bearing even date herewith transferred 100/100th shares of and in the steamship (hereinafter called "the said steamship") to the Controller to secure an account current with the Controller and all and every sum or sums of money now due or which shall from time to time hereafter become due to the said Controller for the payment of the balance of the purchase

price of the steamship *Keramies* and the steamship *Yannis* (being two of the steamers mentioned in the Schedule hereto) and of the steamers *Stathis* and *Mellon* which said steamers have been purchased by the Mortgagor from the Controller of Shipping and of every sum now due or hereafter to become due from the Mortgagor to the Controller on any account whatsoever whether from the Mortgagor solely or from the Mortgagor jointly with any other person or persons or companies or from any firms in which the Mortgagor may be interested or any other sum which may be owing on account under or by virtue of the terms of this indenture (but not exceeding in the aggregate the sum of £1,000,000) or any part thereof that may at any time be owing with interest thereon at the rate hereinafter provided.

AND WHEREAS by way of further security the Mortgagor has agreed to execute these presents and concurrently therewith statutory mortgage and deeds of covenants in the same form as the statutory mortgage and these presents in respect of all the other vessels named in the Schedule hereto (which said statutory mortgage and deeds of covenants are hereafter together sometimes referred to as the "Concurrent Mortgages").

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and for the consideration aforesaid the Mortgagor hereby covenants and agrees with the Controller as follows:

1. All and every sum or sums of money which are now or which shall from time to time hereafter become due or owing to the Controller from the Mortgagor on any account whatsoever whether from him solely or jointly with any other person or persons, company or firms for notes or bills discounted or paid or other loans, credits or advances made to the Mortgagor or for his accommodation or at his request whether solely or jointly as aforesaid or for any money for which he may be liable as surety or for which the Controller may have become liable as surety or guarantor for him in any other way whatsoever together with all interest, commissions, discounts and all other proper legal charges to be repayable in the manner hereinafter mentioned together with interest at the rate of 2 per cent per annum above the Bank rate from time to time ruling, such interest being calculated from the 1st day of August, 1920, and shall be payable half-yearly on the first day of February and on the first day of August of each year. In consideration of the granting of credit and of the continuing of such current account the Mortgagor hereby covenants and declares that at the date of signing of this indenture and of the statutory mortgage there are no maritime or other liens, charges or incumbrances on the said steamships and that he has full power to mortgage. If the Mortgagor shall pay the interest hereinbefore covenanted to be paid within 14 days after the day on which the same shall fall due and shall perform and observe all the covenants and stipulations therein contained and on his part to be performed and observed, then the Controller will not take any steps whatsoever for enforcing payment of the principal sum due to the Controller from the Mortgagor at the date hereof or any part thereof for a period of two years from the date hereof. All other sums due from the Mortgagor to the Controller under these presents shall be repayable on demand.

2. The Mortgagor agrees and undertakes to keep the said steamships insured during the continuance of the mortgage against all risks, including war risks, at her full declared value and at least in the sum of . . . by policies, certificates and entries subject to the reasonable approval of the Controller both as to the underwriters and as to the risk, terms and extent of the insurance and also to have the said steamship fully entered in a Protection and Indemnity Association approved by the Controller and immediately on receipt of same to hand such policies and all cover notes and other documents relating to the insurance to the Controller

or at the Mortgagor's option a letter of undertaking by approved insurance brokers to hold the policies on behalf of and to the order of the Controller, subject to the broker's lien thereon for unpaid premiums and also to take out any renewals of the same which may be necessary during the continuance of the said mortgages and shall effect the said insurances either in the name of the Controller or in such manner by giving proper notices to the insurers or underwriters as shall create a legal right title and interest in and a right to sue upon the said policies, cover notes and other documents in the Controller.

3. In the event of the Mortgagor failing to effect or keep in force during the continuance of the said mortgage and the said insurance or any of them or to hand over the policies or the said undertaking to the Controller or failing to take any other steps necessary to vest in the Controller the legal rights, title and interest therein, it shall be lawful for but not obligatory upon the Controller to effect and keep in force policies of insurance or insurances up to the amount aforesaid.

4. In the event of default by the Mortgagor in effecting any insurance as hereinbefore provided and in handing over the policies or the said undertaking as aforesaid and in the event of the Controller in pursuance of the power hereinbefore contained himself effecting any such insurances, then the Mortgagor shall forthwith pay to the Controller in cash on demand every sum disbursed by him to effect every such policy of insurance and if any sum so disbursed shall not be paid on demand, the amount thereof shall be added to and held secured by the statutory mortgage and these presents but not so as to make the total amount secured thereby exceed the said aggregate sum of £1,000,000 and shall bear interest at the rate of 10 per cent per annum until repaid.

5. If any claim shall arise under any policy however effected, the Controller shall be entitled if he shall so desire to collect the same from the underwriters or other parties by whom the same shall be payable and shall be entitled to apply the same in the repair of any damages sustained by the said steamship or otherwise and shall be entitled to charge and recover from the Mortgagor the usual broker's commission upon the gross amount of all moneys so collected by him.

6. It is expressly agreed that no provisions in this Indenture relating to the rights or remedies of the Controller shall in any way restrict or limit or deprive him of any rights or privileges he would otherwise be entitled to in law or equity as Mortgagee or by virtue of the statutory mortgage, but such provisions in this Indenture shall be interpreted if necessary in the interests of the Controller as giving the Controller extended rights and privileges.

7. The Mortgagor hereby expressly covenants with the Controller as follows:

- (a) That upon the request from the Controller and subject and without prejudice to the provisions of any then existing charter-parties but so nevertheless as to strictly comply with the law of Greece, he will cause the said steamship to proceed to her declared port of registry and there at his own cost complete all necessary formalities in connection with the registration of the said steamship under Greek flag and also at his own cost register or cause to be registered the statutory mortgage and this Indenture in the Mortgage Register at the declared port of registry and produce to the Controller a formal certificate from the Registrar of Shipping or other duly constituted officer at such declared port of registry certifying that the mortgage is the first in date and priority and that no other mortgage or charge has been registered prior to or on the same day or attachment made or sale effected to a third party.
- (b) Not to execute or register any mortgage or charge on the said steamship on the same day in priority to the statutory mortgage or further to mortgage the said steamship (except with the consent of the Controller in writing first

had and obtained) or without such consent sell or otherwise dispose of the said steamship or any shares therein nor do or permit any act neglect or default whereby the said steamship shall or may lose her character as a Greek ship. Provided that the Mortgagor shall be at liberty to sell the said steamship on giving 4 days notice written to that effect to the Controller, provided the purchase money is made payable to the Controller and provided that same or the sum of . . . whichever be the larger is paid over to the Controller in respect of such sale to be applied in reduction of the amount due to the Controller under the statutory mortgage or these presents and such sale shall not constitute a breach of this sub-clause.

- (c) That during any voyage the said steamship shall not make any deviation not allowed by any policy and/or charter-party and that nothing shall at any time be done or omitted whereby any insurance shall become void or voidable in whole or in part.
- (d) At all times upon the request to give the Controller full information regarding the said steamship, her employment, position and engagements and copies of charter-parties with names of charterers and if requested so to do on the completion of every voyage to send to the Controller certified copies of the ships' and engineers' log-books covering the period of such voyage.
- (e) That the Mortgagor undertakes that all freights or hires earned in respect of the said steamship will immediately upon receipt be paid to the London County Westminster and Parr's Bank Limited, Lombard Street, London E.C., to the credit of the Controller or his duly nominated agents, less the ordinary steamship disbursements, commissions and necessaries, and will if the charterers fail or refuse to give a letter undertaking to pay such freights or hire moneys to the said bank on request execute all such assignments, instruments, acts and things as shall be necessary for effecting this purpose or for further assurance. Provided that as freights and hire moneys are placed to the credit of the Controller under these presents so much thereof as shall be required for the purpose shall be applied in payment of all commission, disbursements, repairs, accounts for necessaries and insurance premiums due and owing by the Mortgagor in connection with the employment and insurance of the said steamship and the balance thereof shall be applied in reduction of the amount due from the Mortgagor to the Controller under or by virtue of the statutory mortgage and these presents.
- (f) The Mortgagor undertakes to reduce the amount owing to the Shipping Controller by at least the sum of £75,000 each six months.

8. IT IS HEREBY AGREED notwithstanding anything to the contrary herein contained that the Controller shall be entitled to take immediate possession of and to sell the said steamship without the necessity of applying to the Court on the happening of any or either of the following events, viz.:

- (a) If any amount to the said Controller by the Mortgagor on any account whatever shall not be repaid at the times and in the manner provided herein.
- (b) If the said steamship and her machinery shall not be kept in a seaworthy and seagoing condition and her classification maintained.
- (c) If the said steamship shall be arrested by or under any order of any court or tribunal in Great Britain or Ireland or any other country and shall not be freed from arrest within 21 days from the date of such arrest.
- (d) If the Mortgagor at any time upon request by the Controller shall fail to satisfy the Controller within a reasonable time that the masters, officers and crew of the said steamship have no claim or claims for wages in respect of a period exceeding three months.

- (e) If the Mortgagor neglects to insure or protect the said steamship by insurance as hereinbefore provided or neglects to pay the premiums or calls when due or fails to hand over the policies, cover notes or broker's undertaking to the Controller as aforesaid or to give proper notice or to make such assignment as or omit any other act that may be necessary to vest in the Controller the legal interest in the said policies or any of them.
- (f) If the said steamship be sold and the net proceeds of sale or sum of £ . . . whichever shall be the larger be not paid to the Controller as aforesaid, or transferred to any new management without the consent in writing of the Controller.
- (g) If the Mortgagor or the captain for the time being of the said steamship shall enter into or execute any bottomry bond or respondentia or if the said steamship shall become subject to any maritime or other lien charge or incumbrance (of which notice shall be immediately given to the Controller) and is not freed thereon by the Mortgagor within 21 days from the time the said lien is enforced.
- (h) If the Mortgagor shall become insolvent or a bankruptcy notice or a bankruptcy petition be presented against him or equivalent proceedings be taken in any foreign country or if he shall enter into any deed of arrangement or composition with his creditors or any distress or execution shall be levied against his goods.
- (i) If the Mortgagor shall commit any breach of or make any default in the observance or performance of any of the stipulations set out in this Indenture, including those in this clause otherwise than a breach which shall have been made good before the exercise of any such power by the Controller.
- (j) If the aforesaid Mortgagor shall employ or permit the said steamship to be employed in any manner in carrying contraband goods or other goods that shall be declared to be contraband of war.
- (k) If the Mortgagor shall let the said steamship upon time charter whereby more than on a calendar month's hire shall be payable in advance to the Mortgagor and such moneys so paid in advance shall not be paid into the said bank to the credit of the Controller or if he shall create any charge or lien upon such hire money other than for usual ship's disbursements and necessities.
- (l) If the said steamship shall be lost or destroyed or captured and the policy moneys shall not be paid to the Controller.
- (m) If the said steamship shall be allowed to remain idle in any foreign port for more than 25 days, except when under repair or through stress of weather or in the reasonable course of her employment or through strikes or lock-outs.
- (n) If the Mortgagor shall allow the said steamship to proceed to her declared port of registry without first giving the Controller 21 days notice of such intention. Provided that if under the provisions of any charter-party of the said steamship to proceed to Greece such direction shall not constitute a breach of this sub-clause unless the statutory mortgage shall not be registered concurrently with the registration of the said steamship. The Mortgagor shall give immediate notice to the Controller in writing of such direction.
- (o) If the Mortgagor shall create any other mortgage or charge on the said steamship capable of being registered at the declared port of registry prior to or contemporaneously with the statutory mortgage to the Controller.
- (p) If the Mortgagor shall make default under or commit a breach of any of the covenants, stipulations and conditions of all or any of the concurrent mortgages.
- (q) If any freight or hire money in respect of the said steamships shall not be

provided by Clause 7(2) hereof be forthwith paid to the account of the Controller at the London County Westminster and Parr's Bank Ltd., Lombard St., London, E.C.

9. If the Mortgagor shall make any default in any payment hereunder or commit any breach (other than a breach or default which has been made good by the Mortgagor before the exercise of any power given to the Controller by the proceeding clause) of any of the covenants, conditions or stipulations herein contained or upon the happening of any of the events mentioned in paragraph 8 hereof, the Controller shall be at liberty to take possession of the said steamship in any part of the world and to trade with her in such trade or trades as he may elect and at the current market rates or in his opinion at such rates as after taking all the circumstances connected with the said trading into consideration he may consider equivalent to current market rates and to charge a reasonable management fee therefor (the Controller not being liable for any acts or omissions as manager nor for the negligence of his servants or agents) or to lay her up and in either event for a period or periods as to him may seem expedient, giving credit for all profits and debiting all losses to the Mortgagor in their net amount and accordingly deducting or adding same from or to the moneys already owing to the intent that the whole be secured by the said statutory mortgage, or he may take possession of the said steamship in the United Kingdom or elsewhere in any part of the world and in his discretion sell her without applying to the Court for an order for sale by public auction or private contract, and in case of a sale they shall be entitled to charge or pay £1 per centum brokerage and all other usual and proper sale charges and expenses which may be incurred and also to satisfy any liens or claims, maritime or otherwise, which may be proved to be outstanding against the said steamship and all moneys expended by the Controller and all proper brokerage and outgoings and all losses (if any) sustained by him in or about the proper exercise of any of the powers herein contained or vested in him by virtue of the statutory mortgage or otherwise by operation of law shall be paid to him by the Mortgagor on demand and shall be deemed to be secured by the said statutory mortgage.

10. It is hereby agreed and declared that any neglect, delay or forbearance of the Controller to require or enforce payment of any money hereby secured or any other covenants, conditions or stipulations of this Indenture and any time which may be given to the Mortgagor shall not amount to a waiver of any of the powers vested in the Controller by virtue of the statutory mortgage of these presents or by operation of law and shall not in any way whatsoever prejudice or affect the right of the Controller to afterwards act strictly in accordance with the powers conferred upon the Controller by this Indenture.

11. Notwithstanding anything to the contrary herein contained, the statutory mortgage and these presents shall be construed according to English law and the Mortgagor agrees that the Controller shall be at liberty to take any proceedings in the English courts to protect or enforce the security provided by the statutory mortgage or to enforce any of the provisions of these presents or to recover payment of any sums due. For the purpose of any proceedings in the English courts the mortgagor shall be considered as ordinarily resident or carrying on his business at the offices at 46, St. Mary Axe in the City of London of Mr. G. E. Ambatielos, and if such offices shall be closed then at the office of his solicitors, Messrs. William A. Crump & Son, wherever they may be situated and the Mortgagor agrees that service of any writ issued against him by delivering the same to some person at the said office shall be deemed good service and no objection shall be taken by or on behalf of the Mortgagor to such service and for the purpose of any proceedings the statutory mortgage and these presents shall be construed and enforced according to English law. The Mortgagor further agrees that if the said steamship is at any

time in any port or place in England or Wales the said steamship may be arrested in any action instituted in the Probate Divorce and Admiralty Division of the High Court of Justice to enforce the statutory mortgage or these presents or protect the security, and no objection shall be taken by or on behalf of the Mortgagor to set aside or prevent the enforcement of any judgment in such action on the ground that the Court had no jurisdiction. For the purpose of any such action the Mortgagor hereby agrees that he shall be deemed to have entered unconditional appearance and consented to the jurisdiction of the Probate Divorce and Admiralty Division of the High Court of Justice.

12. The Mortgagor for the purpose of giving effect to the carrying out of the provisions of this Indenture hereby constitutes and appoints the Controller to be his true lawful and irrevocable attorney for him and in his name to ask, demand, receive, sue for and recover all insurance freight passage and other moneys of the said steamship which may become due and owing under the security of the statutory mortgage and these presents and to do all such acts and things in the name of the Mortgagor or otherwise as may be necessary for the due enforcement of the said security and on receipt of any such moneys to give proper receipts and discharges for the same and whatever the said attorney shall do in the premises the Mortgagor hereby ratifies and confirms.

13. As the amount due to the Controller is from time to time reduced by the amounts hereinafter mentioned, the Controller will absolutely release from the statutory mortgage relating thereto and accompanying deed of covenant the steamships hereinafter named, viz.:

When the amount due is reduced by £150,000, the S.S. *Panagis*.

When the amount due is reduced by a further £150,000, the S.S. *Nicolis*.

When the amount due is reduced by £130,000, the S.S. *Trialos*.

When the amount due is reduced by £130,000, the S.S. *Cephalonia*.

When the amount due is reduced by £130,000, the S.S. *Ambatielos*.

When the amount due is reduced by £85,000, the S.S. *Yannis*.

When the balance is repaid, the S.S. *Keramies*.

14. The Mortgagor undertakes to pay the reasonable and proper costs, charges and expenses of the Controller and of his solicitors in and about the preparation and execution of this Indenture and of the statutory mortgage.

IN WITNESS WHEREOF the Mortgagor hath hereunto set his hand and seal and the Controller has caused the Common Seal to be hereunto affixed the day and year first above written.

The schedule hereinbefore referred to:

<i>Name</i>	<i>Former Name</i>	<i>Deadweight</i>
S.S. <i>Keramies</i>	S.S. <i>War Coronet</i>	8,250 tons
S.S. <i>Trialos</i>	S.S. <i>War Sceptre</i>	8,250 tons
S.S. <i>Nicolis</i>	S.S. <i>War Bugler</i>	8,250 tons
S.S. <i>Ambatielos</i>	S.S. <i>War Trooper</i>	8,250 tons
S.S. <i>Cephalonia</i>	S.S. <i>War Miner</i>	8,250 tons
S.S. <i>Panagis</i>	S.S. <i>War Diadem</i>	5,150 tons
S.S. <i>Yannis</i>	S.S. <i>War Tiara</i>	5,150 tons

Signed, sealed and delivered by the said
Nicholas Eustace Ambatielos in the
presence of:

(Signed) N. E. AMBATIELOS

.....
(Signature of Greek Consul in Paris)

ANNEX 4

LETTER OF FEBRUARY 3, 1921, FROM MR. G. E. AMBATIELOS
TO THE SHIPPING CONTROLLER

GEA/ECM

By hand

February 3, 1921

IMPORTANT

The Shipping Controller,
Ministry of Shipping,
St. James's Park, S. W. 1

Sir,

Re N. E. Ambatielos of Paris

Whilst apologising for troubling you with this letter we ask for your indulgence while we place clearly before you the position we find ourselves in re the above, in the hope that you may give it sympathetic and favourable consideration.

In 1919 we bought 11 steamers from the Ministry involving a sum — including extras — of over three millions sterling.

From the very fact that this transaction involved, as it did, the cash provision of £2,200,000 — and left only a relatively small balance of £800,000 — to be found, we ask you to believe, that it was entered upon only after most careful calculation based on business experience, and was not hastily or rashly undertaken.

Our Bankers, both verbally and in writing, informed us that we could rely upon certain advances which would fully cover our requirements to complete this transaction and we implicitly relied upon this assurance. Much to our dismay, however, when the time came for this accommodation to be provided, they refused to grant us a loan on the grounds that things had considerably changed, that they had in the meantime advanced considerable sums of money to assist shipping, and that they were obliged to meet demands from other customers, not connected with shipping.

We immediately brought the matter to the knowledge of the competent gentleman at the Ministry, but still continued our efforts to procure a loan through other Bankers, namely, Messrs. Cox & Co., with whom we negotiated over a long period, but unfortunately they also turned the business down. These efforts were known to Mr. J. O'Byrne, who, we must admit has all along done his utmost to assist us in trying to meet the situation that has arisen.

We chartered the following vessels, as under, with first-class American and English firms:

S.S. *Nicolis*, chartered 30th April 1920, at the rate of \$21.50 per ton, for as many consecutive voyages as steamer can make up to the 30th June 1921, from Hampton Roads to West Italy.

S.S. *Panagis*, chartered on the 29th April 1920, for as many consecutive voyages as steamer can perform up to 1st April 1921, from Hampton Roads to French Atlantic, at the rate of \$20.00 per ton.

S.S. *Ambatielos*, chartered 22nd April 1920, at the rate of \$21.50 per ton, for six consecutive voyages from Hampton Roads to West Italy.

S.S. *Cephalonia*, chartered 29th May 1920, at the rate of \$19.50 per ton, for as many voyages as steamer can perform up to the 31st July 1921, from Hampton Roads to West Italy.

S.S. *Keramies*, chartered 25th March 1920, for six consecutive voyages, from Calcutta to Alexandria, at the rate of 120/- per ton.

S.S. *Trialos*, chartered 28th April 1920, for as many consecutive voyages as steamer can perform up to the 1st April 1921, from Hampton Roads to Antwerp or Rotterdam, at the rate of \$19.

We had every reason to reckon that these charters would yield to the owner in a year's time a minimum net profit of £900,000. However most unfortunately, we have had all these charter-parties, one after another, cancelled, for no earthly reason or excuse whatever, and we are now suing the charterers for damages.

Shipping, as you are well aware, Sir, is going through a most abnormal crisis, but it is to be hoped that things cannot possibly remain as they are because business at large, and trade in general is thereby paralysed and almost at a standstill. Nevertheless, one must face the actual fact, that ships can no longer pay their expenses and are being rapidly laid up.

All this has been worrying us more than it is possible for you to realise, and notwithstanding the fact that we have spared no efforts to make satisfactory arrangements with a view to meeting our obligations we can see no immediate prospect of doing so.

As above stated, Sir, this very considerable transaction was not entered upon in the spirit of speculation. Had that been so, we would certainly not deserve, or appeal for any indulgence. It was a thoroughly well thought out business proposition, in which personal property was sunk of over two millions sterling, and for which we respectfully submit, no normal foresight could have anticipated any such difficulties as have arisen.

How can we possibly deal with the present situation effectively and satisfactorily unless we receive some indulgence at your hands.

Having regard to the "impasse" we are faced with, we would ask you to consider whether you could release us from purchasing at least the ss. *Stathis* and the ss. *Mellon*. In that event, together with the proceeds of a ship we have just sold, the outstanding balance would be reduced to proportions that we could handle and thus save ourselves from utter ruin.

We beg to offer you, Sir, in anticipation of a favourable solution, our most grateful thanks and appreciation, and remain.

Yours respectfully,
(Signed) G. E. AMBATIELOS

ANNEX 5

CORRESPONDENCE BETWEEN SIR JOSEPH MACLAY
AND MAJOR LAING, JULY, 1922

Station Hotel, Dornoch
12th July 1922

Strictly private and confidential.

Dear Major Laing,

I am still acting as Advisor in connection with winding up the affairs of the old Ministry of Shipping, and when in London recently the question came up of the vessels which were sold to Mr. Ambatielos.

At the time the sale was being negotiated you will remember you were in constant touch with me, but so far as I remember nothing was ever said about guaranteeing dates of delivery, which, of course, it was impossible to do. I presume you told purchaser that the Ministry would do anything it could to hasten delivery, and hoped-for dates might be mentioned, but nothing beyond this.

Will you kindly let me have a line to Duchal, Kilmalcolm, Renfrewshire. I am North having a few days holiday.

I trust all goes well with you and with kind remembrances.

Yours sincerely,
(Signed) J. MACLAY

20th July, 1922

Strictly private and confidential.

Dear Sir Joseph,

I was delighted to get your letter and to hear you were at last taking a holiday. Please accept my apologies for not writing sooner. It is due to my being away.

With regard to the sale of the ships to Ambatielos, I have, as far as I can, with the help of my secretary, refreshed my memory as to what actually took place prior to the sale of the steamers then building in Hong Kong, etc.

As you will remember, I was a pessimist as to the future of shipping, and my one idea was to reduce the liability against the Ministry of Shipping as rapidly as possible.

I was of the opinion that it was most essential to dispose of the ships building at Hong Kong, and I had cables sent to our agents who were responsible for the building and completion, and they cabled back dates which they considered quite safe, and it was on this information that I was enabled to put forward a proposition to you.

The Eastern freight market at that time being very high, I came to the conclusion, and laid my deductions before yourself and the Committee of the Ministry of Shipping, that, provided these ships could be delivered at the times stated by our agents on behalf of the builders, they were worth, with their position, owing to the freight they could earn, another £500,000, and this I added to what I considered an outside price for the ships. It was only by this argument that I induced Ambatielos to purchase the ships. This figure worked out at £36 per ton D.W. for 8,000 tonners and over £40 per ton for 5,000 tonners.

The Ministry of Shipping got a very large sum of money on account, and in addition were relieved of the expense of sending officers and engineers out to Hong Kong.

I think I am right in saying that, in the case of all ships building and not taken by Lord Inchcape, a date of delivery was given, and in the case of the "N" boats building at Chepstow, which were sold and purchased by Farina on behalf of the Italian Government at £29 per ton, considerable difficulty arose over the late delivery. These boats were disposed of at the same time as those to Ambatielos, and full particulars as to delivery was obtained by Mr. Farina from the Shipbuilding Co. Had these boats not been sold at that time to Mr. Ambatielos, I doubt very much if the vessels would have realized an average of £25 per ton, owing to the break in the Eastern freight market, and the dislike to foreign-built ships.

Just prior to the sale of these Hong Kong ships, the contract with Lord Inchcape amounting to about £14,000,000 had been entered into on the basis of £25 per ton less depreciation and overhaul, which meant a net of about £21 per ton, and the ships building in Canada were cancelled or taken over by the builders at a heavy loss to the Ministry, so that I considered the sale to Ambatielos, on the information given me as to the delivery by our own people, an extremely advantageous one.

Yours sincerely,

(Signed) Bryan LAING

21, Bothwell Street, Glasgow

Strictly private and confidential.

Dear Major Laing,

Thanks for your letter.

I arrived home on Thursday after a very good holiday, and feel much the better for it.

Your letter reached me on Friday.

I will probably be in London next week, and will therefore not take up any details meantime.

With kind remembrances.

Yours sincerely,

(Signed) J. MACLAY

ANNEX 6

DECLARATION ACCOMPANYING THE TREATY OF COMMERCE
AND NAVIGATION BETWEEN GREAT BRITAIN AND GREECE
OF JULY 16, 1926

It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886, and that any differences which may arise between our two Governments as to the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the protocol of November 10th, 1886, annexed to the said Treaty.

ANNEX 7

STATUTORY DECLARATION OF MAJOR LAING
OF JANUARY 19, 1934

I, Bryan LAING, of 73, St. Stephen's House, Westminster, in the County of London, DO SOLEMNLY and SINCERELY DECLARE as follows:

1. On the 1st April 1919, I was appointed Assistant Director of Ships Purchases and Sales at His Majesty's Ministry of Shipping. The Minister of Shipping at that time was Sir Joseph Maclay and the Director of Purchases and Sales was Sir John Esplen.

2. During the time when I was negotiating the purchase and sale of ships for the Ministry, that is, from the 1st April 1919 until October 1920, although Sir Joseph Esplen was nominal head of the Department during that time, I sold on behalf of His Majesty's Government over one hundred million pounds worth of ships and in no single instance was any exception taken or alteration made to the terms which I had agreed with the purchasers on behalf of the Shipping Controller. It was my habit to report the deal which I had made and the Contract would be signed in that form embodying the terms which I alone had agreed with the purchasers. In fact on more than one occasion when other persons in the Department had negotiated for the sale of ships, including the Minister himself, I had objected pointing out that there could not be two persons who had charge of negotiations for the sale of ships and in the cases referred to the negotiations which had been made by persons other than myself were cancelled and I subsequently re-sold the same boats at an enhanced price.

3. At the same time as I was at the Ministry of Shipping, I was also appointed on the Lord Lytton Committee of the Admiralty where my powers were of a similar nature and similar occasions arose where sales had been tentatively entered into by persons other than myself and where I objected and where they were annulled and later the same ships were sold by myself at an enhanced price.

4. I was also at this time largely consulted by the Chartering Department of the Ministry of Shipping and I was in this way able to know the position of freights in the world market because these would naturally be governed by what ships were in the district for the purpose of carrying goods which had to be moved.

5. It was while I was in this position that I first made the acquaintance of Mr. G. E. Ambatielos who approached me on behalf of his brother Mr. N. E. Ambatielos concerning the purchase of tonnage, and I offered to sell him nine ships then building to the order of His Majesty's Government at Hong Kong and Shanghai and I recommended that he should purchase these ships because I knew that at that time the Eastern freight market was very high and the owner of these ships would be able to make a very substantial profit provided a free charter-party could be obtained (which I arranged) instead of Blue Book rates. It was also advantageous if the right price could be obtained for His Majesty's Government to sell these ships for the reason that it would have been necessary to send out crews and stores to bring them home and I estimated that those would have cost at least £100,000. I therefore bargained on behalf of His Majesty's Government with Mr. G. E. Ambatielos and later confirmed the matter with his brother Mr. N. E. Ambatielos for the sale to them of these ships at an average price of £36 Os. Od. per ton dead weight. I was able to do this because I first ascertained and arranged that a free charter-party should be given and also caused cablegrams to be sent to His Majesty's representatives in Hong Kong and Shanghai and asked them to cable definite dates on which deliveries could be promised; and it was because I was able to offer to Mr. Ambatielos firstly the free charter-party and secondly the position then obtaining in the Eastern freight market, which position was made certain by my being able to offer him definite dates for delivery of the ships, that I induced him to sign the Contract dated the 17th July 1919. In my position at the Ministry of Shipping I was not able to contract with Mr. Ambatielos in such a way as would have bound him to share with His Majesty's Government the profit which I expected he would have been able to make owing to this combination of free charter-party and certain delivery dates. I estimated that the profit which he was likely to make would be about one million pounds over and above Blue Book rates and I informed him that I considered that he ought to pay to His Majesty's Government for the privilege of the open charter-party and the freights obtainable at that period which was made possible by the certain delivery dates one half of that expected profit, namely £500,000, and so I added that amount to the purchase price of the ships. I was able to assure him from Messrs. David Pinkney & Co. whom he had telephoned whilst he was at the Ministry of Shipping that these high freights would be obtainable if the vessels were delivered by the dates agreed.

6. The Ministry of Shipping's ordinary Form of Contract was therefore prepared providing for the sale to Mr. Ambatielos of the nine vessels therein mentioned. Prior to this Contract being signed on the 17th July, 1919, I had given to Mr. G. E. Ambatielos a piece of buff paper on which I had copied the agreed delivery dates which were the same dates as those which had been cabled to me as reliable dates from Hong Kong and Shanghai. When therefore Mr. Ambatielos on the signing of the Contract pointed out to me that in the written Contract these specific dates were not mentioned I informed him that if he would look at Clause 7 of the Contract he would see that delivery would have to be made "within the time agreed" and that those words meant the dates which I had already given to him and which were written on the buff slip of paper.

7. In confirmation of the fact that there were fixed delivery dates a telegram was sent, signed Straker, Secretary to Sir John Esplen, who was on the Committee of the Ministry of Shipping, which telegram was sent on his instructions after a meeting of the Committee, reading as follows:

“ From Esplen, Shipminder, London,

“ To Britannia Hongkong.

“ Following for Dodwell, War Trooper.

“ As the steamer was sold to buyers for delivery not later than November it is of utmost importance that she should be completed by that date stop Cable immediately progress of construction. (Signed) M. J. STRAKER.”

This was sent because the Committee were becoming worried at the continual delay and they foresaw either cancellation of the Contract or a claim being made against them.

8. Prior to the case coming on in Court Sir Joseph Maclay wrote to me on the 12th July, 1922, asking in so many words whether or not I had agreed to give guarantee dates for delivery thus confirming the powers that I had for the disposal of His Majesty's ships and which I have enumerated in the preceding paragraphs. On the 20th July, 1922, I wrote back to Sir Joseph explaining the position as I have set out in the preceding paragraphs hereof, namely, that I was able to get Mr. Ambatielos to pay an extra £500,000 because I was able to get him to share the profit which he was to make with the Ministry of Shipping owing to the high Eastern freights then ruling and to the fact that guaranteed delivery dates could be assured, and on the 24th July, 1922, Sir Joseph acknowledged my letter without comment. I take it that it was because of this that I was not asked to give evidence on behalf of His Majesty's Government at the trial, although I was subpoenaed by them and could not therefore be approached by Mr. Ambatielos.

9. This is the evidence which I would have given to the Court at the time had I been called.

And I make this solemn Declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act, 1835.

DECLARED at Palace Chambers, Westminster, in the County of London, this 19th day of January, 1934.

(Signed) Bryan LAING

Before me:

(Signed) [Illegible]

A Commissioner for Oaths.

ANNEX 8

PARAGRAPHS 70 AND 71 OF THE GREEK CASE AND EXTRACT FROM SIR FRANK SOSKICE'S SPEECH ON FEBRUARY 1, 1956

70. The second flaw in the proceedings was committed by Mr. Justice Hill who allowed the Crown the privilege of not disclosing the files of this, a plainly commercial transaction. He accepted this claim of privilege without further inquiry, to which he was entitled, in order to ascertain that it was justified, more particularly as the Crown was a party to the litigation. See *Hennessy v. Wright* (1888) 21 Q.B.D. 509; *In re Joseph Hargreaves Ltd.* (1900) 1 Ch. 347 and *Robinson v. State of South Australia* (1931) A.C. 704.

71. It is difficult to understand this claim of privilege as the contract of July 17, 1919, was entirely and exclusively a commercial contract and no reason for the withholding of these documents existed. As held by the Court of Appeal in *the Asiatic Petroleum Co Ltd. v. Anglo-Persian Oil Co. Ltd.* (1916) 1 K.B. 822: “ the foundation of the rule of the protection of documents from discovery is that the informa-

tion cannot be disclosed without injury to the public interest and not that the documents are confidential or official, which alone is no reason for their non-production.”

* * *

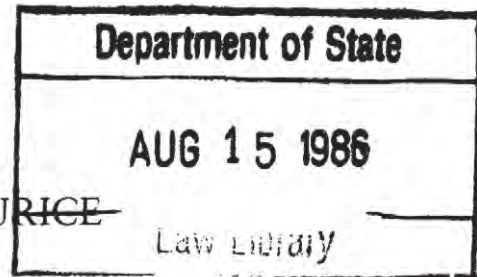
May I say perfectly frankly to the Commission with regard to those two paragraphs that they contain an error, and that the Greek Government does not rely on those two paragraphs; and I wish to correct the error and to withdraw the two paragraphs, 70 and 71. The error consists in the assertion in that paragraph that there was a flaw in the proceedings on the part of Mr. Justice Hill because he did not further enquire into the rightness or wrongness of the claim of privilege. The Commission will see that English case *Hennessy v. Wright* is cited in support of that proposition. *Hennessy v. Wright*, and the doctrine that the judge could enquire once privilege were claimed, claimed in proper form, if necessary by an affidavit, that doctrine was specifically overruled by Lord Simon in his speech in the House of Lords in the case of *Cammell Laird* which I have previously cited, that case being reported as the Commission may remember, in 1942 Appeal Cases at page 638. The House of Lords in that case recognised specifically that once privilege has been claimed the court cannot go behind that privilege and ask whether the privilege is properly claimed or not. The Minister who claims the privilege takes the responsibility upon himself of claiming the privilege and using it properly. If he has misused the privilege there is no power in the court whatever to correct his misuse, to correct his abuse. If he chooses to claim the privilege it is final. The court can say — “ We would like on affidavit a statement from you that you claim the privilege ” — but what is said on the affidavit cannot be questioned. The Minister’s statement is final, and no court can go behind it, and therefore the statement in these two paragraphs that Mr. Justice Hill made an error in not investigating whether the privilege was properly claimed, that statement cannot be supported and is contrary to the law of England. Therefore, Mr. President and Members of the Commission, I formally withdraw paragraphs 70 and 71 of the Greek case.

ANNEX 122

THE LAW AND PROCEDURE
OF THE
INTERNATIONAL COURT OF JUSTICE

THE LAW AND PROCEDURE
OF THE
INTERNATIONAL COURT OF JUSTICE

by the late
SIR GERALD FITZMAURICE
G.C.M.G., Q.C.



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VOLUME TWO



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Annex 122

§ 10. PARTICULAR POINTS OF INTERNATIONAL LAW:

(1) THE EXHAUSTION OF LOCAL REMEDIES RULE

(1) *Statement of the main issues*

(a) *In General.* It could be said that virtually all the difficulties—and to this day they remain such—that are attendant upon the subject of the exhaustion of local remedies revolve round three or four points. The rule—known for short as the local remedies rule—is accepted as one of the best established and, in principle, least questioned rules of international law: yet its precise scope and application can be highly controversial. The rule requires that in every case (or in certain kinds of cases—but that is part of the controversy) in which (a breach of international law involving the responsibility of the State being alleged) the local law of the State impugned affords (or if resorted to would have afforded) remedies,¹ these must be exhausted by the claimant party—either as a condition precedent to there being a possible infraction of international law at all, or as a condition of the formulation of a receivable international claim in respect of the alleged infraction. Somewhat less compressed, the last point means one of two things. There may, in the final analysis, be no breach of international law at all until all legal remedies have been exhausted—the breach consisting in the very failure to afford a remedy, provided it be an improper failure. In that case, no question of any breach can arise until all such remedies have been exhausted. In the second category of case, the breach can be established (or at any rate alleged) independently of the action of the local tribunals; but in that event, a bar to the admissibility of any international claim in respect of the breach continues so long as any remedies afforded by the local law in respect of it have not been exhausted. These two aspects might be called respectively the substantive and the procedural aspects of the local remedies rule. In its substantive aspect, the rule operates, not so much as a preliminary objection, but rather as a direct plea to the merits, i.e. if local remedies have not been exhausted, there is not, or there is not yet, any substantive breach of international law at all, and the tribunal must find in favour of the defendant State on the merits. In its procedural aspect, the rule operates as a preliminary objection *pro tempore* to the *admissibility* of the claim; and if upheld by the tribunal, will rule out any decision on the merits²—i.e. there may or may not be a breach of international law, but an international claim will not lie, and cannot be examined by an international tribunal—until local remedies have been exhausted.

¹ Assuming, of course, that the claimant, plaintiff or appellant, is in the *right*. This point is considered below, and is of the first importance.

² Theoretically, a *joinder* of the issue to the merits would be possible, but inappropriate unless (which would not here be the case) the breach lay in the very failure (improperly) to afford a remedy.

Parallel with all this is the question of what constitutes a 'remedy' for the purposes of the application of the rule; and there is also one further, highly preliminary, issue to be mentioned presently.

The main questions that arise might therefore be formulated as follows:

1. Does the local remedies rule apply in every case in which a breach of international law or treaty is alleged, and the local law of the defendant State in principle affords remedies (if its courts recognize the existence of the breach) or could do so if invoked; or are there cases, or classes of cases, to which the rule has no application, even if the local law could afford a remedy if resorted to? Here three possible situations may be postulated: (a) the claim arises exclusively out of a wrong alleged to have been done to a national of the claimant State; (b) the claim has a double aspect involving an alleged wrong to the national, but additionally and independently a wrong to his State;¹ (c) the alleged wrong is exclusively to the State.²

2. In what cases does the rule operate as a bar to admissibility and in what as a plea to the merits (see above, p. 686)? This question is related to the first, but has independent aspects.

3. What constitutes a 'remedy' for the purposes of the application of the rule; must every actual or apparent remedy be invoked and, in general, what is the kind of remedy non-resort to which will bring the objection into play?

4. Where does the burden of proof lie of establishing, as the case may be (a) that local remedies existed, but have either (i) not been resorted to at all, or (ii) have been resorted to, but have not been fully exhausted; (b) that although such remedies existed, they were not of the kind to which the rule relates, or otherwise that non-resort to them is no bar to the claim?

(2) *The Case of an alleged breach of State rights*

The most controversial of the questions arising under the first of the above heads is whether the local remedies rule applies, not only where the claim is made on behalf of a private person or entity, but also where it is made, either in whole or in part, in respect of an alleged direct breach of international law as between State and State. This matter, which has several aspects, cannot be gone into here, but some indication of what might in general have been Lauterpacht's judicial attitude towards it is

¹ e.g. an alleged breach of, say, a commercial treaty; or interference with a ship on the high seas, involving damage or loss by delay to the shipowner, but also 'flag prejudice' to the State of registration.

² Of course, all wrongs to an individual involving breaches of international law are, or are also, wrongs to his State; and might even, on one view, be said to be wrongs exclusively to the State, the national being merely the *corpus vilitis* of the claim. But the above rough and ready classification will do for present purposes. Annex 122

i.e. where the breach arises directly out of the judicial act itself and would not otherwise exist; for instance where there is a denial of justice as above described. In such a case, according to well-established principles, no international wrong arises at all unless either the highest courts of appeal of the country concerned fail to reverse the decision of a lower court constituting a denial of justice, or themselves independently perpetrate such a denial. If these means of recourse are not resorted to therefore, there can, in the final analysis, be no breach of international law. Consequently, a plea of non-exhaustion in such cases is essentially a contention that the defendant State has committed no such breach, and is legally blameless: it is essentially a preliminary objection on the merits, not going to jurisdiction or competence.

(6) *Limitation to the local remedies rule: no obligation to exhaust local remedies that are not at least potentially effective*

(a) *Statement of the problem.* It has for long been accepted that the local remedies rule only applies if means of recourse under the local law not merely exist, but also appear to be such as would be capable of affording a remedy, if the claimant's case is good in law—in short the remedy must be, potentially, an 'effective' one. In the *Norwegian Loans* case (*I.C.J. Reports*, 1957, p. 39), Lauterpacht said:

'... the requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act on it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it.'

Thus to take the last few words, it has been suggested that in a dispute between the government of a State and a foreigner, in a country where the judiciary is notoriously under the influence of the executive, appeal to the courts, though possible, would be futile *a priori*, and that in consequence no effective remedy exists.¹ Nevertheless, in many cases it may be a matter of no small difficulty, in the face of a theoretically possible means of recourse, to determine whether such means is ineffective in the sense necessary to displace the local remedies rule for the purposes of an international claim. Will it, for instance, suffice that, although the recourse *might* succeed, it is highly unlikely to do so in fact? It has even been seriously urged in international proceedings² that because a claim is almost certainly unmeritorious

¹ Even so, such a plea is unlikely to succeed in practice except in proceedings taken long after the event and relating to a former admitted period of general disorder and misrule in the defendant State subsequently brought to an end by the act of the State itself. It is in these kinds of circumstances that such a plea has succeeded before claims commissions.

² *Ambatielos* case (*Greece v. The United Kingdom*), third phase—see n. 1 on p. 690 above. Some

under the local law (whatever its merits internationally), the claimant is thereby absolved from exercising a right of appeal given him by the local law against a decision of a lower court adverse to his claim. To regard such cases as covered by the exception of ineffectiveness would go far to nullify the whole local remedies rule in practice; and it has to be insisted on that a remedy is always an effective one for the purposes of this rule if, provided the claimant is *right*, it can and will afford him due relief or compensation. A remedy cannot be *ineffective* merely because, if the claimant is in the wrong, it will not be *obtainable*.

Difficulties of this type were well exemplified in the *Norwegian Loans* case. The argument of the French Government was that, as the Norwegian courts were bound to apply Norwegian legislation, and as it was this very legislation which deprived the French bondholders of their alleged right to payment at gold value rates, recourse to the Norwegian courts would be futile, since the latter would not be in a position to afford any effective remedy. Lauterpacht, while not sharing this view, indicated that he felt a good deal of sympathy for it. The 'position of the French Government', he said (*loc. cit.*), was 'not altogether without merit', and he added (*ibid.*) that he could 'appreciate the contention of the French Government that there are no effective remedies to be exhausted' even if he must hold that 'however contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them'.

(b) *The test of 'reasonable possibility'*. Lauterpacht in fact went pretty far in this case in the direction of holding that wherever a *possible* remedy exists, recourse must be had to it, even if this is in fact highly unlikely to be successful; and he in effect therefore endorsed the view that the question of the probability or otherwise of success is quite different in principle from the question of effectiveness, and that to substitute the one test for the other, as the criterion for displacing the local remedies rule, would be incorrect, and would also drastically alter the incidence of this rule. After referring to the grounds on which it might well be doubted whether the Norwegian courts could afford any effective remedy he continued (*ibid.*):

'However these doubts do not seem strong enough to render inoperative the requirement of previous exhaustion of local remedies. The legal position on the subject cannot be regarded as so abundantly clear as to rule out as a matter of reasonable possibility an effective remedy before the Norwegian courts.'

Here Lauterpacht propounded the criterion of there being a 'reasonable possibility' that a remedy would be afforded, as being the test of effectiveness—or in other words he suggested that no means of recourse can be regarded as futile from the effectiveness standpoint unless there does not

ANNEX 123

Denial of Justice in International Law

Jan Paulsson



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Exhaustion of local remedies and denial of justice

The case for exhaustion

In *Loewen*, where the documentation put before the arbitral tribunal was particularly exhaustive, the final award noted that:

No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system.¹

The absence of such instances is unsurprising. International law attaches state responsibility for judicial action only if it is shown that there was no reasonably available national mechanism to correct the challenged action. In the case of denial of justice, finality is thus a substantive element of the international delict. States are held to an obligation to provide a fair and efficient *system* of justice, not to an undertaking that there will never be an instance of judicial misconduct. Writing as rapporteur to the International Law Commission, James Crawford put it this way:

an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act.²

¹ *Loewen*, 26 June 2003, at para. 154. The proposition articulated in the quoted paragraph should be understood as limited by the context of the claim of denial of justice. As a general statement of international responsibility, it is likely too wide.

² International Law Commission (Crawford), Second Report on State Responsibility, UN Doc. A/CN.4/498 (1999) at para. 75. Commenting on the ILC Draft Articles in 1998, the UK expressed itself as follows: 'Corruption in an inferior court would not

Exhaustion of local remedies and denial of justice

The correctness of this proposition is not open to doubt. Freeman traced it back to the medieval regime of reprisals, which were considered lawful when there was, as da Legnano wrote in 1360,³ 'a failure of remedy (*propter defectum remedii*) arising from the neglect of those who govern'. It followed that the injured alien could look to external force (including his own, with the permission of his prince) only if he was unable to obtain reparation from the local sovereign. By the twentieth century, Freeman wrote, this had been transformed into 'the rule that local remedies must first be exhausted'.⁴ He cited numerous precedents⁵ and made the following sensible observation:

Ample protection against arbitrary violations of the local law will normally be afforded within the State itself by the conventional means of appeal to a superior court. Ruling improperly on evidence, erroneously charging a jury, exceeding the decorous limits of judicial restraint with prejudicial effects for one of the parties (such as openly insulting the claimant's attorney before the jury), emotionally addressing the jurymen with the aim of kindling their hostility, and the like will usually find rectification in the wisdom of the reviewing bench.⁶

Against this background, Freeman gave the following reasons for the perpetuation of the rule⁷:

- the outcome of national appeals may make international action unnecessary;
- facts that emerge in the course of such appeals may deter international action on behalf of the aliens;
- 'the presumption of uniformity between national institutions and the requirements of international law' is overcome only 'by a denial of justice against which there is no effective appeal';
- inter-state friction is lessened;

violate [the duty to provide a fair and efficient system of justice] if redress were speedily available in a higher court', International Law Commission, Draft Articles on State Responsibility, Comments and Observations Received from Governments, UN Doc. A/CN.4/488 (1998) at p. 69. See also the *Green, Burn, The Ada, Smith* and *Blumhardt* cases rendered by Umpire Thornton in *US v. Mexico* cases, Moore *Arbitrations* at p. 3139 and following, as well as *The Mechanic (Corwin v. Venezuela)*, *ibid.* at p. 3210. The *Jennings, Laughland & Co.* award (*US v. Mexico*), *ibid.* 3135, at p. 3136 declared: 'The Umpire does not conceive that any government can thus be made responsible for the misconduct of an inferior judicial officer when no attempt has been made to obtain justice from a higher court.'

³ *Tractatus de Bello, de Repraesalus et de Duello*, ch. CXXIII, quoted in Freeman at p. 55.

⁴ Freeman at p. 56. ⁵ *Ibid.* at p. 403 *et seq.* ⁶ *Ibid.* at pp. 291–292 (notes omitted).

⁷ *Ibid.* at pp. 416–417.

Denial of Justice in International Law

- 'the gravity and exceptional character of international responsibility' is respected by limiting claims to those 'really worthy of consideration'.

Moreover, as Nsongurua Udombana, a Nigerian scholar, has more recently pointed out:

local remedies are normally quicker, cheaper, and more effective than international ones. They can be more effective in the sense that *an appellate court can reverse the decision of a lower court, whereas the decision of an international organ does not have that effect*, although it will engage the international responsibility of the state concerned.⁸

All of these reasons, however, militate in favour of the exhaustion rule with respect to *all* claims of state responsibility, not only in connection with claims of denial of justice. Indeed, the exhaustion requirement has long been established as a general principle of international law.⁹ As such, it is applicable to claims presented by diplomatic protection under a treaty even if it is not expressly mentioned therein.¹⁰

Loewen and the problem of waiver

A problem then arises by reason of the fact that waivers of the exhaustion requirement have been made in many treaties. International arbitrations

⁸ Nsongurua Udombana, 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights', (2003) 97 *AJIL* 1, at p. 9 (emphasis added). W. Michael Reisman was able to encompass all of these considerations in a single sentence: 'The domestic remedy rule is founded on principles of economy, localization of delict and remedy, and good faith', in *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (New Haven, CT: Yale University Press, 1971), at p. 364.

⁹ *Panevezys-Saldutiskis Railway (Estonia v. Lithuania)*, (1939) PCIJ, Series A/B, No. 76, 3; see generally the Separate Opinion of Judge Sir Hersch Lauterpacht in *Certain Norwegian Loans (France v. Norway)*, 1957 ICJ Reports 9, at pp. 34–66, A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983). (The application of the principle to deny admissibility in *Panevezys-Saldutiskis Railway* is, however, open to considerable doubt; Judge Erich's analysis in his dissent, at pp. 52–53, seems a far more realistic assessment, consistent with the approach of international tribunals before and since, from *Robert E. Brown to ELSI; accord.*, Reisman, *Nullity*, at p. 369.)

¹⁰ 'If there is a positive utility to the exhaustion rule – and it is submitted that there is – an argument for automatic waiver other than through an express compromise is not persuasive', Reisman, *Nullity*, at p. 365, n. 18. This doctrinal view was given jurisprudential confirmation in *Elettronica Sicula SpA (ELSI) (US v. Italy)*, 1989 ICJ Reports 15, at para. 50: 'the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so'.

ANNEX 124

OPPENHEIM'S INTERNATIONAL LAW

NINTH EDITION

Volume I

PEACE

INTRODUCTION AND PART 1

Edited by

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OPPENHEIM'S INTERNATIONAL LAW

Irrespective of the position in strict law as to a state's right to present claims on behalf of companies with a substantially foreign shareholding, it may, in deciding whether or not to exercise its right of protection over a company, have regard to the degree of real connection between the company and the state, in particular the extent to which shares in the company are held by its nationals. The states representing the various interests affected may also act together in pursuing claims in respect of damage suffered by a company.

Agreements for settling international claims often include provisions whereby a company, in order to be regarded as a 'national' of the claimant state, must not only be established under its laws but also have a significant proportion of its shareholding held by nationals of that state, or in some other way be effectively controlled from that state.²⁵ It is debatable to what extent such provisions, particularly in view of their diversity, can be regarded as providing evidence of a rule of customary international law, or as simply reflecting what the negotiating states considered appropriate in the particular circumstances with which they were dealing.

§ 153 Exhaustion of local remedies It is a recognised rule that, where a state has treated an alien¹ in its territory² inconsistently with its international obliga-

²⁵ See n 21. See also eg Art 3 of the Convention establishing the UK–Mexico Claims Commission (TS No 11 (1928)), covering claims against Mexico for damage suffered by 'any partnership, company or association in which British subjects or persons under British protection have or have had an interest exceeding 50% of the total capital'. The USA–Yugoslavia Claims Agreement 1948 required that claimant US companies be incorporated in the USA and have at least 20 per cent US ownership of shares in the company (on which see *Cisatlantic Claim*, ILR, 21 (1954), p 293; and, for the interpretation of the 20 per cent requirement in the sense that it referred to beneficial ownership, see *Westhold Corp'n Claim*, ILR, 20 (1953), p 226). The USA–Hungary Claims Agreement 1973 required claimant US companies to be both incorporated in the USA and have at least 50 per cent of their outstanding capital stock or other beneficial interest owned directly or indirectly by natural persons who are US nationals; but Hungarian companies need only be incorporated or constituted under Hungarian law: ILM, 12 (1973), pp 407, 409.

The Algiers Declaration 1981 providing for the settlement of US–Iran claims (ILM, 20 (1981), p 230) defines a US national, in relation to companies, as a company organised under US law and in which US citizens hold, directly or indirectly, an interest equivalent to at least 50 per cent of its capital stock: Art VII.1. For application of this provision, see eg *Harza Engineering Company v Islamic Republic of Iran* (1982), ILR, 70, p 118; *Flexi-Van Leasing Inc v Islamic Republic of Iran* (1982), *ibid*, p 497 (an important decision, as to evidentiary requirements for establishing the nationality of stock ownership); *Ultrasystems Inc v Islamic Republic of Iran* (1983), ILR, 71, p 663; *RayGo Wagner Equipment Company v Iran Express Terminal Corp'n* (1983), *ibid*, p 688.

For treaty provisions which deal with the position of companies solely by reference to the place of incorporation, see eg Art 78.9(a) of the Treaty of Peace with Italy 1947; Art 3(1)(ii) of the UK–Bulgarian Agreement 1955 (TS No 79(1955)).

See also § 380, n 12, for other treaty definitions of national companies.

¹ The rule is essentially concerned with injuries suffered by private persons, whether natural or legal. Where a private company is financed by public capital, or even where a company with a predominantly public character engages in activities *iure gestionis*, it would not seem that the rule is excluded: YBILC (1977), ii, pt 2, p 46, para (45).

² As to the possible irrelevance of the local remedies rule if a state causes injury outside its territory to an alien, see Jennings, Hag R, 121 (1967), ii, pp 485–6; Parry, Hag R, 90 (1956), ii, p 688; Meron, BY, 35 (1959), p 98. The ILC in Art 22 of pt I of its Draft Articles on State Responsibility, provisionally refrained from excluding from the scope of the rule injuries occurring outside the state's territory: YBILC (1977), ii, pt 2, pp 43–4, paras (38)–(40).

tions but could nevertheless by subsequent action still secure for the alien the treatment (or its equivalent) required by its obligations, an international tribunal will not entertain a claim put forward on behalf of that person³ unless he has exhausted the legal remedies available to him in the state concerned.⁴ So long as

³ The requirement to exhaust local remedies applies to those cases which involve the protection by a state of its nationals. The rule does not apply where a state causes direct injury to another state, irrespective of whether a local remedy might in fact be available in such circumstances. Even where the substance of the complaint concerns damage to an alien, local remedies probably do not have to be exhausted where the damage has been suffered as the result of conduct by the defendant state which, while not being in breach of its internal law, is directly in breach of its international obligations to another state, whether arising by treaty or customary international law. See Fawcett, BY, 31 (1954), pp 452, 454ff.

A claim which is essentially about the interpretation and application of a treaty, even though arising out of circumstances affecting a private person, does not attract the operation of the local remedies rule. *Swiss Confederation v German Federal Republic (No 1)*, ILR, 25 (1958-1), pp 33, 42-50 (and see comment by Johnson, BY, 34 (1958), pp 363-8); *Greece v United Kingdom*, *ibid*, pp 168, 170; *USA-France Air Services Arbitration* (1978), ILR, 54, pp 304, 322-5; *Ireland v United Kingdom* (1978), ILR, 58, pp 190, 263. It is a question of appreciation in each particular case whether the claim is essentially one in which the claimant state is adopting the cause of its national: in the *Interhandel* case, the ICJ held that Switzerland's claim was of that kind, and so attracted the local remedies rule (ICJ Rep (1959), pp 28-9). See also the *Elettronica Sicula Case*, ICJ Rep (1989), pp 42-3, as to the difficulty for a state sometimes to establish a direct breach of an international obligation which is distinct from, and independent of, a dispute arising out of an injury suffered by one of its nationals.

It may be that where a state, in a contract with an alien, provides for disputes relating to that contract to be settled exclusively by arbitration, there is no need for the alien to exhaust other remedies: see Schwebel and Wetter, AJ, 60 (1966), pp 484-501.

⁴ Borchard, §§ 381-3; Ralston, §§ 129-33; *Bases of Discussion*, iii, pp 136-39; Eagleton, *The Responsibility of States in International Law* (1928), pp 95-124, and RI, 3rd series, 11 (1930), pp 643-59, and *ibid*, 16 (1935), pp 504-26; Dunn, *The Protection of Nationals* (1932), pp 156-59; Witenberg, *La Procédure et la sentence internationales* (1937), pp 153-55, and Hag R, 41 (1932), iii, pp 50-6; Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp 403-55; Borchard, ZöV, 1 (1929), pp 233-42; Borchard, *Annuaire*, 35, (2) (1931), pp 424-35, and AJ, 28 (1934), pp 729-33; Fachiri, BY, 12 (1931), pp 95-106, and *ibid*, 17 (1936), pp 19-36; Friedmann, RI, 3rd series, 14 (1933), pp 318-27; Ténékidès, *ibid*, pp 514-35; Ago in *Archivio di diritto pubblico* (vol iii, 2, 1938) pp 181-249. See also the dispute between Persia and Great Britain in 1932 and 1933 concerning the Anglo-Persian Oil Company's Concession in Persia; Toynbee, *Survey*, 1934, pp 224-47; Verzijl and others, *Annuaire*, 45 (1954), i, pp 5ff, and 46 (1956), i, pp 1ff; Fawcett, BY, 31 (1954), pp 452-8; Briggs, AJ, 50 (1956), pp 921-7; Bagge, BY, 34 (1958), pp 162, 165-9; Garcia Amador, Hag R, 94 (1958), ii, pp 445-61; Meron, BY, 35 (1959), pp 83-101; Simpson and Fox, *International Arbitration* (1959), pp 111-17; Law, *The Local Remedies Rule in International Law* (1961); Fitzmaurice, BY, 37 (1961), pp 53-64; *Harvard Draft* (1961), Art 19; Amerasinghe, ICLQ, 12 (1963), pp 1285-1325, ZöV, 25 (1965), pp 445-77, *State Responsibility for Injuries to Aliens* (1967), pp 169-269, ZöV, 36 (1976), pp 727-59 and *Local Remedies in International Law* (1990); Mummery, AJ, 58 (1964), pp 389-414; Jenks, *Prospects for International Adjudication* (1964), pp 527-37; Schwebel and Wetter, AJ, 60 (1966), pp 484-501; Mann, BY, 42 (1967), pp 31-6; Head, Can YBIL, 5 (1967), pp 142-58; Jennings, Hag R, 121 (1967), ii, pp 480-86; Dawson, ICLQ, 17 (1968), pp 404-27; Dawson and Head, *International Law, National Tribunals and the Rights of Aliens* (1971); Chappez, *La Règle de l'épuisement des voies de recours internes* (1972); McGovern, ICLQ, 24 (1975), pp 112-27; Trinidad, *Rev Belge*, 12 (1976), pp 499-527, Neth IL Rev, 24 (1977), pp 373-92, and *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983); Draft Articles on State Responsibility, pt 1, Art 22 and Commentary, YBILC (1977), ii, pt 2, pp 30-50; Arechaga, Hag R, 159 (1978), i, pp 291-7; Rule VII of the UK Government's Rules Applying to International Claims 1985, cited by Warbrick, ICLQ, 37 (1988), pp 1006, 1008; Adler, ICLQ, 39 (1990), pp 641-53. As regards the burden of proof when the local remedies rule is invoked, see Robertson, ICLQ, 39 (1990), pp 191-6.

there has been no final pronouncement on the part of the highest competent authority within the state, it cannot be said that a valid international claim has arisen.⁵ Effective exhaustion of the local remedies requires the alien not only to have recourse to the substantive remedies available to him, but also to avail himself of the procedural facilities at his disposal under the local law.⁶

The substance of this rule, usually referred to as the 'local remedies' rule, is frequently included in conventions providing for the jurisdiction of international tribunals.⁷ The International Court of Justice has confirmed that the rule 'is a well-established rule of customary international law'.⁸

⁵ Various reasons for this rule have been given. These include: (a) an alien resident in a state should, and normally does, have recourse to local courts before seeking external assistance from his state, and the rule accordingly reflects what usually happens, and what ought to happen if the legal system is to function properly; (b) a state must be given the opportunity to redress by its own means and within its own legal framework any wrong suffered by an alien before being called to account internationally for its actions; (c) in cases where the international obligation requires a state to achieve a certain result, the definitive failure to achieve that result, and thus the breach of the obligation, is not established until procedures for rectifying an initial failure have been resorted to and have failed; (d) until local remedies have been exhausted, justice has not been definitely denied; (e) the nature and extent of the damage suffered by an alien, and thus the basis for his state's international claim, is not certain until local remedies have been exhausted; (f) there is considerable convenience in local courts conducting the initial inquiries into the matter, and should have the opportunity to do so up to the highest level. The ILC regarded the real reason for the existence of the principle of the exhaustion of local remedies as being 'to enable the State to avoid the breach of an international obligation by redressing, through a subsequent course of conduct adopted on the initiative of the individuals concerned, the consequences of an initial course of conduct contrary to the result required by the obligation': YBILC (1977), ii, pt 2, p 47, para (48). For consideration by the ILC of the question, which is more of theoretical than practical significance, whether the local remedies rule is a condition for the existence of international responsibility or is merely a procedural condition governing the enforcement of responsibility which has already arisen (with the ILC adopting the former view), see YBILC (1977), ii, pt 2, pp 34-42. The underlying rationale of the rule makes it unlikely that recourse to arbitration under the International Convention for the Settlement of Investment Disputes 1965 (see § 407, n 49) should be treated as a *local* remedy which needs to be exhausted before a claim which could have been referred to such arbitration may be pursued at the international level.

⁶ 'It is the whole system of legal protection, as provided by municipal law, which must have been put to the test': *Ambatielos Arbitration (Greece v UK)* (1956), RIAA, 12, p 83; ILR, 23 (1956), p 306, and 24 (1957), p 291; and see Lipstein, ICLQ, 6 (1957), at pp 654-5. Also *Lawless v Republic of Ireland*, ILR, 25 (1958-I), pp 216, 222. See generally on procedural remedies, Amerasinghe, ICLQ, 12 (1963), pp 1285-325. It is sufficient if the claims asserted in seeking a domestic remedy are in substance equivalent to, even if not identical with, the international obligations which are in question: *Guzzardi Case* (1980), ILR, 61, pp 276, 304-5; *Elettronica Sicula Case*, ICJ Rep (1989), pp 45-6; cf *Van Oosterwijck Case* (1980), ILR, 61, pp 360, 372-5.

The rule requires 'that recourse should be had to all legal remedies available under the local law which are in principle capable of providing an effective and sufficient means of redressing the wrongs for which, on the international plane, the respondent State is alleged to be responsible', even if those remedies may be regarded as of an extraordinary nature: *Nielsen v Government of Denmark* (1959), ILR, 28, pp 210, 227ff. But a tribunal may be reluctant to accept remedies of an extraordinary nature as being an available remedy: see the decision of the Human Rights Committee in *Pietroroia v Uruguay* (1981), ILR, 62, pp 246, 252-3; *Teti v Uruguay* (1982), ILR, 70, pp 287, 294. An *ex gratia* remedy is not among those which have to be exhausted: *Greece v United Kingdom*, ILR, 25 (1958-I), pp 27, 29.

⁷ See eg Art 26 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (on the interpretation and application of which there are many decisions of the European Court and Commission of Human Rights: see Fawcett, *The Application of the European Convention on Human Rights* (1969), pp 288-309; Trinidad, *Human Rights Journal*, 10 (1977), pp 141-86 and *The Application of the Rule of Exhaustion of Local Remedies in*

However, failure to exhaust local remedies will not constitute a bar to a claim if there are no available remedies which should have been pursued;⁹ or if available remedies are inappropriate for the subject matter of the claim¹⁰ or are in practice shown to be ineffective in relation to the matter complained of;¹¹ or if it is clearly¹² established that, in the circumstances of the case, an appeal to a higher municipal authority would have had no effect, for instance, when the supreme judicial tribunal is under the control of the executive organ whose acts are the subject matter of the complaint,¹³ or when the decision complained of has been given in pursuance of an unambiguous municipal enactment with the result that there is no likelihood of a higher tribunal reversing the decision or awarding compensation, or, as a rule, when the injury to the alien is the result of an act of the government as such.¹⁴ Nor do local remedies have to be exhausted where the

International Law (1983); Couvreur, *Rev Belge* 16 (1981–82), pp 130–71; Arts 26 and 27(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965; Art 46 of the American Convention on Human Rights 1969; Arts 11(3) and 14(7)(a) of the Convention on the Elimination of All Forms of Racial Discrimination 1966; and Art 41.1(c) of the Covenant on Civil and Political Rights 1966. At the 1930 Hague Codification Conference the Third Committee adopted the following text (Art 4.1): ‘the State’s international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State’.

⁸ The *Interhandel Case*, ICJ Rep (1959), p 27. See generally Briggs, AJ, 53 (1959), pp 547–63. The local remedies rule has to be distinguished from a requirement, such as that in Art 6(1) of the European Convention on Human Rights, that, as a matter of substantive obligation, a state must provide for recourse to an independent tribunal to adjudicate upon civil rights and obligations.

⁹ See eg *Altesor v Uruguay* (1982), ILR, 70, pp 248, 253. See also Advisory Opinion OC–11/90 of the Inter-American Court of Human Rights on *Exceptions to the Exhaustion of Domestic Remedies* (1990) to the effect that indigency, or a general fear in the legal community to represent a complainant, may justify non-exhaustion of domestic remedies: *Human Rights Law Journal*, 12 (1991), p 20.

¹⁰ *Velasquez Rodriguez Case*, ILM, 28 (1989), pp 291, 304–9.

¹¹ *Ibid.*

¹² If there is any doubt whether a possible remedy will be effective the issue must be submitted to the national courts before recourse may be had to an international tribunal: *Panevezys-Saldutiskis Railway Case* (1939), PCIJ, Series A/B, No 76, p 19; *Retimag SA v Federal Republic of Germany*, YBECHR, 4 (1961), pp 384, 400; *X v Federal Republic of Germany, Decisions and Reports of the European Commission on Human Rights*, 6 (1977), pp 62, 63. See also *Levey Co v Federal Republic of Germany* (1961), ILR, 42, p 380.

¹³ See eg *Salvador Commercial Company Claim* (1902), RIAA, 15, pp 467, 476–7; *Brown’s Case*, AD, 2 (1923–24), No 35; *Re Arbitration between Valentine Petroleum & Chemical Corp’n and Agency for International Development* (1967), ILR, 44, pp 79, 91.

¹⁴ See the Award of March 1933 given by Undén, Arbitrator, in the dispute between Greece and Bulgaria concerning the *Interpretation of Article 181 of the Treaty of Neuilly*: AJ, 28 (1934), p 787; and *X, Cabales and Balkandali v United Kingdom* [1983] 5 EHRR 132, 139. See also the *Finnish Ships Arbitration* (1934), RIAA, 3, p 1481, between Finland and the UK: for comment thereon see Borchard, AJ, 28 (1934), pp 729–33; Beckett, Hag R, 50 (1934), iv, pp 198–303; Freeman, *The International Responsibility of States for Denial of Justice* (1939), pp 423–34; and Fachiri, BY, 17 (1936), pp 19–36. See also ZöV, 4 (1934), pp 671–84; and *Re Arbitration between Valentine Petroleum & Chemical Corp’n and Agency for International Development* (1967), ILR, 44, pp 79, 91–2; and *Cyprus v Turkey* (1978), ILR, 62, pp 4, 76ff. See also *Inter-ocean Transportation Company of America v The United States of America*, AD, 8 (1935–37), No 115 (at pp 272–74), on purely illusory remedies. The interpretation given to the Calvo Clause (see § 408, n 22) in some cases – eg *Mexican Union Railway Case*, AD, 5 (1929–30), No 129 – substantially reduces the operation of that clause to a condition of observing the local remedies rule.

states concerned have agreed that that requirement should not apply,¹⁵ or where the state for whose benefit it would apply has waived the requirement¹⁶ or is estopped from invoking it.¹⁷ It is for the state claiming that local remedies have not been exhausted to demonstrate that such remedies exist;¹⁸ and if they are shown to exist, it is for the opposing party to show that they were exhausted or were inadequate.¹⁹ If pending proceedings have been unreasonably prolonged through no fault of the aggrieved person it may be concluded that no further domestic remedies remain to be exhausted.²⁰

§ 154 Bar by lapse of time (extinctive prescription) The principle of extinctive prescription, that is, the bar of claims by lapse of time, is recognised by international law.¹ It has been applied by arbitration tribunals in a number of cases.² The

¹⁵ The USA–Iran Claims tribunal was given jurisdiction to settle claims notwithstanding non-exhaustion of local remedies: see *Amoco-Iran Oil Co v Iran* (1982), 1 Iran–US CTR 493; *Amoco International Finance Corp v Iran*, ILM, 29 (1988), pp 1314, 1326. But the tribunal's jurisdiction was excluded for claims under contracts specifically providing for disputes thereunder to be within the sole jurisdiction of Iranian courts: see Art II of the US–Iran Claims Settlement Agreement 1981 (ILM, 20 (1981), p 230, and Stein, AJ, 78 (1984), pp 1–52). See also, for the non-applicability of the rule by virtue of a treaty provision, *Uzielli Claim* (1963), ILR, 40, p 149.

¹⁶ *Government of Costa Rica Case (Re Viviana Gallardo)* (1981), ILR, 67, p 578. But waiver will not be implied from silence on the matter in a general disputes settlement provision in a treaty: *Elettronica Sicula Case*, ICJ Rep (1989), p 42.

¹⁷ *Foti and Others Case* (1982), ILR, 71, pp 366, 380–82; *Corigliano Case* (1982), *ibid*, pp 395, 403. Failure to mention local remedies in the course of 'somewhat desultory diplomatic exchanges' will not constitute a waiver of the rule by estoppel: *Elettronica Sicula Case*, ICJ Rep (1989), p 44.

¹⁸ *Greece v United Kingdom*, ILR, 25 (1958–I), pp 27, 29; *Foti and Others Case* (1982), ILR, 71, pp 366, 381; *Dermitt v Uruguay* (1982), *ibid*, pp 354, 358; *Elettronica Sicula Case*, ICJ Rep (1989), pp 46–8.

¹⁹ *Velasquez Rodriguez Case*, ILM, 28 (1989), pp 291, 305.

²⁰ See *Teti v Uruguay* (1982), ILR, 70, pp 287, 294.

¹ See Verykios, *La Prescription en droit international public* (1934), pp 129–93; Ralston, §§ 683–98; Fauchille, §§ 856–57(3), and the Report of Politis and Charles de Visscher, *Annuaire*, 32 (1925), pp 1–24; H Lauterpacht, *Analogies*, § 129; Cavaglieri, *Rivista*, 3rd series, 5 (1926), pp 169–204; Witenberg, *La Procédure et la sentence internationales* (1937), pp 138–43, and Hag R, 41 (1932), iii, pp 27–35; Sørensen, *Nordisk TA*, 3 (1932), pp 161–70; Borchard, *Annuaire*, 36 (1931), i, pp 435–41; King, BY, 15 (1934), pp 82–97; Bin Cheng, *General Principles of International Law* (1953), pp 373–86; Pinto, Hag R, 87 (1955), i, pp 438–48; Simpson and Fox, *International Arbitration* (1959), pp 122–6; *Harvard Draft* (1961), Art 26. The League Codification Committee studied prescription in 1928.

In respect of certain particularly serious offences it has been provided that there should be no temporal limitation on the punishment of offenders. See § 148, and §§ 157, 435.

² See *Gentini Case* (1903), RIAA, 10, pp 552–5; *Williams Case*, Moore, *International Arbitrations*, iv, pp 4179–203; *Cayuga Indians Case* (1926), RIAA, 6, pp 173, 189; *Sarropoulos v Bulgarian State*, *Recueil TAM*, 7 (1927), p 47; AD, 4 (1927–28), No 173; *Cook Case*, AD, 4 (1927–28), No 174; *Ambatielos Arbitration*, ILR, 23 (1956), pp 306, 314–17 (on which see Lipstein, ICLQ, 6 (1957), pp 646–7, and Vallat, *International Law and the Practitioner* (1965), pp 30–32); *Lighthouses Arbitration*, ILR, 23 (1956), pp 659, 671–2; *Kahane v Secretary-General of the United Nations* (1968), ILR, 43, pp 290, 299–300.

The apparent rejection of the principle of extinctive prescription by the Hague Court of Arbitration in the *Pious Fund* case in 1902 (Scott, *Reports of the Hague Court of Arbitration* (1916), pp 3–17) had not been generally followed: see remarks in the *Gentini case*, above.

ANNEX 125

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2006

*Volume II
Part Two*

*Report of the Commission
to the General Assembly
on the work
of its fifty-eighth session*

UNITED NATIONS
New York and Geneva, 2013



NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 2006*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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a legal person and as a national of a State. There is no reason why such legal persons should not qualify for diplomatic protection if injured abroad, provided that they are autonomous entities not forming part of the apparatus of the protecting State.¹⁶⁷ Non-profit-making foundations, comprising assets set aside by a donor or testator for a charitable purpose, constitute legal persons without members. Today many foundations fund projects abroad to promote health, welfare, women's rights, human rights and the environment in developing countries. Should such a legal person be subjected to an internationally wrongful act by the host State, it is probable that it would be granted diplomatic protection by the State under whose laws it has been created. NGOs engaged in causes abroad would appear to fall into the same category as foundations.¹⁶⁸

(5) The diversity of goals and structures in legal persons other than corporations makes it impossible to draft separate and distinct provisions to cover the diplomatic protection of different kinds of legal persons. The wisest, and only realistic, course is to draft a provision that extends the principles of diplomatic protection adopted for corporations to other legal persons—subject to the changes necessary to take account of the different features of each legal person. The proposed provision seeks to achieve this. It provides that the principles governing the State of nationality of corporations and the application of the principle of continuous nationality to corporations, contained in the present chapter, will apply, “as appropriate”, to the diplomatic protection of legal persons other than corporations. This will require the necessary competent authorities or courts to examine the nature and functions of the legal person in question in order to decide whether it would be “appropriate” to apply any of the provisions of the present chapter to it. Most legal persons other than corporations do not have shareholders, so only draft articles 9 and 10 may appropriately be applied to them. If, however, such a legal person does have shareholders, draft articles 11 and 12 may also be applied to it.¹⁶⁹

PART THREE

LOCAL REMEDIES

Article 14. Exhaustion of local remedies

1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.

¹⁶⁷ As diplomatic protection is a process reserved for the protection of natural or legal persons not forming part of the State, it follows that in most instances the municipality, as a local branch of government, and the university, funded and, in the final resort, controlled by the State, will not qualify for diplomatic protection, although it may be protected by other rules dealing with the problem of State organs. Private universities would, however, qualify for diplomatic protection, as would private schools, if they enjoyed legal personality under municipal law.

¹⁶⁸ See further K. Doehring, “Diplomatic protection of non-governmental organizations”, in M. Rama-Montaldo (ed.), *El derecho internacional en un mundo en transformación: liber amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga*, Montevideo, Fundación Cultura Universitaria, 1994, pp. 571–580.

¹⁶⁹ This would apply to the limited liability company known in civil law countries which is a hybrid between a corporation and a partnership.

2. “Local remedies” means legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.

3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

Commentary

(1) Draft article 14 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the exercise of diplomatic protection. This rule was recognized by the ICJ in the *Interhandel* case as “a well-established rule of customary international law”¹⁷⁰ and by a Chamber of the ICJ in the *ELSI* case as “an important principle of customary international law”.¹⁷¹ The exhaustion of local remedies rule ensures that “the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system”.¹⁷² The Commission has previously considered the exhaustion of local remedies in the context of its work on State responsibility and concluded that it is a “principle of general international law” supported by judicial decisions, State practice, treaties and the writings of jurists.¹⁷³

(2) Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies. Non-nationals of the State exercising protection, entitled to diplomatic protection in the exceptional circumstances provided for in draft article 8, are also required to exhaust local remedies.

(3) The phrase “all local remedies” must be read subject to draft article 15 which describes the exceptional circumstances in which local remedies need not be exhausted.

(4) The remedies available to an alien that must be exhausted before diplomatic protection can be exercised will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. Paragraph 2 seeks to describe, in broad terms, the main kind of legal remedies that must be exhausted.¹⁷⁴ In the first instance it is clear that the foreign

¹⁷⁰ *Interhandel*, Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 6, at p. 27.

¹⁷¹ *ELSI* (see footnote 149 above), p. 42, para. 50.

¹⁷² *Interhandel* (see footnote 170 above), at p. 27.

¹⁷³ See article 22 of the draft articles on State responsibility provisionally adopted by the Commission on first reading, *Yearbook ... 1996*, vol. II (Part Two), chap. III, sect. D.1 (draft article 22 was approved by the Commission at its twenty-ninth session and the text and the corresponding commentary are in *Yearbook ... 1977*, vol. II (Part Two), chap. II, sect. B, pp. 30–50); and article 44 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 120; the commentary to this article is on pp. 120–121.

¹⁷⁴ In the *Ambatielos Claim*, the arbitral tribunal declared that “[i]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test” (*Judgment of 6 March 1956*,

national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Even if there is no appeal as of right to a higher court, but such a court has discretion to grant leave to appeal, the foreign national must still apply for leave to appeal to that court.¹⁷⁵ Courts in this connection include both ordinary and special courts since "the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress".¹⁷⁶

(5) Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which may result in a binding decision. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies whose "purpose is to obtain a favour and not to vindicate a right"¹⁷⁷ nor do they include remedies of grace¹⁷⁸ unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Requests for clemency and resort to an ombudsman generally fall into this category.¹⁷⁹

(6) In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case, the Chamber of the ICJ stated that "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success".¹⁸⁰ This test is preferable to the stricter test enunciated in the *Finnish Ships Arbitration* that "all the contentions of fact and propositions of law which are brought forward by the claimant Government ... must have been investigated and adjudicated upon by the municipal Courts".¹⁸¹

UNRIAA, vol. XII (Sales No. 63.V.3), p. 120). See further on this subject, C. F. Amerasinghe, *Local Remedies in International Law*, 2nd ed., Cambridge University Press, 2004, pp. 182–192.

¹⁷⁵ This would include the *certiorari* process before the United States Supreme Court.

¹⁷⁶ *B. Schouw Nielsen v. Denmark*, Application No. 343/57, Decision of 2 September 1959, European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights 1958–1959*, p. 438, referring to the consideration of the Institute of International Law in its resolution of 1954 (*Annuaire de l'Institut de droit international*, vol. 46 (1956), p. 364). See also *Lawless v. Ireland*, Application No. 332/57, Decision of 30 August 1958, European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights 1958–1959*, pp. 308 et seq., at pp. 318–322.

¹⁷⁷ *De Becker v. Belgium*, Application No. 214/56, Decision of 9 June 1958, European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights 1958–1959*, p. 238.

¹⁷⁸ See *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war* ("Finnish Ships Arbitration"), Award of 9 May 1934, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1479.

¹⁷⁹ See *Avena* (footnote 29 above), at pp. 63–66, paras. 135–143.

¹⁸⁰ *ELSI* (see footnote 149 above), at p. 46, para. 59.

¹⁸¹ *Finnish Ships Arbitration* (see footnote 178 above), at p. 1502,

(7) The claimant State must therefore produce the evidence available to it to support the essence of its claim in the process of exhausting local remedies.¹⁸² The international remedy afforded by diplomatic protection cannot be used to overcome faulty preparation or presentation of the claim at the municipal level.¹⁸³

(8) Draft article 14 does not take cognizance of the "Calvo clause",¹⁸⁴ a device employed mainly by Latin American States in the late nineteenth century and early twentieth century to confine an alien to local remedies by compelling him to waive recourse to international remedies in respect of disputes arising out of a contract entered into with the host State. The validity of such a clause has been vigorously disputed by capital-exporting States¹⁸⁵ on the ground that the alien has no right, in accordance with the rule in *Mavrommatis*,¹⁸⁶ to waive a right that belongs to the State and not its national. Despite this, the "Calvo clause" was viewed as a regional custom in Latin America and formed part of the national identity of many States. The "Calvo clause" is difficult to reconcile with international law if it is to be interpreted as a complete waiver of recourse to international protection in respect of an action by the host State constituting an internationally wrongful act (such as denial of justice) or where the injury to the alien was of direct concern to the State of nationality of the alien.¹⁸⁷ The objection to the validity of the "Calvo clause" in respect of general international law are certainly less convincing if one accepts that the right protected within the framework of diplomatic protection are those of the individual protected and not those of the protecting State.¹⁸⁸

(9) Paragraph 3 provides that the exhaustion of local remedies rule applies only to cases in which the claimant State has been injured "indirectly", that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim.¹⁸⁹

(10) In practice it is difficult to decide whether the claim is "direct" or "indirect" where it is "mixed", in the sense that it contains elements of both injury to the State and injury to the nationals of the State. Many disputes before the ICJ have presented the phenomenon of the mixed claim. In the *United States Diplomatic and Consular Staff in Tehran* case,¹⁹⁰ there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its diplomats

¹⁸² See the *Ambatielos Claim* (footnote 174 above).

¹⁸³ See D. P. O'Connell, *International Law*, vol. 2, 2nd ed., London, Stevens, 1970, p. 1059.

¹⁸⁴ See footnote 156 above.

¹⁸⁵ See generally D. R. Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy*, Minneapolis, University of Minnesota Press, 1955.

¹⁸⁶ See footnote 26 above.

¹⁸⁷ *North American Dredging Company of Texas (U.S.A.) v. United Mexican States*, UNRIAA, vol. IV, p. 26.

¹⁸⁸ See above paragraph (5) of commentary to draft article 1.

¹⁸⁹ See generally on this subject, C. F. Amerasinghe, *Local Remedies in International Law* (footnote 174 above), pp. 145–168.

¹⁹⁰ *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, p. 3.

and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the *Interhandel* case,¹⁹¹ there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the *United States Diplomatic and Consular Staff in Tehran* case, the Court treated the claim as a direct violation of international law; and in the *Interhandel* case, the Court found that the claim was preponderantly indirect and that *Interhandel* had failed to exhaust local remedies. In the *Arrest Warrant of 11 August 2000* case there was a direct injury to the Democratic Republic of the Congo and its national (the Foreign Minister), but the Court held that the claim was not brought within the context of the protection of a national so it was not necessary for the Democratic Republic of the Congo to exhaust local remedies.¹⁹² In the *Avena* case, Mexico sought to protect its nationals on death row in the United States through the medium of the Vienna Convention on Consular Relations, arguing that it had “itself suffered, directly and through its nationals” as a result of the United States’ failure to grant consular access to its nationals under article 36, paragraph 1 of the Convention. The Court upheld this argument because of the “interdependence of the rights of the State and of individual rights”.¹⁹³

(11) In the case of a mixed claim, it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant. In the *ELSI* case, a Chamber of the ICJ rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that “the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations]”.¹⁹⁴ Closely related to the preponderance test is the *sine qua non* or “but for” test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the “but for” test. If a claim is preponderantly based on injury to a national, this is evidence of the fact that the claim would not have been brought but for the injury to the national. In these circumstances only one test is provided for in paragraph 3, that of preponderance.

(12) Other “tests” invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment

are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a Government official,¹⁹⁵ diplomatic official¹⁹⁶ or State property¹⁹⁷ the claim will normally be direct, and where the State seeks monetary relief on behalf of its national as a private individual the claim will be indirect.

(13) Paragraph 3 makes it clear that local remedies are to be exhausted not only in respect of an international claim, but also in respect of a request for a declaratory judgment brought preponderantly on the basis of an injury to a national. Although there is support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted,¹⁹⁸ there are cases in which States have been required to exhaust local remedies where they have sought a declaratory judgment relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national.¹⁹⁹

(14) Draft article 14 requires that the injured person must himself have exhausted all local remedies. This does not preclude the possibility that the exhaustion of local remedies may result from the fact that another person has submitted the substance of the same claim before a court of the respondent State.²⁰⁰

Article 15. Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

(b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(d) the injured person is manifestly precluded from pursuing local remedies; or

(e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.

¹⁹⁵ See *Arrest Warrant of 11 August 2000*, I.C.J. Reports 2000 (footnote 192 above), para. 40.

¹⁹⁶ See the *United States Diplomatic and Consular Staff in Tehran* case (footnote 190 above).

¹⁹⁷ The *Corfu Channel* case, *Merits*, Judgment, I.C.J. Reports 1949, p. 4.

¹⁹⁸ See *Air Service Agreement of 27 March 1946 between the United States of America and France*, Decision of 9 December 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 417; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Reports 1988, p. 12, at p. 29, para. 41.

¹⁹⁹ See *Interhandel* (footnote 170 above), at pp. 28–29; and *ELSI* (footnote 149 above), at p. 43.

²⁰⁰ See *ELSI* (footnote 149 above), at p. 46, para. 59.

¹⁹¹ See footnote 170 above.

¹⁹² *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3, at pp. 17–18, para. 40.

¹⁹³ *Avena* (see footnote 29 above), pp. 35–36, para. 40.

¹⁹⁴ *ELSI* (see footnote 149 above), at p. 43, para. 52. See also *Interhandel* (footnote 170 above), at p. 28.

ANNEX 126

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

2001

Volume II
Part Two

*Report of the Commission
to the General Assembly
on the work
of its fifty-third session*

UNITED NATIONS
New York and Geneva, 2007



RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

General commentary

(1) These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantial customary and conventional international law.

(2) Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, saw the articles as specifying:

the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility ... [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.³²

(3) Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

(a) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful;

(b) Determining in what circumstances conduct is to be attributed to the State as a subject of international law;

(c) Specifying when and for what period of time there is or has been a breach of an international obligation by a State;

(d) Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;

(e) Defining the circumstances in which the wrongfulness of conduct under international law may be precluded;

(f) Specifying the content of State responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;

(g) Determining any procedural or substantive pre-conditions for one State to invoke the responsibility of

another State, and the circumstances in which the right to invoke responsibility may be lost;

(h) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles.

This is the province of the secondary rules of State responsibility.

(4) A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:

(a) As already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other “sources” of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

(b) The consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such.³³ No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the 1969 Vienna Convention). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with action of the United Nations under the Charter, which is specifically reserved by article 59.

(c) The articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law (e.g. compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the *status quo ante* after some lawful activity has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation, or to restore the *status*

³² *Yearbook ... 1970*, vol. II, p. 306, document A/8010/Rev.1, para. 66 (c).

³³ For the purposes of the articles, the term “internationally wrongful act” includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See paragraph (1) of the commentary to article 1.

be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless, an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the articles to specify in detail the form which an invocation of responsibility should take. In practice, claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In the *Certain Phosphate Lands in Nauru* case, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".⁶⁷⁶ The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However, the Court also noted that:

It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position".⁶⁷⁷

The Court summarized the communications between the parties as follows:

The Court ... takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time.⁶⁷⁸

In the circumstances, it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus, *paragraph 2 (a)* provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would

satisfy the injured State; this may facilitate the resolution of the dispute.

(6) *Paragraph 2 (b)* deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,⁶⁷⁹ or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.⁶⁸⁰ Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

Article 44. Admissibility of claims

The responsibility of a State may not be invoked if:

(a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Commentary

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of

⁶⁷⁹ As PCIJ noted in the *Factory at Chorzów*, *Jurisdiction* (see footnote 34 above), by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents (p. 17).

⁶⁸⁰ In the *Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures, Order of 29 July 1991*, I.C.J. Reports 1991, p. 12, ICJ did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement, see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *Annuaire français de droit international*, vol. 38 (1992), p. 905, at p. 940.

⁶⁷⁶ *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 253, para. 31.

⁶⁷⁷ *Ibid.*, p. 254, para. 35.

⁶⁷⁸ *Ibid.*, pp. 254–255, para. 36.

that responsibility by another State or States. Thus, it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispence or election as they may affect the jurisdiction of one international tribunal *vis-à-vis* another.⁶⁸¹ By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) *Subparagraph (a)* provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As PCIJ said in the *Mavrommatis Palestine Concessions* case:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.⁶⁸²

Subparagraph (a) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.⁶⁸³

(3) *Subparagraph (b)* provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as “an important principle of customary international law”.⁶⁸⁴ In the context of a claim

⁶⁸¹ For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. 2, pp. 427–575; and S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, 3rd ed. (The Hague, Martinus Nijhoff, 1997), vol. II, *Jurisdiction*.

⁶⁸² *Mavrommatis* (see footnote 236 above), p. 12.

⁶⁸³ Questions of nationality of claims will be dealt with in detail in the work of the Commission on diplomatic protection. See first report of the Special Rapporteur for the topic “Diplomatic protection” in *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

⁶⁸⁴ *ELSI* (see footnote 85 above), p. 42, para. 50. See also *Interhandel, Preliminary Objections, I.C.J. Reports 1959*, p. 6, at p. 27. On the exhaustion of local remedies rule generally, see, e.g., C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappaz, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, “Local remedies, exhaustion of”, *Encyclopedia of Public International Law*, R. Bernhardt, ed. (footnote 409 above), vol. 3, pp. 238–242; and G. Perrin, “La naissance de la responsabilité internationale et l'épuisement des voies de recours internes

brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.⁶⁸⁵

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from “the merits of the case”.⁶⁸⁶

(5) Only those local remedies which are “available and effective” have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular, there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44, *subparagraph (b)*, does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.⁶⁸⁷

Article 45. Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(a) the injured State has validly waived the claim;

(b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary

(1) Article 45 is analogous to article 45 of the 1969 Vienna Convention concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard, the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute

dans le projet d'articles de la Commission du droit international”, *Festschrift für Rudolf Bindschedler* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, e.g., A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983); and E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65–89.

⁶⁸⁵ *ELSI* (see footnote 85 above), p. 46, para. 59.

⁶⁸⁶ *Ibid.*, p. 48, para. 63.

⁶⁸⁷ The topic will be dealt with in detail in the work of the Commission on diplomatic protection. See second report of the Special Rapporteur on diplomatic protection in *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514.

ANNEX 127

**THE INTERNATIONAL
RESPONSIBILITY OF STATES
FOR
DENIAL OF JUSTICE**

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CHAPTER IV

HISTORICAL AND LEGAL FOUNDATIONS
OF DENIAL OF JUSTICE

At the opening of this work it was said that some of the confusion which has obscured the problem of denial of justice arose from a failure on the part of many authorities to perceive its true position in the scheme of responsibility for injuries to foreigners. To fit the concept into its proper place requires an investigation (1) of its earliest origins in the classical soil of international law; (2) of its present legal significance and scope; and (3) of the fundamental features of the relationship which now exists between municipal and international law in the matter of judicial protection.

Each of these studies is vital to an adequate appreciation of the functions which are now performed by responsibility for denial of justice; but the first to some extent overshadows the others in that it definitely stamps the concept as a product of the law of nations — specifically, as one inescapably bound up with the diplomatic protection of citizens abroad.¹ From this fact flow several consequences of which the most obvious is the inability of individual States to fix for themselves the content of the State's duty of judicial protection.

1. Denial of Justice in the System of Private Reprisals.² — There is a definite historical basis for this duty in the relations between States: it is found in the classical institution of private reprisals. In effect, the ancient system of reprisals was the medium through which the most rudimentary principles of State responsibility

¹ De Visscher, in 52 *Recueil des Cours* (1935), p. 374.

² For a recent examination of the origin and development of denial of justice, see Spiegel, in 32 *A. J. I. L.* (1938), p. 63.

operated.¹ And at the basis of a doctrine which permitted a private resort to force against the subjects of another sovereign reposed the concept of denial of justice, an illegality which thus appears as the earliest and most typical form of wrong committed by a State to the prejudice of foreign subjects.²

Long before the emergence of the modern State it was settled that an individual who was wronged in a strange land and who had there been unable to obtain reparation for this injury from the local sovereign might, with the permission of his own prince, initiate forceful measures to obtain that justice which had been refused him. The practice had come to be established in ancient Greece as a legitimate international procedure for exacting compensation when justice could not be obtained by peaceful methods.³ However, it was not until the period of the Middle Ages that it flowered into the widespread system of protection which distinguished its final form. This development and its causes are set forth in a remarkable passage from da Legnano's treatise on reprisals in which the author concludes that the institution of private reprisals satisfied a real need in the relations of peoples:

" In the early time, when the Lord governed in his own person, there was no need of reprisals, since justice was administered by the Lord. In the time of Noah and his successors in the government of the people of the Jews, there was no need of reprisals, since justice was administered by ministers, and subjects among the people recognized a superior whom they obeyed. In the early days of the supreme Pontiffs and the Roman Emperors

¹ I Lapradelle-Politis, *Recueil*, p. 213.

² "... the terms " reprisals " and " denial of justice " were for a considerable time, with the exception of a very short period, linked to one another to such an extent that the latter was a necessary condition for the legality of the former. It was not until the term " illegality " became known as an integral part of legal theory that it took the place of denial of justice as a condition precedent to the application of reprisals. Only then did denial of justice develop as a separate subject unconnected with what is now known as " reprisals ". It is due to the long-lasting association of the terms " reprisals " and " denial of justice " that the origin of denial of justice is to be found in the law relating to reprisals. " Spiegel, *op. cit.*, pp. 63-64.

³ This form of self-help the Greeks designated by the word *androlepsia* (ἀνδροληψία). Cf. Coleman-Philippson, *The International Law and Custom of Ancient Greece and Rome*, vol. 2, pp. 349-352. " Polychares, a Messinian, having been defrauded by Euaephus, a Spartan, with whom he had been associated for the purpose of breeding and exporting cattle, was denied justice in Sparta, even though his son had been killed by the latter; consequently he took possession of all he could lay hold of in Laconia, and murdered every Lacadaemonian he caught. " *Ibid.*, p. 354.

But the doctrine of denial of justice was unknown to Roman law. Cf. Spiegel, *op. cit.*, pp. 63-64.

...there was no need of reprisals, since the complement of justice was administered by princes, with observance of the due order of law. But when the Empire began gradually to be exhausted, so that now there are some who in fact recognize no superior, and by them justice is neglected, the need arose for a subsidiary remedy, when the ordinary remedies fail, but which is on no account to be resorted to when they exist... For its final object is that justice may obtain its due effect, and its occasion is when there is a failure of remedy (*propter defectum remedii*) arising from the neglect of those who govern and rule peoples...¹

However, da Legnano cautions that the extraordinary remedy of reprisals is not to be given for slight cause but that a high degree of injustice must first be proven — such as amounts to a complete failure of justice. “Otherwise if the failure is partial only...for reprisals do not completely do justice.” Then, in what seems to have been the earliest discussion of responsibility for unjust judgments, he amplifies his position :

“...if the judge does not neglect to do justice, but does injustice by pronouncing an unjust judgment, then if the State has a judge of appeal appointed over him, he will be applied to by way of appeal; and if it has not, reprisals will be declared... But if the judges of appeal do injustice, then it seems that the party is without any remedy, since no third appeal is allowed; nor does it appear that reprisals may be declared, since there has been no *failure of jurisdiction*. But it may be said that if they pronounced unjust judgments from favor to the other party, then *restitutio in integrum* may be claimed; ...but if the reason was favor to the rulers, then they would be liable to the party for the loss caused him; ...but if the unjust judgment arose from the judge's sole motion, then the party is without any remedy, as shown above.”²

Here we have, as early as the fourteenth century, a clear recognition of two principles which may be regarded as the precursors of equivalent rules now operative in the theory of international responsibility: The first of these is that a denial of justice subjected the delinquent State to reprisals carried out by private individuals on

¹ da Legnano, *Tractatus de Bello, de Repræsalis et de Duello* (1360), ch. CXXIII. In ch. CXXIV, he again refers to this remedy, not as one instituted by positive law, (canon or civil), but as a device to be resorted to when the remedies of positive law fail, “lest justice should perish”.

² *Ibid.*, ch. CL. da Legnano's theory appears to have been based upon a work on reprisals written by Bartolus in 1354 (see the reference on p. 56, note 2, *infra*), who took the position that where a superior authority was lacking, the failure of a community to dispense justice was a *justa causa* for reprisals. Cf. Spiegel, *op. cit.*, p. 70.

their own behalf, the second that on no account were reprisals to be declared as long as there existed local remedies for obtaining one's due. Transposed into twentieth century legal science this is tantamount to saying that a denial of justice engages the international responsibility of the State but that diplomatic claims may not be made until there has been compliance with the rule that local remedies must first be exhausted.¹

From the fourteenth to the eighteenth century, a constant trend of authority supports the rule that reprisals may be exercised to secure justice where it had been denied or refused.² Indeed, in frequent instances it was expressly recognized by treaty. Thus, in the agreement of 1386 between England and Portugal, it was provided that in case justice could not be secured by ordinary means, resort to extreme measures might be had without such acts being considered as acts of war.³ Only in rare instances, however, up until the writings of Wolff and Vattel, is there to be found a clearly formulated doctrine concerning the factors necessary to produce a denial of justice, or indicating with some degree of precision the cases in which

¹ See *infra*, Chapter XV.

² Bartolus, *Tractatus de Repr.*, Opera 5, Nr. 9, p. 595, quoted in Hatscheck, *An Outline of International Law*, p. 284; Zouche, *Juris et Judicii Fecialis sive Juris inter Gentes... Explicatio* (1650), Part I, VI, p. 33; Bynkershoek, *Questionum Juris Publici Libri Duo*, Book I, ch. 24, pp. 172-173, and his statement at p. 173: "Denegatam igitur justitiam Reppressaliæ solent excipere." Cf. Grotius, *De Jure Belli ac Pacis*, lib. III, chap. II, par. 5, 1, p. 627; Pufendorf, *Elementorum Jurisprudentiæ Universalis...*, p. 85; Vattel, *Le Droit des Gens*, Livre II, ch. 18, §§ 342 and 350. Some publicists even regarded denial of justice as a just cause of war. See Gentili, *De Jure Belli Libri Tres*, Book I, ch. XXI and Book II, ch. I, pp. 215-216; Hamilton's remarks in *The Federalist*, quoted on p. 65, note 1, *infra*. And compare Wheaton's later work (*Elements of International Law*, p. 412), quoting Rutherford.

It is interesting to note that during the Revolutionary War General Washington justified the exercise of reprisals against the British on the ground of a denial of justice. When an abortive council set up by General Clinton failed to pronounce judgment upon a British officer guilty of the brutal hanging of an American Captain, Washington, "considering this proceeding as a formal denial of justice", ordered execution of one of his prisoners. The victim, young Asgill, was later released by Washington upon the entreaties of the youth's mother. Martens, *Causes Célèbres*, vol. II, p. 174.

See also the opinion of Pinkney, C., in the *Betsey*, Moore, *Arbitrations*, p. 3183; s. c., *idem*, *International Adjudications*, vol. IV, p. 243.

³ The right to exercise reprisals where an open denial of justice had occurred was likewise affirmed in Article 60 of the Peace of Münster of January 30, 1648. See Bynkershoek, *op. cit.*, p. 173.

Diplomatic communications as late as the middle half of the 19th century can be found in which the principle is reaffirmed. See for example Mr. Bayard to Mr. McLane, June 23, 1886, quoting Valin, VI Moore, *Digest*, p. 266. Señor de las Carreras to Signor Barbolani (2, 1, 1865), *Fontes Juris Gentium*, Series B, Section 1, Tomus 1, par. 2376; Senhor Loureiro to Mr. Lettsom (20, 8, 1864) *ibid.*, par. 2374.

it could be said to occur.¹ Victoria, who acknowledged the right of an injured sovereign to authorize property seizures against the malefactors or their innocent co-subjects, did so on the ground that it was a breach of duty for their sovereign "to neglect to vindicate the right against the wrongdoing" of his subjects.² Thus the wrong justifying reprisals is seen to be a State wrong. But nowhere does the celebrated Spaniard use the term "denial of justice". Zouche spoke of a form of private war known as *Pignoratio*, ('Ενεχυρασμός,) which "is when, between different princes or peoples, on account of a denial of justice (*justitiam denegatam*) a right of seizing goods by public authority is granted to private persons; and this is commonly called reprisals." For him justice was denied not only if judgment could not be obtained against a guilty person or a debtor within a reasonable time, but also if in a clear case a judgment was given which was obviously contrary to law.³ Zouche's remarks were closely patterned after a formula by Grotius who, like his predecessors, defended seizure by violence to enforce a right that had been denied.⁴ The influence of Grotius upon Wolff may likewise be detected in the latter's reasoning that the property of foreign subjects might be seized in satisfaction of a right that had been denied or by way of pledge.⁵ Grotius, it may

¹ da Legnano's analysis of the circumstances in which an unjust judgment subjected the State to reprisals, apparently remained the most direct attack on this problem for well over two hundred and fifty years.

² *De Jure Belli Relectiones*, sect. 41. Elsewhere Victoria gives as a reason for the legality of reprisals the fact that "otherwise, they (the injured individuals) could not recover their own possessions. In this case, moreover, it is a question not of individual persons, but of a state." *De Bello, On St. Thomas Aquinas, "Summa Theologica"*, sect. 15, translated by Scott, in *The Spanish Origin of International Law*, Part I, p. cxxiii.

³ *Loc. cit.* That force could be resorted to for obtaining justice in those instances in which a State withheld from foreigners the right to appear in court was also affirmed by Pufendorf, who held that under these circumstances agreements between citizens of the territorial State and aliens would "have efficacy in the basis of the law of nature alone, and therefore will give power to apply force, which power, in defect of civil and pacific action, the law of nations has granted." *Op. cit.*, p. 85. And compare Wolff, *Institutiones du droit de la nature...* Book VI, ch. VI, MCLXIII, p. 149.

⁴ "*Alia executionis violentae species est... jus repressaliarum... Locum autem habet, ut ajunt Iurisconsulti, ubi jus denegatur.*"

"*Quod fieri intelligitur non tantum si in sontem aut debitorem judicium, intra tempus idoneum obtineri nequeat, verum etiam si in re minime dubia (nam in dubia re praesumptio est pro his qui ad judicia publici electi sunt) plane contra jus judicatum sit...*" *De jure belli ac pacis*, Book III, cap. 2, IV-V.

⁵ "...*jus vero denegatur non tantum, si judicium in detentorem rei, aut debitorem intra tempus idoneum obtineri nequeat, verum etiam si in re minime dubia plane contra jus judicatum sit, quod tanquam per se clarum sumitur...*" Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, cap. V, § 587.

be added, was the first to demonstrate clearly that the judgment of a domestic court was not itself conclusive of the rights of foreign subjects.¹ In this view both Zouche and Wolff concurred.

But if it was universally admitted that an injured alien might seek the protection of his prince by requesting a grant of letters of marque in retaliation for an injustice suffered, it was none the less true that before private reprisals were permitted, a denial of justice *had* to be established.² The legalization of reprisals required a "failure to secure compensation or redress by diplomatic, juridical or other similar means", after every practicable effort to use such means had been made. Private reprisals were not considered as an alternative to resorting to the local authorities or tribunals of the State against whose nationals a claim lay; but they were forceful measures invoked only after peaceful means had failed.³ An appeal had to be made to the Prince of the land and if this proved vain, (whether because of ill will or plain lack of power), the subject who was armed with his sovereign's sanction could then wage a private struggle against the people of the delinquent Prince until he had

¹ Grotius, Zouche and Wolff all agreed that the authority of the judge did not have the same validity against foreigners as against subjects. Grotius thus explained the right of a nation to obtain reparation through reprisals where a judicial sentence was rendered plainly against right *in re minime dubia*: "... subjects cannot legally hinder by force the execution of a judgment even if it is unjust, or assert their rights by force against it, because of the effectiveness of the authority over them; but foreigners have the right of compulsion, which they may not use, however, so long as they can obtain what is theirs by a judgment." *Loc. cit.*

² See the references to Vattel, Grotius, and Bynkershoek on p. 56, *supra*, and compare Victoria, *De Jure Belli Relectiones*, *loc. cit.*, and Trelles in 17 *Recueil des Cours* (1927), p. 310. Cf. Butler and Maccoby, *The Development of International Law*, p. 176; Strupp, *Wörterbuch des Völkerrechts*, vol. 1, p. 341; Wheaton, *International Law*, p. 409; De Martens, *Précis du droit des gens*, vol. 1, p. 270; Burlamaqui, *Principes du Droit Politique*, p. 267.

"Is ordo est, ne repressaliæ concedantur nisi palam denegata justitia." Bynkershoek, *loc. cit.* For a reappearance of this doctrine in arbitration, see Gore's opinion in the *Betsey*, 4 Moore, *International Adjudications*, p. 236.

³ Clark, in 27 *A. J. I. L.* (1933), on *The English Practice With Regard to Reprisals by Private Persons*, p. 694, at pp. 695-696. The principle was one which was rigidly observed in 13th century England where it was legal for the authorities of one town to take reprisals on the citizens of another, but only after the claimant failed in his effort to seek justice before the court of his adversary. See *ibid.*, p. 704.

Although under early English law reprisals could be exercised upon the default of a private debtor, from the 13th century on, (cf. the *Leges Quatuor Burgorum*, cap. 97), reprisals were only permitted in the case of a *community* denying justice; *i. e.*, the basis of reprisals was no longer the wrong of individuals who denied the claimant's right, but the "default of the lord or the magistrates in their capacity as representatives of the community." Spiegel, *op. cit.*, pp. 66-67, and see his summary of the case of *Wynand Morant v. Andrew Papyng and partners*, which consecrated this principle. A statute was finally passed in 1353 restricting the use of reprisals to cases of denial of justice. *Ibid.*, pp. 67-68.

recovered adequate compensation through seizures of property belonging either to the original malefactor or to his co-citizens.

This restraint upon the exercise of reprisals is further evidenced by numerous treaties concluded from the twelfth century onward¹ which limit their employ in various ways. In a treaty between the Duke of Lorraine and the Count of Flanders in 1339, it was agreed that reprisals should never be resorted to unless justice had first been sought from the constituted authorities.² Commercial agreements concluded in the sixteenth century witness the frequent recurrence of clauses to the effect that no reprisals are to take place unless for denial or delay of justice,³ unreasonable delays thus being early considered as tantamount to ordinary denial. The Anglo-Spanish Treaty of 1667 was very precise in this respect, declaring that if no satisfaction were given upon the intervention of six months after the instances made, the party might have his letters.⁴ Such conditions are occasionally found supplemented with a provision that execution of the letters granted should be pursued only against the principal delinquents or their goods.⁵

¹ Traces of the practice are already found in a treaty between Sicard of Benevent and the Neapolitans of 836, (limiting the right of reprisals to denials of justice suffered by subjects of the contracting parties), and in a treaty between the Emperor Lotar I on behalf of a number of Italian Cities with Venice (providing, *inter alia*, for the right to exercise reprisals against judges of one territory who denied justice to the subjects of the other). See Spiegel, *op. cit.*, pp. 64-65, and especially at p. 69 where it is stated that "in the 13th century there were hardly any treaties of friendship which did not contain a restriction of reprisals."

The earliest limitation on the right of reprisals which has come to our attention is that contained in the treaty between Oeantheia and Chalaeum in the fifth century B. C. This was an accord of mutual renunciation of the practice except on the open sea and it also provided for recourse by aliens to the local tribunals in the case of disputed claims. See Coleman-Phillipson, *op. cit.*, vol. 2, pp. 357-358.

² Dumont, *Corps Diplomatique*, I, ii, p. 185. Compare the treaty of 1406 between Henry IV and the Duke of Burgundy, and of 1474 between Edward IV and the Hanse Towns. *Ibid.*, II, ii, p. 305, and III, i, p. 469, resp.

³ England and Spain (1515), *ibid.*, IV, i, p. 216.; France and England (1525), *ibid.*, p. 438. The provision in the latter treaty thus reads: "Conventum, concordatum, et conclusum est, quod ex neutris Principum praedictorum Cancellaria, aut alia Curia, imposterum concedantur aliquæ Litteræ Repressaliarum, Marcæ aut Contramarçæ, nisi super & contra principales delinquentes, & eorum Bona, eorumque fautores, vel in casu manifestæ denegationis justitiæ de quâ per Litteras Summationis aut Requisitionis, & prout de Jure requiritur, sufficienter constabit." Similar clauses are found in a treaty between the same powers of 1510 (*ibid.*, IV, i, p. 126); and between England and Spain of 1670, referred to in Clark, *op. cit.*, p. 711. See also Dumont, *op. cit.*, vol. VII, pt. I, p. 132, and cf. Manning, *Commentaries on the Law of Nations* (1875), p. 149.

⁴ Cited in Clark, *loc. cit.*

⁵ In addition to the authorities cited in Note 3, see the additional treaties concluded between France and England (1514 and 1515) in Dumont, *ibid.*, pp. 184 and 205 resp. Compare the treaty of Dec. 25, 1610 between the Emperor of Morocco and the States-

Frequently such instruments, in addition to reproducing the conventional formula binding the parties not to resort to reprisals except in the case of delay or manifest denial of justice, contain clauses imposing the procedure to be followed as a necessary antecedent to a grant of royal warrant, and fixing delays (of three, four or six months) at the expiration of which — in the contingency that justice had not been rendered — resort to private force was permissible. In Article 24 of the treaty of April 5, 1654, between the English and the States-General, it was agreed that such letters should not be issued unless the sovereign whose subject complained of the injury should lay the complaint before the sovereign whose subject was accused of wrongdoing, and the latter fail to have justice rendered within three months.¹ Somewhat greater care is found to have been exercised in the drafting of Article 17 of the Commercial Treaty of April 27, 1662 between the King of France and the States-General, which, after the customary stipulation limiting reprisals to refusal of justice, added the proviso that justice should not be considered denied unless the petition for reprisal be shown also to the envoys of the sovereign whose subjects were complained of, so that he might inquire into the truth of the complaint, and if the allegation be found justified, have four months in which to render justice.²

Treaties containing this type of provision persist in European history even after the last stages of private reprisals were reached. One interesting example at the close of the 18th century is found in the famous Jay Treaty of 1794 between the United States and

General, Article IX of which specified that neither party should grant letters of reprisals and that both parties should render justice to each other's subjects (Dumont, *op. cit.*, V, ii, 158); and compare the treaty between England and Denmark of 1621 (*ibid.*, p. 393).

¹ Bynkershoek, *op. cit.*, p. 173. Compare the treaty between Spain and Scotland (1550), quoted in Butler and Maccoby, *op. cit.*, p. 176.

² Bynkershoek, *op. cit.*, p. 174: "In this way the peace is not disturbed, and the sovereign may himself judge regarding the justice or injustice of the charge and pronounce his own sentence."

Compare Article 16 of the Treaty of Utrecht of March 13-April 11, 1713, which provided, *inter alia*: "A l'avenir, aucune desdites Majestés n'en délivrera de semblables [e. g. letters of marque] contre les sujets de l'autre, s'il n'apparait auparavant d'un délai ou d'un dény de justice manifeste, ce qui ne pourra être tenu pour constant à moins que la requête de celui qui demandera des lettres de représailles n'ait été apportée ou représentée au ministre ou ambassadeur qui sera dans le país de la part du Prince contre les sujets duquel on poursuivra lesdites lettres..." De Clercq, 1 *Recueil des Traités de la France*, p. 8. To the same effect: Treaty of Commerce between Great Britain and France, Sept. 26, 1736, Art. III, De Martens, *Recueil de Traités de l'Europe*, vol. IV, p. 157; Spain and Scotland (1550), Dumont, *op. cit.*, vol. IV, iii. 12.

Great Britain. This treaty expressly stipulated in its Article XXII "that neither of the said contracting parties will order or authorize any acts of reprisal against the other, on complaints of injuries or damages, until the said party shall first have presented to the other a statement thereof, verified by competent proof and evidence, and demanding justice and satisfaction, or the same shall either have been refused or unreasonably delayed."¹

The *raison d'être* of these restrictions is not difficult to find. Primarily they seem to have been designed to prevent the bringing of unreasonable charges that justice had been denied and to guard partially against the abuses inherent in any subjective appreciation of elements upon which the use of force is made to depend. By insisting upon the observance of certain forms and prescribed lapses of time, a "cooling period" was provided which militated strongly against inadequately justified outbursts of unbridled revenge. However, the sun of private reprisals had already begun to set by the end of the seventeenth century,² and the practical importance of such safeguarding clauses shrank to an inconsequential minimum. Thereafter during peace few letters of reprisals were issued; and by the end of the eighteenth century, the institution had reached a permanent condition of desuetude.

It is unnecessary to dwell at length upon all the causes of this decline, (less discrimination against foreigners, better administration of justice everywhere, etc.), but note must be taken of the change which occurred in the life of the State and its far-reaching effect upon politico-legal theory. As the modern State slowly emerged

¹ De Martens, *Recueil*, vol. V, p. 680. Further examples will be found in Dumont, *op. cit.*, VI, ii, pp. 76, 121, 347; and VII, i, pp. 38 and 42.

Municipal statutory regulations on this subject, as we have seen (*cf. supra*, p. 58, note), were not uncommon. Bynkershoek refers to an old law of Amsterdam which declared that if any citizen of that place suffered wrong outside the domains of the State, whether by force or by an unjust judgment, and laid his claim before the magistrate of the place where the wrong was done; then, if after receiving an answer the magistrate of Amsterdam still considered that an injustice had been done the subject of his city, reparation should be made to the injured person by a court order, by process against such goods and persons of the foreign sovereign as might be found in the territory of Amsterdam. The learned author thus comments on this ordinance: "The law uses the phrase 'by an unjust judgment', so that it does not suffice *merely to pronounce judgment*, [*italics ours*] it must also be just; and the magistrate is to be the judge of the fairness, for this is a matter which is not usually submitted to the decisions of others..." Bynkershoek, *op. cit.*, p. 135. See also the Statute of 4 Hen. V, cap. 7, and the celebrated Marine ordinance of Louis XIV (1681) as referred to in Wheaton, *International Law*, p. 402.

² De Martens, *Précis*, vol. 2, p. 190; Butler and Maccoby, *op. cit.*, p. 177.

with its improved political organization, a more effective authority was developed over the internal activities of the realm. Power over all the functions of international activity gradually became concentrated in the hands of a more centralized system which the new theory conceived of as exclusive subject and organ of international law, and as such the sole protector of nationals abroad. This expansion of sovereign power inevitably entailed a steady encroachment upon the privilege of private persons to deal with outsiders as they had been accustomed. Whereas during a relatively early period the State *occasionally* interposed to take measures of reprisal on behalf of private persons,¹ this type of action now became the only one consonant with the new order of things.² Simultaneously legal theory as to the circumstances warranting reprisals also underwent a transformation. Several authorities came forward to announce that reprisals might be resorted to not only in the case of a denial of justice as traditionally understood, but for all claims of international character whether private or State in origin.³ And finally the practice of private reprisals disappeared altogether. Reprisals could now be exercised only by the State, and their justification lay not merely in a denial of justice in the classical sense of a refusal to grant justice to alien subjects, but any international delinquency, whether the basis of the claim was pecuniary or political, private or public.⁴

¹ Two early examples, *Arnald de Santo Martino v. The Castilians* (1316), and *John de Waghen v. The Leydenese*, are found in Clark, *op. cit.*, pp. 705-708.

² It is extremely interesting to observe how political history has repeated itself here. In those countries where government was centralized (such as ancient Rome and medieval France), the doctrine, of reprisals never attained great importance. Similarly, the practice of reprisals disappeared as the modern State emerged with its concentration of governmental power, itself capable of providing adequate redress.

³ See Wolff, *op. cit.*, §§ 586, 589, 591, 594, 596, and especially at § 603: "Quamvis vero etiam contingat, ut repressaliis utatur Rector civitatis, seu Gens ipsa in causa publica..." Italics ours. Compare Gentili, *De Jure Belli Libri Tres* (1598), Bk. II, chap. I, pp. 215-216. "...the goods of all subjects are liable in respect of debts owing by a civil society, or its head, whether owing primarily on their own account or because they have made themselves liable by not enforcing the debt of another." Zouche, *op. cit.*, Pt. II, Section VI, 7.

In the *Silesian Loans* case, a Report of the British Committee declared: "The law of nations, founded upon justice, equity, conscience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the State, and justice absolutely denied *in re minime dubia* by all the tribunals, and afterwards by the Prince." Quoted in *The Zamora*, (1916) 2 A. C., p. 77 at p. 94; s. c.; Evans, *Cases*, p. 619; Dickinson, *Cases*, p. 45; De Martens, *II Causes Célèbres*, p. 53.

⁴ Compare Spiegel, *op. cit.*, pp. 74-75.

Thus was there generated a theory of State sovereignty which has lived to plague us in its diverse forms, but which permitted the attribution of all the acts of its organs to the State, and vested the exercise of the protective function in the "person" of the latter.¹ The necessary corollary of this new-born conception of autonomy, power and exclusive jurisdiction was an external responsibility for wrongs suffered by aliens within the territorial State. This responsibility, of course, implied a certain duty of protection, a duty which has been enlarged by almost imperceptible degrees and which has come to comprise, among other things, a fundamental obligation of providing adequate means of judicial redress.

Such was the new *cadre* into which the concept of denial of justice, an ancient *conditio sine quâ non* for private letters of reprisals, came to be placed. No longer the excuse for violence except as the *ultima ratio*, denial of justice finally came to occupy the niche of a relatively common international delict the commission of which engenders what in legal theory is designated as the responsibility of the State.²

From the foregoing brief survey of its classical origins, it is clear that the concept of denial of justice is one of *customary* international law and is not dependent for its validity upon treaty stipulation. Although many modern treaties expressly or impliedly recognize that diplomatic interposition is justified by a denial of justice³ — in which respect they are similar to early clauses renouncing the right of reprisal except for the same cause — these instruments are not creative of the right, but merely declaratory in nature. As a matter of fact, the present fundamental right of each State to extend its "diplomatic protection" on behalf of injured nationals is nothing else than a modern version of the classical right of princes to grant letters of reprisals. And just as an injured subject was required to seek redress from the local authorities before obtaining permission from his prince to resort to force, so today foreign nationals must have recourse to and exhaust the remedies available under the local

¹ De Visscher, in 52 *Recueil des Cours* (1935), pp. 373-374.

² De Visscher, *loc. cit.*

³ See, for example, Article 18, par. 2 of the treaty between Mexico and Germany, December 5, 1882, (9 De Martens, *Nouveau Recueil General*, 2nd Series, p. 474) and similar agreements cited in the notes on pp. 491-493, *infra*. Compare Article 4 of the Arbitration Treaty between Denmark and Italy of Dec. 16, 1905, *U. S. Foreign Relations* (1906), Part I, pp. 528-529.

law before diplomatic interposition is proper.¹ There is, however, this important difference: In the classical system, the sole justification for an exercise of reprisals was a denial of justice. In its modern counterpart, denial of justice is by no means the sole ground of diplomatic interposition on behalf of foreigners despite a popular view in some quarters to the contrary.² This must be distinctly understood if confusion as to the functions of the local remedy rule is to be avoided.³

In its elementary features, however the theory of private reprisals contained the germ of our present system of limitations which operates between domestic and international law in the matter of judicial protection. Local courts and princes enjoyed the opportunity of rectifying wrongs committed within their domains; and only where just demands were refused did local supremacy yield. Denial of justice was then the signal which removed the bars to an international action — the proof, just as today, that local justice was deficient. Until that proof was obtained forceful measures were banned. In other words, it seems that each State was to be regarded as capable of rendering justice until the contrary was shown, which is substantially the principle that obtains today.

This aspect of the interrelationship between the two legal systems inevitably brings up one of the most delicate questions of modern international practice; viz., that of the finality of domestic judgments. To the solution of this problem as well the classical system has not failed to contribute. It is clear that the denial of justice which justified reprisals comprised not only refusals to judge or unwarranted delays equivalent to a refusal; but even an unjust judgment, or a judgment “plainly against right”. da Legnano,⁴ Grotius,⁵ Zouche,⁶ Bynkershoek,⁷ Wolff,⁸ and Vattel⁹ are among the eminent

¹ See *infra*, p. 79.

³ See *infra*, pp. 100, 107. and chap. XV.

⁵ *De Jure Belli ac Pacis*, *loc. cit.*

⁷ “An old law of Amsterdam specifies that if any citizen of that place suffers wrong outside the domains of the State, whether by force or *by an unjust judgment*... reparation shall be made to the injured person by order of the court, by a process against such goods and persons of the foreign sovereign as may be found in the territory of Amsterdam.

“The law uses the phrase ‘by an unjust judgment’, so that it does not suffice merely to pronounce judgment, it must also be just; ... To be sure, treaties of nations usually say only that letters are not to be given except when ‘justice has been refused’, but the plaintiff will readily interpret it as a refusal even when a decision is given, but in an unfair way, and we may add that sovereigns will generally interpret all unfavourable decisions

² See *infra*, p. 99.

⁴ *Supra*, p. 55.

⁶ *Op. cit.*, p. 33.

early publicists who recognized that adjudication by the local courts was not conclusive of the justice of a decree for purposes of reprisals.¹ The historical background of denial of justice does not, therefore, bear out the contention — habitually shared by younger and weaker States of the New World² — that the law of nations is indifferent to the substance of a decree rendered in causes involving aliens.

Finally, a word on the original terminology of denial of justice: For a long time it denoted a specific type of delinquency, i. e. the failure to grant justice to foreign subjects, and more precisely, the failure to redress a prior wrong. But not all classical writers employed it in that restricted sense. As the basis for reprisals broadened so as to allow their use in cases of injuries to the State itself as well as to individuals, "denial of justice" was enlarged and gradually appears to have acquired the wide character of a general international wrong. This is strikingly evidenced by the works of Wolff. In several passages he plainly regards denial of justice as the equivalent of an unrepaired violation of State right. Thus he speaks of a nation refusing "to do justice *to another nation or to its citizens*"³ and later holds it to be allowable "to take the goods of any citizen of another nation *if it denies justice to us or to*

as unfair. It is apparent then, that what this law of Amsterdam provides for is actually reprisal." Bynkershoek, *op. cit.*, pp. 135-136.

² "A right is denied you if you cannot acquire by a judgment that which is your own or ought to be made your own. It is plain that this can be brought about in two ways, either if the judge refuses to hear you, or if he gives an unjust decision. It is in accord with civil law that a decision made by a judge ought to be considered just, if either within a certain time it should not be appealed against to a higher court, or should have been affirmed by it. Therefore, since civil laws bind only members of the state in which they are promulgated, *among nations the decision of a judge whether properly or improperly made is not considered correct and just, even if it shall have been confirmed by a higher court. If then in a matter not doubtful a decision has been made plainly contrary to law, the decision is considered a nullity, and therefore the right denied is properly taken.*" Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, §587 (italics ours).

³ *Op. cit.*, § 350.

¹ Additional early recognition of this accepted principle was furnished in Alexander Hamilton's argument to extend the authority of the Federal Judiciary to all cases involving the "peace of the confederacy": "As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned." *The Federalist*, (Lodge Ed., 1888), p. 495.

² See *infra*, pp. 120 and ff.

³ Wolff, *op. cit.*, § 586. Italics ours.

our citizens.”¹ Even Wolff’s great adapter, Vattel, to whom we are so deeply indebted for his valuable contribution to the theory of denial of justice, does not seem to regard it exclusively as a *judicial* tort. For example, he declares :

“ Reprisals are resorted to between Nation and Nation in order to obtain justice when it can not otherwise be had. If a Nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to make due satisfaction, the latter may seize something belonging to that nation...

“ Reprisals may be resorted to against a Nation *not only for acts of the sovereign but also for those of his subjects...*

“ Likewise the sovereign demands justice, or resorts to reprisals, *not only in his own interest but in that of his subjects*, whom he must protect and whose cause is the cause of the Nation...

“ We have said... that reprisals should only be resorted to when justice can not be otherwise obtained. Now, justice may be refused in several ways: (1) By an outright denial of justice or by a *refusal to hear the complaints of a State or of its subjects...*

“ If it should happen that a prince, having cause to complain of some injustice or some acts in the nature of hostilities, and not finding his adversary disposed to give him satisfaction, determines, before coming to an open rupture, to use reprisals in an attempt *to force him to listen to the voice of justice...*”²

This extreme usage (which is only paralleled by the modern tendency in some quarters to view denial of justice as the equivalent of all international injuries to foreigners³) enjoys a temporary vogue until the development of a sounder theory of responsibility and the concept of “international illegality” renders it superfluous. It then resumes a meaning which is more consonant with its traditional position in the law of reprisals.⁴

¹ *Ibid.*, § 591. Italics ours. See also §§ 592 and 594, and especially 589, where he states that “there is no place for reprisals, except when another people does an injury to us or to our citizens, and, when asked, is unwilling to repair it within a proper time, that is, without delay.”

² Vattel, *Droit des Gens*, §§ 342, 347, 350, 354. Italics ours.

³ See pp. 97 and ff., *infra*.

⁴ “Originally denial of justice was a condition precedent of [reprisals] ... denial of justice being the refusal to accord justice to a subject of a foreign state. Although these proceedings invariably concerned the money and goods of individuals, it must not be forgotten that the primary consideration was not the pecuniary claim, but the denial of justice: for centuries it was the one and only condition precedent of reprisals. Gradually, however, reprisals became detached from denial of justice and they came to be the consequence of international delicts in general, regardless of whether such delicts had been committed against individuals or others. The detachment of reprisals from denial of justice having taken place, the definition of denial of justice gradually contracted, and the term came to mean again what it had originally meant: a failure of protective justice...” Spiegel, *op. cit.*, p. 77.

Although during the greater part of its early history denial of justice seems plainly to designate judicial wrongs, it had not acquired the full significance which is now attributed to it. On the whole, its classical connotation, while still adequate to cover the commonest category of cases which arise in practice,¹ is here of little importance except to justify a caution as to the evolution in the meaning of the term. As the rules of international law governing the legal and judicial status of aliens enlarged to meet the needs of a rapidly expanding international intercourse, the term itself broadened so as to include "not only the unjust refusal on the part of judicial authorities to repair an initial wrong, but also every failure of the judicial function which involves the violation of an international duty."²

This change in terminology may have contributed to the confusion which now reigns in treatises, diplomatic correspondence and arbitral awards on the meaning of the term itself. It is therefore worth mentioning at this point in order to dispel any possible suggestion that the classical significance of the term conforms in all respects to its modern scope.

2. Present Scope and Function of Denial of Justice. — Today the concept of denial of justice no longer designates merely a failure on the part of domestic tribunals to repair injuries inflicted by the private subjects of a foreign Prince; it regularly functions also as an international guaranty of the alien's legal status and capacity before domestic jurisdictions. Let us look more closely at this modern scope of the term.

Over and over again it has been affirmed in the literature of international law that a State is under a duty to administer justice with respect to foreigners;³ or, as it is more commonly stated,

¹ " ... dans la majorité des cas, le déni de justice est resté ce qu'il fut dès l'origine: le refus de réparation d'un tort dont l'Etat n'assume pas la responsabilité directe..." De Visscher, 52 *Recueil des Cours* (1935), 374.

² *Loc. cit.* Translation ours.

³ This duty has been clearly recognized in recent attempts to codify the law. See for example the discussion of Bases 5 and 6 at the Hague Conference of 1930. *Minutes, passim*, and the resolutions voted by the *Institut de Droit International* in 1927, Articles 5 and 6, *Annuaire* (1927), vol. 3, pp. 330 and ff. Cf. also *Research in International Law*, Draft Convention, Art. 9 and comment, 23 *A. J. I. L.* (1929), supp., p. 173.

"Le principe que justice est due aux étrangers aussi bien qu'aux ressortissants est un principe de droit naturel que le droit positif ne saurait méconnaître, et qu'il reconnaît, ainsi qu'en témoignent des conventions internationales..." Dupuis, in 32 *Recueil des Cours* (1930), p. 198. For an early recognition that even apart from treaty, sovereigns are bound to see that justice is done to foreigners, see Bynkershoek, *op. cit.*, Book I, ch. XXIV.

to allow them access to court to defend "their" rights.¹ First of all, it might be inquired why any such rule exists.

It is clear that unless foreigners are to be regarded as endowed with certain *substantive* legal rights, there would be no place for the argument that they must also be given the procedural right of invoking local instrumentalities of justice to defend these rights. The ultimate end of a litigation is the establishment of some substantive right, the recognition of a particular legal capacity. Thus the whole concept of denial of justice is really auxiliary in character, being ancillary to another, more fundamental conception: viz., the postulate that aliens enjoy certain substantive rights which every State must respect. Deprive them of these rights, and there is no material upon which an international denial of justice can work. Infringe these rights in the process of judicial "protection", and the doctrine of denial of justice permits reparation of the wrong. Since this is so, it is of some importance to know the extent of the rights of aliens under general or customary international law. Denial of justice may arise not only from some defect in the administration of justice with respect to the rights secured by national law; but as well from judicial action violative of an international rule, whether or not that rule has found its way into municipal legislation. And regardless of the *procedural* propriety of judicial activity, one must always look behind it to determine whether there has been compliance with the substantive international rules relative to the treatment of aliens.²

Speaking in a very general way and apart from a number of common exceptions, it can be said that aliens regularly enjoy, in so far as concerns their civil capacity, a status which is not appreciably different from that which is given to nationals throughout civilized

¹ Thus, for example, Cavaglieri, *Corso di Diritto Internazionale*, *loc. cit.*; Hoijer, in *R. D. I.* (1930), vol. 5, p. 117; Fauchille, *Traité*, vol. I, p. 533; Ansaldo, *Studi di Diritto Internazionale*, p. 436; De Visser, in *II Bibliotheca Visseriana*, p. 99.

² We may add in passing that this aspect of denial of justice seems never to have occupied the attention of publicists. Pioneers in this field have been concerned almost exclusively with ascertaining the kind of *organization* and *administration* of the local law that is required by the law of nations. They have apparently not considered the substantive international rights of aliens — which must be observed by the courts as well as by other organs of the State — as germane to the problem of denial of justice. True, they have recognized that judicial activity violative of an international rule engages the State's responsibility; but there has been no express recognition that the substantive rights of aliens are relevant to a study of those rules whose violation entails responsibility as for a denial of justice. For an exposition of our position in this matter, see pp. 497 ff., *infra*.

communities of the world. Indeed, a number of States have expressly consecrated the principle of equality between aliens and citizens either in their laws or in their constitutions.¹ Thus far have we progressed from the not distant past when an individual ventured into strange lands at his peril.²

However, the law of nations does not permit the determination of the alien's legal status to rest entirely with the State of sojourn.³ Were that the case, it would be possible for a single member of the international society to wipe out all his rights, to subject him to all kinds of arbitrary or uncivilized treatment merely by enacting appropriate legislation or executing the necessary decrees. As a result the rule requiring judicial protection to be granted to aliens would become an empty gesture, susceptible of complete devitalization at the will of any given State.

This is the principal objection to those theories which maintain that denial of justice consists simply in a refusal to provide judicial protection for the rights which the *national* law recognizes in aliens.⁴ Denial of justice being a concept of international law, it is not within the province of any system of domestic law to emasculate that concept by abolishing the rights which it is designed to safeguard. The rules which have been spun from the loom of international intercourse leave no doubt on the matter. Not satisfied with an empty procedural protection for rights which might be dissolved at the pleasure of the territorial State, the law of nations has forged a chain of substantive rights in aliens which the territorial State cannot break with impunity.

Now the practical value of these rights is directly conditioned upon the legal means available for their vindication. Thus the faculty of prosecuting an action before the local courts is an unescapable and essential corollary of the alien's substantive rights without which they would be hopelessly incomplete and meaningless.⁵ Once the existence of these rights is recognized, it must

¹ Thus, for example, Article 16 of the Argentine Constitution and corresponding Article of the Constitution of Panama. Compare Article 11 of the *Code Civil Suisse*; Article 27 of the Spanish Civil Code; Articles 32 and 33 of the Peruvian Civil Code and Title 8, Sec. 41 of the U. S. Code.

² Cf. Redslob, *Histoire des Grands Principes...*, pp. 67 and ff.

³ Bourquin, in 35 *Recueil des Cours* (1931), p. 164.

⁴ See *infra*, pp. 123-4.

⁵ Verdross in 37 *Recueil des Cours* (1931), pp. 382-383; Scelle, *Précis*, vol. 2, pp. 91-93.

follow that the State is bound to furnish protection for them through the methods normally adopted in the international community for this purpose. The mechanism chosen by modern States to dispense justice is a judiciary invested with competence over various civil causes and charged at the same time with aiding in the enforcement of the criminal law. To this mechanism, the foreigner must be allowed access.

On these matters there is little disagreement. The main differences which are noticeable pertain, *first*, to the extent of the State's obligation so far as concerns the procedural protection forthcoming from its judiciary — i. e., whether a State is under any further international obligation than to grant foreigners mere access to its tribunals; and *second*, to the *quantum* of substantive rights which must be observed in aliens under the general rules of international law: in other words, the principles which local courts cannot ignore in pronouncing judgment on the merits without engaging the responsibility of their State.

At first blush, these things may appear to be totally distinct. Yet reference to the underlying purpose of denial of justice will show them to be more closely interrelated than might be thought. We have already indicated that the right of an alien to invoke the jurisdiction of domestic law courts — a right which has been confirmed by a multitude of treaties of commerce and establishment¹ — is no mere favor flowing from the benevolence of the territorial State; but rather the logical and necessary consequence of the rules guaranteeing to aliens a more or less determinate legal status.² By and large, it is true, the study of denial of justice in practice will be found to consist in a study of the circumstances in which the procedural protection furnished by a given judicial mechanism has been found inadequate. But in its essential character, the doctrine of denial of justice is simply a technique for assuring observance of the alien's substantive rights; in a word, a sort of sanction for the rules of international law which regulate the treatment of foreigners.

3. Types of Situations in which an Alien may encounter Denial of Justice. — A few concrete observations on the more practical

¹ See the treaties referred to in note, p. 123 *infra*.

² Scelle, *op. cit.*, p. 91.

3. Denial of Justice as a Procedural Concept in Theories admitting Responsibility for the Substance of a Judgment.

(a) *Expansion of the Procedural Formula to Cases of Insufficient Guarantees.* — It is with attempts to extend denial of justice beyond its customary *stricto sensu* usage that the first serious obstacles to agreement among publicists are detectable. We have already indicated that the question of excessive delays offered the occasion for disagreement in at least one quarter;¹ but the suggestion that denial of justice also involves the failure of tribunals to provide those guarantees which are generally deemed necessary for the proper administration of justice — whether those guarantees are to be sought in the organization of the courts in the laws governing procedure, or in the existence of circumstances assuring regular operation of judicial proceedings — gives considerable emphasis to the doctrinal rupture.

Nevertheless, the resolutions which were voted by the *Institut de Droit International* at its Lausanne Session in 1927, included an article extending the term to just such a situation :

- “ Art. 5. The State is responsible on the score of denial of justice :
- (1) When the tribunals necessary to assure protection to foreigners do not exist or do not function.
 - (2) When the tribunals are not accessible to foreigners.
 - (3) When the tribunals *do not offer the guarantees which are indispensable to the proper administration of justice.*”²

The first two paragraphs of this definition are clear enough. The second is really a necessary implication of the first, inasmuch as it is obvious that where the tribunals are not accessible to foreigners it is of no importance whether they exist or function at all. But paragraph (3) is nothing if not vague, and for that reason alone could be expected to encounter objection. What are the “ guarantees ” which are indispensable to the “ proper ” administration of justice ? Is the reference to an organization of the judiciary

of the substantive laws of the country, or by refusing to comply with the provisions of a law in accordance with the interpretation given by the courts, or by refusing to execute a final sentence, or by amnesty laws protecting crimes to the prejudice of the interests of aliens, or lastly BY ANY OTHER MEANS WHICH DENY REDRESS TO THE INJURED ALIEN WHO HAS SUFFERED IN HIS INTERESTS.” *Op. cit.*, p. 9.

¹ *Supra*, pp. 120-121.

² *Annuaire* (1927), vol. 3, p. 331; and 23 *A. J. I. L.* (1929), Supp., Appendix No. 3, p. 228, for the translation contained in the text.

which is so defective as to be generally condemned, or may the defective operation of proceedings in a single case suffice to bring paragraph (3) into play ?

These questions are answered to some extent by the comments of the Institute's *rapporteur*, M. Strisower, who pointed out that paragraph (3) was not concerned with the failure of judicial guarantees in a particular case, but that it was aimed rather at the existence of general deficient circumstances "such as the exercise of the judicial function under pressure of the populace"¹. An earlier draft of what subsequently evolved into the article under discussion had declared denial of justice to exist

"...lorsque ces tribunaux, d'après leur constitution ou d'après une expérience sûre, n'offrent pas les garanties indispensables pour obtenir une bonne justice."²

This phraseology was apparently meant to dispense with the necessity of resorting to the local courts under the circumstances envisaged, a grave exception which will always meet a storm of protest. Indeed, it is difficult at best to maintain that the existence of defective courts *in and of itself* constitutes a denial of justice toward foreigners of which complaint can be raised in the absence of a judicial determination infringing their rights.³

A contrary opinion, however, was expressed by Sir Cecil Hurst during the discussion to which paragraph (3) gave rise. He argued that a defective organization of the judiciary was a denial of justice by the *state* as distinguished from decisions emanating from the courts which might be so considered;⁴ but this viewpoint must be rejected in the light of prevailing theory. The "absence of guarantees" is not in itself generally thought of as constituting a denial of justice, and for this reason the use of the term to describe that hypothesis was not a happy one.⁵ So much for the terminological aspects of the question.

¹ *Annuaire, op. cit.*, vol. 3, p. 121.

² *Ibid.*, vol. 1, p. 476-477. "Les tribunaux qui n'offrent pas les garanties indispensables ne sont pas des juridictions aptes à rendre justice et l'Etat qui n'a que de pareils tribunaux ne remplit pas son devoir de rendre justice, sans qu'il soit nécessaire de provoquer une sentence et d'entrer dans son examen..." *Ibid.*, p. 477.

³ Compare De Visscher, 52 *Recueil des Cours*, (1935), pp. 417-418.

⁴ *Annuaire, op. cit.*, p. 129.

⁵ See Séfériadès, *ibid.*, p. 121.

Fundamentally, to characterize the non-existence of indispensable guarantees as a denial of justice is simply to restate an *a priori* assumption — (an assumption capable of verification by international practice) — the principle that so far as aliens are concerned, every State is duly bound to possess a judicial organization guaranteeing that lawsuits will be impartially and competently adjudicated, after a sincere investigation of the truth. The procedural apparatus which is set up must, it is claimed, provide the alien plaintiff or defendant with effective means for the pursuit of his rights.

All this might seem to be obvious; and yet the proposition is by no means universally accepted. One primary difficulty is that the formula of “guarantees” is inherently as abstract as that of “denial of justice” itself. For, beyond certain generally admitted safeguards, there is no single way of determining in advance whether such guarantees are furnished by a particular court or not.

Acceptance of the “guarantees” doctrine, however, has for its excellent effect to render more convincing the argument that equality of judicial protection as between alien and national must be insisted upon. It then becomes sound to say that, given a member of the international community which has furnished such guarantees, the laws in force for the vindication of rights before local courts must be available to no less extent and without discrimination than they are to subjects; and, conversely, it then becomes true, at least so far as the conduct of local proceedings is concerned, that the alien must be content with a status of equality. The whole theory finally boils down to the proposition that what the international legal order demands is a minimum degree of judicial organization, on a scale comparable with that found in a normally constituted State. This, of course, seems in its entirety to approximate something like an international standard, which alone explains why it has met with opposition.

A small, but ardent, minority of publicists contends that the question of adequate guarantees for the administration of justice is not something which is a proper subject for investigation by a foreign State. Thus the Rumanian delegate to the Hague Codification Conference protested that the inclusion of such a provision in Basis No. 6 drawn up by the Preparatory Committee would grant the right to investigate the way in which justice was organized and administered within a given State:

"...can other States be allowed the right to criticise and investigate? If so, where would the investigation stop? Would it be a formal investigation? Could it be said that justice was badly administered because there were three judges instead of five or on account of the particular method of appointing the judges? Would it be an investigation into a judge's capacity and honesty?... But what countries can claim to be the sole depositories of a form of civilisation which entitles them to enquire whether justice is well or badly organized?"¹

This line of argument, it may be added, has not at all bothered several subsequent writers who have accepted the conclusions of the *Institut* as embodying sound principles of public law.²

Article 5, which incorporated the expanded definition of denial of justice adhered to at Lausanne, again introduces one into the annoying maze of terminological complications. The Institute, while defining denial of justice in the manner we have set forth above, by no means limited responsibility for the conduct of the judiciary to those sole cases. It did not escape the *rapporteur* that despite an adequately organized judiciary a judgment might be rendered which was so unsound and unjust — whether due to xenophobia or other reasons — as to provoke a diplomatic claim. For this type of case, Article 6 of the resolutions adopted posited responsibility on a different count: that of "*manquement manifeste à la justice*".³ Strisower's *avant-projet* had employed the terms "*défi à la justice*", a phrase which is sometimes encountered in doctrinal utterances,⁴ but this was unacceptable to his colleagues because it conjured up an emotional image and was too vague.⁵

"Défi" or "*manquement manifeste*", — for practical and theoretical purposes they are one and the same, and quite as objectionable as the expression "*manifest injustice*" of Anglo-Saxon writings.⁶

¹ *Minutes*, p. 114. Compare the remarks of the Spanish delegate, *ibid.*, p. 118.

² Thus, for example, Dumas, in *R. D. I. L. C.* (1929), p. 292; (but who considers the Institute's formula as incomplete); Cavaglieri, *Corso di Diritto Internazionale*, pp. 515-516; *Comments of Dr. Cantero-Herrera on Denial of Justice*, *op. cit.*, p. 9. Compare Kaufmann, in *54 Recueil des Cours* (1935), p. 432, and Accioly, *op. cit.*, § 416.

³ Art. 6: "L'Etat est également responsable si la procédure ou le jugement constituent un *manquement manifeste à la justice*, notamment s'ils ont été inspirés par la malveillance à l'égard des étrangers, comme tels, ou comme ressortissants d'un Etat déterminé." *Annuaire*, *op. cit.*, vol. III, p. 323; and see also Eagleton, *Responsibility*, Appendix, p. 265.

⁴ As in Dumas, *op. cit.*, p. 294: "...il peut y avoir défi à la justice si la décision rendue est en contradiction avec les principes essentiels du droit des gens."

⁵ *Annuaire*, *op. cit.*, vol. III, p. 130.

⁶ See p. 326, *infra*.

By setting up a distinct category of complaint based upon improper conduct of the trial or the substance of the judgment rendered, the *Institut* and those jurists who insist on preserving denial of justice in a procedural shell have done nothing to advance the evolution of a clear theory of responsibility in this matter. On the contrary, they have aided and abetted a usage which dates as far back as Vattel and which reflects a well-established tendency on the part of publicists to limit the meaning of the term denial of justice in accordance with the precepts of municipal law.

Far different is this type of restriction, it is true, from that imposed in the Guerrero report. Here the sole effect is one of terminology; the substantive extent of responsibility is not thereby modified. Nevertheless, it would have been less confusing had the term "denial of justice" not been used at all, (thus avoiding the pointed criticism that the Institute's resolutions afforded just another sample of the diverse ways in which the term may be understood — "*quoad formam*" and "*quo d materiam*"¹), rather than to consecrate an unsound terminological distinction between the form and the substance of judicial proceedings.

To sum up: the admission that a State is responsible when its tribunals do not offer the guarantees which are indispensable to the proper administration of justice is a desirable recognition that the State does not fulfil its international obligations merely by according the alien free access to court on the same footing as nationals. The Institute's resolutions are sound in impliedly denying that the bare minimum of protection required by international law is a status of equality. If this were true, it would clearly follow that a State could, of its own accord, change that status as it pleased, thus limiting its international obligations so long as nationals and aliens were treated indiscriminately. From this it would again follow that any kind of inadequate or corrupt institution might be set up to receive complaints, invested with judicial functions, provided with incompetent judges, and administered under outrageous procedure, without objection from States whose nationals suffer injury thereby. This, of course, is an insufficient compliance with the duty of protection, as the Institute's resolution attests.

* * *

¹ Ruegger und Burckhardt, *Die völkerrechtliche Verantwortlichkeit des Staates*, p. 27.

We have treated Article 5 of the Lausanne resolutions in some detail because of the expanded definition of denial of justice which it contains. However, the principles adhered to by the Institute in Articles 5 and 6 really fall under the heading of those theories which, while conserving denial of justice as a procedural concept, nevertheless admit that international responsibility may be engaged by additional acts of judicial wrongfulness toward foreigners. It is these theories which we now propose to investigate.

(b) *Additional Theories distinguishing between "Denial of Justice" and other Judicial Illegalities to Aliens.* — The origin of the conceptions to be considered under this heading can be traced directly to Vattel¹ who, while drawing a distinction between a "denial of justice properly so-called", (that is, a "refusal to hear" the complaints of aliens or "to admit them to establish their rights before the ordinary tribunals"), on the one hand, and a "manifestly unjust and partial decision", on the other, clearly admitted that responsibility existed in both classes of cases.² This terminological differentiation between a procedural refusal of court access and a substantively unjust judgment has been reproduced not only by subsequent writers,³ but by arbitral tribunals as well. In the *Medina* case, Commissioner Bertinatti listed as the grounds justifying a government in extending its protection to citizens abroad, "a formal denial of justice, the dishonesty or *prevaricatio* of a judge legally proved, 'the case of torture, the denial of the means of defense at the trial, or gross injustice, *in re minime dubia*'." ⁴ A

¹ It is uncertain as to just how much importance should be attached in this connection to the work of da Legnano, who preceded Vattel by some four centuries. In his *Tractatus De Bello, De Repraesaliis et De Duello*, da Legnano, referring to the conditions justifying reprisals, employed the terms "commission of injustice or the denial of justice" (*Qualiter constabit de iniustitia facta, vel ea denegata?*) in one passage, and in another "neglect to do justice" as contradistinguished from the doing of "injustice by pronouncing an unjust judgment." *Op. cit.*, ch. CLVI, p. 326, and ch. CL, p. 323, resp.

Several other publicists prior to Vattel had distinguished between the procedural refusal or neglect to administer justice, and the failure to do justice or pronouncement of an unjust judgment. See Gentili, *De Jure Belli Libri Tres*, Book I, ch. XXI, p. 101; Grotius, *De Jure Belli ac Pacis*, Book III, ch. II, V, p. 627. Compare Zouche, *op. cit.*, Pt. I, Section VI, 2, p. 33; and Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, § 587, p. 301.

² *Le Droit des Gens*, Book II, § 350, p. 536.

³ For a few examples see Diena, *Diritto Internazionale*, p. 528; Phillimore, II *Commentaries* (3rd ed.), p. 5; Westlake, *Chapters*, p. 104. And see the reference to Fauchille and De Visscher, *infra*, p. 141. Compare Cavaglieri, *Corso*, pp. 515-516.

⁴ United States v. Costa Rica, under the convention of July 2, 1860, Moore, *Arbitrations*, p. 2317.

more celebrated example in international jurisprudence is the *Cotesworth and Powell* case, which has frequently been cited as summarizing the established rules on the question of State responsibility for acts of the judiciary which inflict damage upon aliens. It was there stated in the opinion that

“ nations are responsible to those of strangers... *first*, for denials of justice; and *second*, for acts of notorious injustice. The first occurs when the tribunals refuse to hear the complaint, or to decide upon petitions of complainant, made according to the established forms of procedure, or when undue and inexcusable delays occur in rendering judgment. The second takes place when sentences are pronounced and executed in open violation of law, or which are manifestly iniquitous.”¹

Among modern writers on international law, Anzilotti stands out as the best-known advocate of this view, just as he is also admitted to have been one of the very first to present a scientific analysis of that specific international wrong popularly referred to as “denial of justice”, but concerning which few precise ideas had been previously entertained. His was at least the merit of perceiving its proper position with respect to the whole picture of international responsibility arising out of damages suffered by foreigners.

For Anzilotti and the adherents of his theory, “denial of justice” consisted in the State’s refusal to grant to an alien the protection of his rights by appropriate court action.² The fundamental pillar upon which he constructed the conclusion that this is violative of the law of nations was the so-called “personality” doctrine. That doctrine originally sprang from the universalist conception of international law developed by Victoria, Suarez and Grotius. Under it, the State was considered as but a member of humanity in its entirety, and from this was disengaged the principle — based upon the Christian idea of universal brotherhood — that every State must respect the human personality in all men, even in aliens.³

¹ Great Britain v. Colombia, under the convention of Dec. 14, 1872, *ibid.*, p. 2083. The relatively recent *Chattin* case (United States v. Mexico, *Opinions*, p. 422 at pp. 428-429), professed to see in the passage quoted support for what we choose to designate as the “local redress variant” of denial of justice. For a criticism of this position see *infra*, p. 157.

² “*La Responsabilité Internationale des Etats...* in 13 *R. G. D. I. P.* (1906), p. 5 at p. 21. See also Tosti, in *La Rivista di Diritto Internazionale* (1915), p. 401; and De Visscher, in II *Bibliotheca Visseriana*, p. 99. Compare Cavaglieri, in 26 *Recueil des Cours* (1929), pp. 548-549.

³ Verdross, in 37 *ibid.* (1931), p. 348.

Thus, for Anzilotti, denial of justice involved a disregard (*méconnaissance*) for the individual's legal personality, the primary manifestation of which

“ consiste précisément dans la possibilité de demander et d'obtenir la protection légale contre toute violation du droit subjectif. Le refus de cette protection équivaut, en définitive, à autoriser les autres membres de la société à ne pas respecter la personnalité de l'individu, à l'offenser impunément dans sa personne et ses biens, en un mot à le traiter en chose plutôt qu'en sujet de droits... ”¹

In other words, in virtue of the individual's quality as a legal personality there must be made available to him while abroad the means essential for the effective pursuit of his rights. Failure to provide such means is the equivalent of denying his capacity as a “ personality ” and therefore contrary to the State's international obligations.

On the other hand, the impression might be gathered from some of the early passages in Anzilotti's work that he considered the duties of the State to be satisfied as soon as foreigners were put in a position to have recourse to the local tribunals. For, it is said: “ Le résultat du procès ne saurait être jamais considéré comme un déni de justice, car il est au contraire précisément la reconnaissance et la consécration du droit. ”² One is reminded of the Guerrero thesis upon noting the statement that “ un Etat n'est tenu de garantir aux étrangers que la régulière prononciation du jugement, et on doit nécessairement admettre que l'arrêt rendu est conforme au droit. ”³

And yet despite phrases of this kind which might seem to restrict unduly the obligations of the State, it is clear from subsequent passages that Anzilotti did not regard the domestic judgment as absolutely shielded from international review. Thus he declares that a violation of international law might well be produced every time there existed a contradiction between the judgment rendered and some rule of the law of nations, whether this contradiction be due to the laws applied, to their interpretation by the courts, or to the failure to promulgate laws required to protect the foreigner adequately in his rights. In this hypothesis, however, Anzilotti denied that responsibility was as for a “ denial of justice ”:

¹ Anzilotti, *loc. cit.*

² *Op. cit.*, p. 22.

³ *Loc. cit.*

“...la responsabilité encourue ne provient pas d'un déni de justice, mais d'une autre violation quelconque du droit des gens. En somme, le déni de justice n'est pas autre chose que le refus du libre accès aux tribunaux : ceux-ci ont toujours le droit de déclarer le recours admissible ou inadmissible ; au cas d'un jugement déniait action, ou portant quelque autre disposition, il y aura seulement à voir s'il ne constitue pas une violation spéciale du droit international.”¹

These views represent the position subsequently taken by Fauchille, who warns that the “denial of justice” must not be confused with the *mal jugé*, or judgments violative of law.² De Visscher may likewise be cited as having once followed in the footsteps of the great Italian jurist with his declaration that where responsibility becomes engaged as a result of judgments pronounced by a State's tribunals, it is not a case of “justice denied”, for “justice” has in such cases actually been “rendered”.³

Such casuistic quibbling confuses the real issue involved by sticking two different labels on things which are identical in their practical effects — viz., the deprivation of judicial protection to which aliens are entitled. The words “justice rendered” in the passage quoted can signify nothing else than the *functioning of the judicial process* — the act of operating the State's judicial mechanism. So construed, the consequence of De Visscher's view, as of others examined in this group, is simply to erect an arbitrary distinction between judicial acts or omissions which are allegedly different in kind, but which are actually indistinguishable from the viewpoint of the legal obligation governing the judicial protection of foreigners.

Generally rejected today by theorists is the confusing attitude which Anzilotti voiced that once the machinery of justice has been made available to the alien, a decision of *any* kind, handed down by a competent court, barricades the way to objection that a “denial of justice” has occurred. It is then, according to this view, immaterial whether the court decides to entertain the action, or to dismiss it for whatever reason. A decision that the court lacked jurisdiction or that the alien's case was unfounded in law must

¹ *Op. cit.*, p. 23.

² “... un État ne saurait être responsable pour motif de déni de justice des décisions contraires au droit international, rendues au fond ou sur la recevabilité par ses magistrats.” Fauchille, *Traité*, vol. I, pp. 533-534.

³ De Visscher, *op. cit.*, p. 100, (translation ours). And compare Podesta Costa, *op. cit.*, pp. 256-257. Professor De Visscher has since altered his position. For a brief exposition of his present view, see *infra*, pp. 162-163.

not be regarded as a denial of justice, which could be alleged only where there had been no adjudication at all. But Anzilotti was careful to acknowledge the existence of responsibility where the *déclaration d'irrecevabilité* was due to the absence of laws necessary to endow a court with the required power, (such as the failure to provide a remedy), or to their misapplication by the judge. The very decision then could, as we have seen, be a violation of international law, "but not a denial of justice properly speaking".¹

This refined distinction — which is rarely taken in modern practice — seems to have been the logical result of an unnecessary attempt to limit the scope of the term to its significance in municipal law. In the present realities of international life, it is a complete anachronism. In so far as the alien's legal means of protection are concerned, a *decision* refusing to entertain an action is the absolute equivalent of a refusal of court access altogether. The denial of justice however is none the less real because the judge's decision was necessitated by a legislative act or omission. Where such a decision is compelled by the law's express or implied refusal of any action to aliens, and to them alone, it is quite evident that the expression of judicial will contained in the judgment is a denial of justice, which though conceived in legislation, is born of the court's pronouncement.

It must, however, be clearly emphasized that the consequences of Anzilotti's theory as to denial of justice are solely terminological and in no way limitative of the extent of the State's responsibility for acts of the judiciary. His treatment of "manifestly unjust judgments", i. e., decisions whose content discloses that judicial protection has been internationally deficient, leaves no doubt on this score. Although maintaining the proposition that a State is not bound to keep close vigil over the manner in which its judicial appointees fulfil their mission — or, therefore, to answer for the

¹ Anzilotti, *op. cit.*, pp. 23-24. Compare Tosti, *op. cit.*, p. 405: "... se tale possibilità di ricorso vien meno per assoluta mancanza di norme che diano agli stranieri libero accesso ai tribunali, o per effetto di norme contrarie al diritto internazionale, che sanzionino un inumano e incivile trattamento degli stranieri, la mancata emanazione di norme o l'emanazione di norme contrarie al diritto internazionale costituisce, a parer nostro, anch'essa, un aspetto del diniego di giustizia dal punto di vista del diritto internazionale." To the same effect: Strisower, during discussions of the *Institut de Droit International*, over what subsequently became Art. 5, *Annuaire, op. cit.*, p. 122, and Hoijer, *R. D. I.*, vol. V (1930), p. 119.

"La déclaration d'irrecevabilité est un déni de justice consommé par le jugement d'irrecevabilité." Moussa, *op. cit.*, p. 446.

decisions they may render — he quickly qualifies this by insisting that they perform their functions in good faith. The judgment must not be a mask to conceal evasion of international duties:

“...lorsque, dans un cas donné, la justice a fait absolument défaut, lorsque, de toute évidence, les juges ont obéi à des influences étrangères à leur mission et que les passions politiques l'ont emporté sur les raisons du droit, on peut dire qu'il n'y a plus eu que l'apparence de la protection judiciaire voulue par le droit international: et, alors, l'obligation de l'Etat n'a pas été accomplie, parce que, sous l'extérieur d'une justice rendue, il n'y a eu, en fait, qu'une justice déniée.”¹

The conclusions reached seem definitely to throw overboard the earlier emphasis upon denial of justice as a procedural formula, for it is said:

“Le déni de justice, en définitive, ne résulte donc pas seulement, selon nous, du refus d'accès devant les tribunaux, mais ressort aussi d'un manque évident de justice dans la manière dont le procès a été conduit et le jugement prononcé.”²

Thus Anzilotti arrives at a sound and clear conclusion on the scope of denial of justice. The only vice of his somewhat inconsistent development arises from its original insistence upon denial of justice as a procedural concept. This, in turn, was probably due to the author's conviction that, as a general rule, removing the barrier to judicial access suffices in practice to safeguard the alien's rights.

* * *

Just how solid is the theoretical basis for this entire doctrine? The authorities who profess to follow it³ adduce the “personality” conception we have described above to demonstrate that denial of justice is considered as an act contrary to international law.

¹ *Op. cit.*, p. 25.

² *Ibid.*, p. 25. And compare his later work (*Cours de Droit International*, p. 482), in which he recognizes that the refusal of access or its equivalent is not the only form which a denial of justice might assume.

De Visscher, however, held for some time to the opinion that a dishonest judgment must be termed something else than a denial of justice. (*Loc. cit.*). Cf. Fitzmaurice, *op. cit.*, p. 101.

³ Among these may be cited Fauchille, *Traité*, I, p. 533; De Visscher, *Notes sur la Responsabilité Internationale des Etats*, in *R. D. I. L. C.* (1927), vol. 8, 3rd series, p. 250, who considers that all denial of justice comes back to the negation of the human personality. Thus also Huber, *Rapports*, p. 53; s. c. *Annual Digest* (1923-24), pp. 158-159.

Lest it be thought that their argument is akin to the "fundamental rights of man" *credendum*, it should be quickly pointed out that no such problematical basis for the duty of judicial protection was involved in Anzilotti's reasoning. He conceived of the duty to respect the individual's legal personality as one running from State to State — a duty imposed by international law upon each member of the family of nations to treat the other's citizens in a determinate manner. The orthodox distinction of the individual as *object* and not as *subject* of rights and duties in the international system was thus followed.¹

A few writers have left no room for the possible objection that the "personality" postulate suggests a "natural" or "fundamental rights of man" dogma. Tosti, who refined several points in Anzilotti's approach so as to eliminate its few confusing aspects, reduced the whole notion of denial of justice to a definition in terms of the rules guaranteeing recognition of the alien's personality:

"Ogni atto...il quale...abbia per risultato, non riparabile secondo il diritto interno, di privare lo straniero della protezione legale — quale che sia l'organo statale da cui l'atto emani — deve logicamente rientrare nel concetto del diniego di giustizia se questo è inteso come l'espressione comprensiva di ogni concepibile violazione *della norma giuridica internazionale che garantisce il riconoscimento della personalità dello straniero.*"²

Unless such care is taken, confusion may be produced as to the nature of the right violated. For example, sometimes it is laid down that a subject abroad is invested with certain rights such as the right to respect for his legal capacity; the rights of man: liberty of conscience, of worship, and of person; and the like. From this it is deduced that the State must render justice to him.³ Here it is the rights of the *individual* and not of his State which are emphasized. Opinions of this kind fail to indicate the precise source of the duties

¹ On the orthodox theory as to the place of the individual in the international community, see: Triepel, *Völkerrecht und Landesrecht*, pp. 20 ff.; and Anzilotti, *Teoria*, p. 116, note 1. On the subjects of rights and obligations in international law in general, consult: Politis, *Les Nouvelles Tendances du Droit International Public*, ch. II; Cavaglieri, *I soggetti del diritto internazionale*, in *Rivista di Diritto Internazionale* (1925); Verdross, *Verfassung*, p. 156; and especially Bourquin in *35 Recueil des Cours* (1931), pp. 40 and ff.

² Tosti, *op. cit.*, p. 404. (Italics ours). Tosti's article has been surprisingly overlooked by writers dealing with the problem of denial of justice.

³ Bonde, *Traité Élémentaire du Droit International Public*, p. 303.

owed toward foreigners, whether the positive law of nations, the domestic law of the territorial State, or some natural law philosophy.

* * *

At this point in our work, a transition is perceptible from the view which confines denial of justice within definite, procedural bounds to the view which extends it to various other failures in the judicial function. The gap between that school of thought which denies responsibility for the substantive qualities of a judgment at all odds, and the school now investigated, is one of tremendous legal significance; that between almost all the others is mainly one of terminology.

It will be observed that the ultimate effects of the theories considered in this section do not substantially differ from those examined in the section on "guarantees". There, although the term "denial of justice" was used with somewhat broader effect, responsibility for "manifest injustice" or "*défi à la justice*" was admitted under a separate heading. Here, after what promised to be a tenacious insistence upon denial of justice as a narrow, procedural idea, we find a complete assimilation of denial of justice *stricto sensu* and manifestly unjust judgments under the convenient mantle of the "personality doctrine".

Perhaps the chief merit of this doctrine as expounded by Anzilotti and Tosti is that it serves to disclose that the technical confinement of denial of justice to a bare refusal of court access or its equivalent is excessive and unrealistic. If this is to be its force, what labels are to be attached to the various acts of judicial misconduct that may be produced between the opening of the proceedings and the rendering of final judgment? And why is a denial of the *right to get a cause examined* to be considered as any different from a refusal to recognize the just right which that cause represents? Or any different from abusive delays, improper refusal to hear the alien's testimony, failure to give sufficient notification to permit preparation of a defense and similar wrongs occurring prior to the unjust judgment?

There is absolutely no basis in international law for confining the term "denial of justice" to its significance in municipal codes;¹

¹ "The question remains...whether the restricted interpretation according to which denial of justice is merely a refusal of protective justice becomes likewise [i. e., together with the broad view] superfluous. This question must be answered in the affirmative

and there is cogent reason for giving it a scope sufficiently large to cover *every case in which there has been a failure by the State to comply with its duty of providing aliens with a judicial protection for their rights that is adequate not only in organization but in actual operation.*

B. DENIAL OF JUSTICE AS INDICATING DEFECTS IN THE JUDICIAL PROCESS

(Wrongs by Courts as distinguished from other Organs
charged with administering Justice).

Article 9 of the texts adopted by the Third Committee at the Hague Codification Conference in 1930 declared the State to be responsible if damage sustained by a foreigner resulted from the fact:

“(1) That a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the State;

(2) That, in a manner incompatible with the said obligations, the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice.”¹

Although these paragraphs do not expressly mention the phrase in so many words, they incorporate in substance what may be loosely designated as the “judiciary” conception of denial of justice, or that conception which omits wrongs by any organs of the State other than courts or bodies acting in purely judicial capacity. As used by many writers, this sense of the term covers not only the refusal or failure on the part of a court to allow an alien litigant to present his case, but culpable delay and other improprieties during the conduct of the proceedings, as well as the pronouncement of a judgment which is substantively defective.² The conception, it will be noted, is limited to acts or omissions of *courts*, and does not relate to activities performed by other organs charged with administering justice such as, for example, the arrest and imprisonment

since, in course of time, other kinds of denial of justice besides the refusal to hear a case have become international delicts. Today the one and only important consideration is which particular kind of a failure to accord justice is in issue in a given case.” Spiegel, *op. cit.*, p. 79.

¹ *Minutes*, Annex IV, p. 236 at p. 237.

² See Fitzmaurice, *op. cit.*, pp. 102-103; and Lissitzyn, *op. cit.*, p. 634.

CHAPTER XV

DELEGATED CONTROL: THE "LOCAL REMEDY" RULE AND ITS RELATION TO DENIAL OF JUSTICE

1. General Considerations. — We have seen that during the era of private reprisals grants of letters to individuals wronged abroad were made contingent upon proof of an absolute denial of justice by the foreign courts and afterwards by the Prince himself.¹ Translated into the language of modern international law, this meant simply that no violent outbreaks against another State were to be tolerated as long as the injured subject had not sought redress of grievances before the local courts and had not there been denied justice. That a wrong had been done to a foreign citizen was not regarded, in itself, as giving licence to his sovereign to take up the matter as long as there had been no application for reparation through the same channels as were open to nationals.

This classical doctrine under which complaints as to private injuries must be submitted to the local courts was early emphasized in the report of a Committee set up by Great Britain in 1752 to determine the propriety of certain acts of reprisal in the *Silesian Loans* case:

" If... a subject of the King of Prussia is injured by, or has a demand upon any person here, he ought to apply to your Majesty's Courts of justice, which are equally open and indifferent to foreigner or native; so, vice versa, if a subject here is wronged by a person living in the dominions of His Prussian Majesty, he ought to apply for redress in the King of Prussia's Courts of justice. " ²

¹ See pp. 53 ff., *supra*.

² Quoted in *The Zamora* (1916) 2 A. C. 77; s. c.: Evans, *Cases*, p. 619 at p. 623; Dickinson, *Cases*, p. 45 at p. 49; II De Martens, *Causes Célèbres*, p. 52.

Thus, already at an epoch when the institution of private reprisals had entered upon its dying phases there is found authoritative confirmation of a principle which enjoys a position of capital importance in connection with the State's duty of responding in damages for violation of the rules governing the treatment of aliens. That principle, whose roots ramify throughout the old practice limiting reprisals,¹ may be formulated in the following terms: No international claim for indemnity may be presented on behalf of an aggrieved national as long as there remains at the disposal of the individual in question *effective means for obtaining reparation* in the State in which the wrong was committed. In other words, a complaint based upon denial of justice or any other wrong to an alien will be rejected by the international tribunal seised of the matter where it appears that *the claimant has failed to exhaust his local remedies*.

Now before proceeding any further with our investigations it should be distinctly understood that this rule has no application in those cases where the claim is based upon violation of a right which is proper to the State itself, and is not one advanced on behalf of a given national. For example, let us suppose that an ambassador has been arrested and imprisoned in the country of his post, or has been the victim of a murderous attack under circumstances leaving no doubt as to the creation of international responsibility. Here there is no duty incumbent upon his State to stay its hand until after the ambassador has vainly sought redress from the local courts, or until after the result of penal proceedings against the malefactor has been made known. It may present its demands immediately.

The same principle governs all complaints by an injured State as to the violation of treaties concluded by it with the territorial State.²

¹ Stowell, *International Law*, p. 162, note. "For recourse must first be had to the ordinary remedies, and only if they fail to this remedy, [i.e., reprisals]; and this should be ascertained by a judge who is asked to declare reprisals." da Legnano, *Tractatus de Bello, de Repraesaliis et de Duello* (1860), ch. XXIV. "...before resorting to reprisals, justice must have been asked for in vain, or at least there must have been good reason to think that the demand for it would be ineffectual." Vattel, *The Law of Nations*, Bk. II, Ch. XVIII, § 343.

³ "... la règle de l'épuisement des voies de recours internes ne s'applique pas aux cas où le droit international exige des Etats une attitude déterminée d'ordre conventionnel et qui dépasse l'obligation d'une bonne application de la loi locale. Lorsqu'on est en présence d'une telle obligation internationale concrétisée, qui veut exclure toute attitude contraire, sauf s'il s'agit d'une demande en indemnité, la règle de l'épuisement ne joue pas, même lorsque l'attitude contraire à cette obligation a pris corps dans le jugement d'un tribunal ou que le droit interne prévoit un recours, judiciaire ou autre, contre un acte administratif délictueux." Kaufmann, in *54 Recueil des Cours* (1935), p. 455.

There are, of course, many instances in which an act violating the provisions of an international convention may produce at one and the same time damage to some private individual. Such will be the case whenever the treaty in question is one regulating the status and protection of foreigners. All claims presented *in their behalf* must be subordinated to a preliminary exhaustion by them of the remedies available under the local law; but this item aside, the fundamental question between the two States with respect to the violation of the treaty may be posed forthwith.¹ On the other hand, the local remedy rule will always apply when the point at issue is the non-observance of those rules of the law of nations by which a State is obligated to afford protection to private aliens who are not vested with the status of *organs* of the foreign State.

It will be recalled that when an alien has suffered injury as a result of the conduct of State agents which violates international law, the State is responsible. This, however, does not mean that diplomatic interposition is immediately rendered proper, or that the claim, becomes receivable before an international jurisdiction.² Just as in the case of wrongs inflicted by a private person whatever domestic remedies are available must first be pursued. The necessity of a resort to these remedies is not, then, dependent upon whether the actor was or was not an official of the territorial State; but they must, *as a general proposition*, be invoked in all cases where an alien has sustained injury.

It will also be remembered that the State is not, in principle, responsible for the wrongful acts of mere private individuals where it is not guilty of a failure to exercise due diligence to prevent such acts. Its obligations in this hypothesis are limited to affording the injured party an action against the wrong-doer and to refraining

¹ De Visscher, *op. cit.*, p. 425. *Accord: Case concerning certain German interests in Polish Upper Silesia*, Judgment No. 7, *Publications*, Series A, No. 7, pp. 33-34. "Nations are not amenable to the courts of other countries and consequently the rule of exhaustion of local remedies of necessity cannot apply to cases of direct responsibility of one state to another for its own acts. The unwarranted refusal of the Government of Egypt, acting through its lawfully constituted agents, to recognize the treaty rights of the United States constituted a direct wrong against the Government of the United States as well as against Salem. Such direct national injuries cannot, by the very nature of things, be subjected to adjudication by the municipal courts of the offending State." *Brief of the United States in the Salem claim*, *Arbitration Series No. 4* (2), pp. 93-94.

² Cf. Eagleton, *Responsibility*, p. 98.

from the commission of a denial of justice in conjunction therewith.¹ Relief must first be sought in the local courts, regardless of the source of the wrong. From this flows the interesting consequence that the initial responsibility which is born of the internationally illegal conduct of State functionaries may be discharged completely if local remedies function as required; whereas, on the other hand, a new, original responsibility will be incurred if the proceedings against private persons terminate in a denial of justice.²

The relationship between the local remedy rule and the State's duty of providing an adequate judicial protection for the rights of aliens is so close as to promote continuous confusion. One noteworthy example of this is the statement frequently encountered that a State's responsibility for injuries suffered by aliens can only be put in question after local means of redress have been exhausted and *a denial of justice established*, i. e., a failure on the part of local courts to administer justice according to reasonable standards of civilized law and procedure. The fallacy of this proposition resides in the fact that where the act or omission inflicting injury upon an alien consists in an anterior violation of international law, *the subsequent operation of local remedies must terminate in adequate reparation for the damage he has suffered or an international claim will still lie*. It is not necessary that judicial irregularities tantamount to a technical denial of justice should be superadded to the original violation of international law, for, in the case now being considered it suffices for the purpose of transposing the conflict to the international plane that the remedies provided by the delinquent State have been exhausted *without adequate redress*, in the form of compensation or otherwise.³ Here the sole function of the local remedy rule

¹ A different rule, of course, applies where the injuries received at the hands of private persons are a result of the State's failure to accord proper police protection or to exercise due diligence to prevent the wrongful acts. This constitutes an international illegality, responsibility for which is independent of the question of denial of justice.

² Eagleton, *loc. cit.*, and pages following.

³ But cf. *supra*, p. 78, note. "... la sentence comme telle ne suffit à éliminer cette responsabilité. Acte purement interne, elle est en soi sans pertinence aucune au regard du droit international. Ici, par conséquence, c'est le résultat de l'instance, c'est-à-dire, la réparation accordée qui est l'élément décisif. La responsabilité internationale ne prend donc pas fin par cela seul que l'Etat mis en cause est à l'abri du grief de déni de justice; elle ne prend fin que si l'Etat dont le ressortissant a obtenu la sentence consent à considérer comme satisfaisantes les réparations accordées et renonce, en conséquence, à introduire ou à poursuivre une réclamation." De Visscher, *op. cit.*, pp. 430-431.

is to give the territorial State an opportunity of appreciating and discharging a responsibility that has already been engaged.

On the other hand, neither wrongs traceable to mere individuals acting in a private capacity, nor the illegal conduct of State agents which does not violate the law of nations, can ever be invoked as the basis for an international claim merely on the ground that domestic remedies have been exhausted without redress of grievances.¹ The sole possible ground of complaint in these circumstances will be proof that a denial of justice has been encountered. Responsibility in the first class of claims referred to must have its foundation in an internationally unlawful act committed by some State official; that in the present class must be based upon a denial of justice. In the first class, the exhaustion of local remedies is indispensable to create the conditions under which the claim will be receivable before an international forum, but it is not creative of the *grounds* upon which such a claim is founded. In the second case, the denial of justice creates at once the grounds *and* the conditions of the claim's presentation.

Thus the rule really enjoys both a procedural and a quasi-substantive status. With respect to original violations of international law prior to and unconnected with the administration of justice, it is a *procedural* condition precedent to diplomatic interposition. With respect to wrongful acts by private persons, it enjoys the *substantive* faculty of creating responsibility where local remedies function defectively; i.e., in the case of inadequate judicial protection. But, of itself, the fact that local remedies have been unsuccessfully exhausted is without international significance.² From this standpoint again the functions of the rule are purely procedural.

In short, to say that local remedies must be exhausted *and* a *technical denial of justice*³ established before an international action becomes permissible, is an erroneous statement of the law. It ignores the fundamental distinction between claims arising out of original breaches of international law other than failures in administering justice, and claims founded solely on a defective operation of the judicial function and in which no international wrong was

Compare Friedmann, in *R. D. I. L. C.* (1933), p. 321.

² Cf. the statements of the American and Colombian delegates at the Hague Codification Conference, *Minutes*, pp. 74 and 78, resp.

³ Cf. *supra*, pp. 77-78, note.

committed prior to the operation of local remedies. The scope of the rule is vastly different in these two hypotheses, as we will further attempt to demonstrate somewhat later.¹ But in both of them, it bears repeating, local remedies must have been exhausted for a claim to be receivable before an international jurisdiction.²

From what has just been said, one may easily see that a plenary *power* is delegated to every State over the *international consequences* of unlawful acts produced within its territory to the detriment of aliens. By appropriately redressing violations of international law with respect to the person or property of foreigners, the State asserts a check upon its answerability to other States, discharges the responsibility that has already been engaged, and thus parries, as it were, by anticipation, a reaction from abroad. Here its own domestic tribunals perform, in a very real sense, an international function in executing the first phase of the series of measures contemplated and provided by international law for the realization of its rules. Likewise, in the case of purely individual wrongs, (breaches of contracts, torts, and crimes committed under circumstances not creating responsibility), the local remedy rule again permits the exercise of a control which is delegated to the municipal system, by international law. This control may not be quite so apparent since it is ordinarily present only in the opportunity which superior tribunals are given to supervise and correct the conduct of inferior courts or to arrest the harmful effects of an inadequate judicial protection by lower courts, thus again barring the road to a diplomatic claim. But the function of the judicature even in this case may still be properly designated as an international one,³ since it is instituted in virtue of a norm of the law of nations by which the rights of aliens must be given judicial protection. The municipal tribunals which here assure the execution of international law simply act as its provisional organs, thus furnishing an example of that duality of competence which Scelle has called the law of "*dédoublement fonctionnel*."⁴ Otherwise expressed, the present technical construction of international law (or rather the present form of its

¹ See *infra*, pp. 446 ff.

² The statement is sometimes encountered that there is no need to exhaust local remedies if the source of the damage was a violation of some rule of international law. (Thus Brusa, *rapporteur*, in *Annuaire de l'Institut de Droit International*, 1898, pp. 127-128). This point of view is both theoretically unsound and contrary to international practice.

³ Compare Scelle, II *Precis*, p. 95.

⁴ *Ibid.*, p. 92.

administration) is such as to entrust the execution of its rules, normally, to the various States.¹ Thus, every act of a jurisdictional nature which controls an international legal situation on the basis of some rule of international law must be an international legal act. This conclusion is easily reached when the function of the courts is detached from its formal organization within a given municipal system and examined according to the substantive nature of the act performed rather than according to the particular character of the agent which performed it.²

Contributing to the confusion in this field is the fact that not infrequently a claim in behalf of a given national will have a double foundation, that is, an anterior or initial violation of international law, followed by a failure of the State to provide an adequate judicial protection — in other words, a technical denial of justice.³ This failure is not to be considered as essential to the inception of responsibility, as its sole function is to confirm the State's responsibility for an earlier act of misconduct. Since either or both of these acts create the grounds upon which an international claim may be predicated, the whole of the circumstances giving rise to the invasion of the alien's interests is one to which claimant governments find it convenient to attach the single label "denial of justice."⁴ The inevitable result of this misdescription is not only to confuse the proper scope of denial of justice in other cases where an initial violation of international law is not followed by defects in the operation of judicial machinery, but also to obscure at the same time the function of the local remedy rule.

Denial of justice may proceed from any one of a number of possible deficiencies in the proceedings themselves, as we have seen,⁵ or even, according to a view widely held, from the absence of all remedy whatsoever in those cases where international law requires a remedy to be given.⁶ It is obvious, therefore, that the question of whether there has been a denial of justice is closely bound up with the question

¹ Bourquin, in 35 *Recueil des Cours* (1931), pp. 81 ff.

² Scelle, "La Doctrine de Léon Duguit", *Arch. de phil. du droit*, 1932, p. 93.

³ See *supra*, pp. 77-78.

⁴ For a recent example of this, see the Note of His Majesty's Government to the Mexican Government, April 8, 1938, regarding the *Expropriation of Oil Properties. Correspondence, Mexico No. 1*, p. 3.

⁵ See *supra*, Chaps. VIII-XIV, inc.

⁶ A number of authorities (cf., for example, Fitzmaurice, XIII *British Yearbook*, 1932, pp. 105-106; Beckett, 39 *Recueil des Cours*, 1932, p. 163; De Visscher, *op. cit.*, pp. 395, 424; and especially, Art. IX of the Project on *Responsibility of States* submitted by the Executive Committee of the American Institute of International Law. Seventh

of the *kind* of remedies available to the alien and the manner in which they have been administered. Moreover a resort to these remedies is implied in the very concept of denial of justice in so far as it applies to the vindication of rights before domestic courts. Nevertheless, one must constantly remember that responsibility arising out of denial of justice is purely a *substantive* matter; the local remedy rule is intrinsically a procedural principle and in its own right has nothing to do with the existence of responsibility although, in the course of exhausting remedies, the alien may meet with the phenomenon of a denial of justice.¹ The rule, in sum, is an imperative which interacts with the concept of denial of justice to form the basis of most international claims.

Confirming the necessity of exhausting local remedies (as an indispensable preliminary to diplomatic interposition) is a wealth of authority in the writings of publicists,² in diplomatic practice³ and in the decisions of international tribunals. Insistence

International Conference of American States, *Documents for the Use of Delegates*, p. 20) consider the absence of remedies in such cases (whether due to the nonexistence of courts or to the State's failure to provide appropriate remedial procedure) as itself amounting to a denial of justice. The necessary consequence of this view is that acts or omissions of the legislature may by themselves constitute denials of justice. For motives already alluded to, we are unable to accept this position. Cf. pp. 108-9, 113, 134, 155, 228-229, 310, *supra*.

¹ "Quant à l'épuisement des recours, s'il est une condition de la recevabilité de la réclamation, jamais il n'en est le fondement. Quand on formule cette règle, c'est sur le terrain procédural que l'on se place; on ne préjuge aucunement ni la question de savoir quel est l'acte générateur de la responsabilité ni celle du moment où la responsabilité prend naissance. Les fréquentes confusions qui s'élèvent ici tiennent au fait que, dans nombre de cas où précisément le déni de justice entre en jeu, il s'établit une coïncidence dans le temps entre la naissance de la responsabilité et l'épuisement des recours." De Visscher, *op. cit.*, p. 427.

² Borchard, *Diplomatic Protection*, p. 332; *idem*, in *Zeitschrift...*, *op. cit.*, pp. 239-242; Eagleton, *Responsibility*, Chapter V.; Hyde, *I International Law*, p. 505; Foulke, *2 International Law*, p. 28; Liszt, *Das Völkerrecht*, p. 283; Kaufmann, in *54 Recueil des Cours* (1935), pp. 454-456; De Visscher, *52 ibid.* (1935), pp. 421 ff.; Sfériadès, *51 ibid.* (1935), pp. 66-68; Salvioli, *46 ibid.* (1933), p. 122; Witenburg, *41 ibid.* (1932), pp. 50 ff.; Beckett, *39 ibid.* (1932), p. 163; Décencière-Ferrandière, *Responsabilité*, p. 115; Huber, *Rapports*, p. 187; Strisower's draft, Art. 17, *Annuaire* (1927), vol. I, pp. 492 ff.; Borchard's Report, *ibid.* (1931), vol. I, p. 424; Durand, in *R. G. D. I. P.* (1931), p. 705; Friedmann, in *R. D. I. L. C.* (1933), pp. 319 ff.; Anzilotti, *Cours*, p. 482 (inference); and cf. the *Memorandum* of Gaston Jèze in *47 Revue du Droit Public* (1930), pp. 558 ff.

³ Cf. General Calonge to Sir J. Crampton, Feb. 16, 1867 (Great Britain), *Fontes Juris Gentium*, Series B, Sec. 1, Tomus 1, par. 750; Mr. Gresham to Mr. Osborn, May 17, 1893, VI Moore, *Digest*, p. 669; Mr. Day to Messrs. Lauterbach *et al.*, in *Waller's case*, Feb. 27, 1886, *ibid.*, p. 671; Mr. Marcy to Chevalier Bertinatti, Dec. 1, 1856; *ibid.*, pp. 659-660; Mr. Jefferson to Mr. King, Dec. 7, 1798; *ibid.*, pp. 651-652; Mr. Clay to Mr. Tacon, Feb. 5, 1828; *ibid.*, p. 652; Mr. Clay to Mr. Maheuil, Mar. 28, 1827, *loc. cit.*; Mr. McLain to Mr. Shain, May 28, 1834, *ibid.*, p. 658; Mr. Buchanan to Mr. Larrabee, Mar. 9, 1846, *loc. cit.*; Mr. Davis to Mr. Taylor, Oct. 20, 1871, *ibid.*, p. 661; and the *Comentarios* of Dr. Eugenio Cantero-Herrera, counsel for Cuba before the Permanent Commission of Washington in the dispute between Cuba and Peru, pp. 5-7.

upon the rule has become a cardinal point in the policy of the United States with reference to the espousal of claims, as is attested by paragraph 8 of the General Instructions to claimants issued by the Department of State:

" 8. *Responsibility of Foreign Government.* — Unless the responsibility for the loss or injury for which reparation is claimed is attributable to a foreign Government, efforts of the Government of the United States on behalf of the claimants will be futile. It is essential, therefore, for claimants to show that the responsibility for their losses or injuries is attributable to an official branch, or agency of a foreign Government. *If any legal remedies for obtaining satisfaction for, or settlement of, the losses or injuries sustained are afforded by a foreign Government before its judicial or administrative tribunals, boards, or officials, interested persons must ordinarily have recourse to and exhaust proceedings before such tribunals, boards, or officials as may be established or designated by the foreign Government and open to claimants for the adjustment of their claims and disputes. After such remedies have been exhausted with the result of a denial of justice attributable to an official, branch, or agency of a foreign Government, or have been found inapplicable or inadequate, or if no legal remedies are afforded, the Department of State will examine the claim with a view to ascertaining whether, in all the circumstances of the case and considering the international relations of the United States, the claim may properly be presented for settlement through diplomatic channels, by arbitration or otherwise...*"¹

Numerous bilateral treaties concluded between Latin-American and European States expressly incorporated the rule that the legal means of redress available under the local law must be exhausted before an international claim becomes proper.² Moreover, the principle has been adopted in several recent treaties of compulsory arbitration. Article 31 of the General Act for the Pacific Settlement of International Disputes provides that "in the case of a dispute the occasion of which, according to the municipal law of one of the parties, falls within the competence of its judicial or administrative authorities, the party in question may object to the matter in dispute

¹ Taken from "*Application for the support of Claims against Foreign Governments*" of Oct. 1, 1934. Italics ours.

"His Majesty's Government attaches the utmost importance to the maintenance of the rule that, when an effective mode of redress is open to individuals in the courts of a civilized country by which they can obtain adequate satisfaction for any invasion of their rights, recourse must be had to the mode of redress so provided before there is any scope for diplomatic action." Note of the English Foreign Secretary, April 24, 1916, 10 *A. J. I. L.* (spec. supp.), p. 139.

² See *infra*, pp. 492, 494.

being submitted for settlement by the different methods laid down in the present General Act until a decision with final effect has been pronounced, within a reasonable time, by the competent authority.”¹ A similar provision is found in Article 3 of the Arbitration Conventions attached to the Locarno Pact.²

Some writers have denied that a failure to comply with the local remedy rule may be laid hold of as a plea in abatement to dismiss actions prematurely brought before international tribunals. Ténékidès, for example, pretends that as soon as a State intervenes in order to protect its injured national, there is a sort of “novation” by which the controversy sheds its private nature and puts on the attributes of an international conflict.³ Ralston similarly asserts that the rule is “for the most part a rule of convenience of foreign offices in determining whether or not they shall interpose to secure special relief for their nationals rather than an imperative rule controlling the jurisdiction of international tribunals.”⁴ This conclusion he considers as compelled by the frequency with which awards have held the arbitral body to have been substituted for national forums which otherwise might have been competent in the matter.

It is true that arbitrators have often dispensed with the requirement of exhausting local remedies on the reasoning that by the very submission of the case to arbitration the two governments had

¹ League of Nations Treaty Series, No. 2123, Vol. 93, p. 343, at p. 357. See also 25 *A. J. I. L.* (1931), supp. p. 210. Compare Article 3 of the Treaty of Arbitration and Conciliation of Dec. 3, 1921, between Germany and Switzerland: “Pour les questions qui...relèvent de la compétence d'autorités judiciaires... la Partie défenderesse peut exiger...que le litige ne soit soumis à la sentence arbitrale qu'après qu'une décision définitive ait été rendue par ces autorités judiciaires et...que le Tribunal soit saisi dans les six mois au plus tard à compter de cette décision. Il en sera autrement s'il s'agit d'un cas de déni de justice et si les instances de recours prévues par la loi ont été saisies.” (Italics ours). League of Nations, *Arbitration and Security* (C.34.M.74.1926.V), p. 107.

² *Ibid.*, pp. 169, 173, 177, 182; and see also Le Fur et Chklaver, *Recueil des Textes*, pp. 867 ff.

³ 60 *R. D. I. L. C.* (1933), p. 514, at pp. 531-532. His position is criticised by Séfériadès in 51 *Recueil des Cours* (1935), pp. 66 ff.

Similarly, in the *Finnish Ships* case, Finland argued that resort to local remedies was unnecessary where a State had previously taken up the claim. *Memorandum No. 2, 3; Decision*, p. 9.

⁴ *International Arbitration from Athens to Locarno*, pp. 60-61. And compare his later work (*Supplement*, p. 38) which (inaccurately) cites a *dictum* of Arbitrator Bagge in the *Finnish Ships* case (*Decision*, p. 26) as support for the proposition that “particularly as against agents of the government, failure to resort to local courts has in a number of cases been held no bar before the international tribunal.”

meant to waive the rule.¹ Thus, in the *Lacaze* case, the decision, after admitting that indemnity should have been claimed from the ordinary courts in an action against the State agent responsible, asserted that the respondent Government assumed the burden of reparation by consenting to diplomatic negotiations and arbitration.² But the great weight of authority definitely does not support the Ralston thesis, and a multitude of claims have been rejected because of the claimant's failure to pursue local means of redress.³ In the

¹ Research in International Law, *Responsibility of States*, *op. cit.*, p. 154. Among such cases are: *Davy*, Ralston, *Venezuelan Arbitrations*, p. 410; *Selwyn*, *ibid.*, p. 322; *Young, Smith & Co.*, Moore, *Arbitrations*, p. 3147; (claim based on unlawful seizure of property held to give standing before commission though no resort was had to local remedies).

Much, of course, will depend upon the wording of the *compromis*. The Jay Treaty was interpreted as giving the Anglo-American Board competence over claims although remedies had not been exhausted, where it appeared that the claimants were not guilty of laches. See the *Sally* case, Moore, *Arbitrations*, pp. 3101-3119.

The United States-Mexican Claims Commission of 1868 produced a series of decisions which are absolutely irreconcilable in their treatment of the local remedies rule. Among those cited by Dunn as holding the failure to exhaust local remedies no bar to jurisdiction are the *Belden*, *Turner*, *Renshaw & Co.*, *Alexander*, *Mather and Glover*, *Schneider*, *Wulffing*, *Elliott*, *Costanza*, *Brach* and *Marshall* cases, (Dunn, *The Diplomatic Protection of Americans in Mexico*, pp. 207-215 and the author's statement at p. 217). The same commission held that failure to comply with the rule was a bar in the *Briggs*, *Thompson*, *Black*, *Slocum*, *Carey* and other cases (*ibid.*, pp. 218-226).

² *France v. Argentina*, Mar. 19, 1864, II Lapradelle-Politis, *Recueil*, p. 298.

³ See the *Ziat Ben Kiran* case (Great Britain v. Spain), Dec. 29, 1924, Huber, *Rapports*, p. 185; s. c., *Annual Digest* (1923-24), p. 166, (damages caused by riot; claim rejected because local officials not proceeded against); *De Caro* case, Ralston, *op. cit.*, p. 810, (*dictum*); *Oberlander and Messenger* case, VI Moore, *Digest*, p. 670; *Baldwin* case, *idem*, *Arbitrations*, p. 3126; *Leichardt's* case, *ibid.*, p. 3133; the *Burn*, *Pratt* and *Ada* cases, *ibid.*, pp. 3140, 3141 and 3143, resp.; *Turner* case, *ibid.*, p. 3126; *Green*, *ibid.*, p. 3139; *Jennings*, *Laughland & Co.*, *ibid.*, p. 3135; *Ana*, *ibid.*, p. 3144; *Gray v. United States*, 21 *Court of Claims*, p. 340 (illegal capture); *Brig Freemason*, 45 *ibid.*, p. 555 (failure to use local remedies against the captor of a prize); *Canadian Claims for Refund of Duties*, (Great Britain v. United States under the Convention of Aug. 18, 1910), *Nielsen's Report*, pp. 347 ff.; the *R. T. Roy* case, *ibid.*, p. 406; and compare *Hubbell's* case, American and British Claims Arbitration under the Treaty of 1871, *Hale's Report*, p. 40. See also the *dictum* in the *Pacific Mail S. S. Co.* case, (United States v. Colombia), Moore, *Arbitrations*, p. 1413; s. c., II Lapradelle-Politis, *op. cit.*, p. 486; and the recent case of *Interocean Transportation Co. v. United States*, 32 *A. J. I. L.* (1938), p. 593 at p. 597.

The objection that local remedies had not been exhausted was raised before the Permanent Court of International Justice in the *Case concerning certain German interests in Polish Upper Silesia*. Here the German Government requested the Court to determine whether the application of certain Polish legislation affecting the property of German subjects in Upper Silesia constituted a violation of the Geneva Convention between the two Governments. Poland objected that the application should not be entertained, since there were remedies open to the injured individuals. This argument was rejected by the Court as irrelevant on the ground that the dispute in question was one concerning the application of the convention, and not one in which Germany was advancing a claim on behalf of private individuals. (*Publications*, Series A, No. 7, pp. 33-34). Subsequently, Germany did bring an action directed at the indemnification of its nationals, and again the Court held that the Polish defense of non-exhaustion of

recent *Salem* claim, the American Government attempted to answer Egypt's objection that the claimant had not exhausted the national legal means which were at his command (and therefore that the action was premature) by maintaining that exclusive jurisdiction over the claim in question had been assigned under the Arbitration Agreement to the arbitral tribunal. This contention was rejected by the tribunal which ruled that the conclusion of an arbitration agreement did not constitute any such implied waiver.¹ The necessity of exhausting internal remedies must be regarded as a fundamental rule of international law;² as *mandatory* upon international tribunals (in the absence of an express contrary stipulation in the *compromis*), and not as *permissive* in the sense that it expires when a foreign government decides to intercede diplomatically.

Overwhelming recognition of the principle that a diplomatic reclamation may not be presented as long as the injured alien has

remedies was no bar, on the following grounds: First, that there were actually no remedies open to the injured parties; and second, that Poland could not require them to resort to a remedy which it had, by its violation of the Geneva Convention, rendered inapplicable. *Case Concerning the Factory at Chorzow, Publications, Series A, No. 8, pp. 25-31.* In the case of the *Readaptation of the Mavrommatis Concessions*, (Judgment No. 10, *Publications, Series A, No. 11, p. 23*), the objection that local remedies had not been exhausted was raised but not considered because the Court rejected the complaint for lack of jurisdiction. In the case of the *Serbian Loans*, the Court in a *dictum* recognized the existence of cases "in which an action cannot be brought before an international tribunal when there are legal remedies still open to the individuals concerned." (Judgment No. 14, *Publications, Series A, No. 20, p. 19*). In the case concerning the *Administration of the Prince Von Pless*, Poland raised the objection that legal remedies available under its law had not been exhausted. The court, however, "did not consider it necessary to pass upon the question of the applicability of the principle as to the exhaustion of internal means of redress" since it would "certainly be an advantage to the Court, as regards the points which have to be established in the case, to be acquainted with the final decisions of the Supreme Polish Administrative Tribunal upon the appeals brought by the Prince Von Pless and now pending before that Tribunal..." Procedure before the Court was hence arranged by it so as to ensure that this would be possible, time limits being fixed with regard to the filing of documents so as to give time for the Polish tribunal to render its decision. *Preliminary Objection, Order of Feb. 4, 1933, Series A/B, No. 52, pp. 15-16.*

In *Diaz v. Guatemala*, (March 6, 1909), the complaint was dismissed because of the claimant's failure to take steps before the local courts to recover for hardships suffered by his wrongful arrest and imprisonment. The Central American Court of Justice called attention to the fact that its jurisdiction was conditioned (under Article II of the convention creating it) upon an exhaustion of local remedies. 39 *Clunet, Journal*, p. 274; s. c., 3 *A. J. I. L.* (1909), p. 737.

¹ United States (*George J. Salem*), v. Egypt, June 8, 1932, Arbitration Series No. 4 (6), p. 43. *Accord, Canadian Claims for Refund of Duties*, March 19, 1925, *Nielsen's Report*, pp. 347 ff.

² Such was the position of the Committee on Responsibility at the Hague Conference. See *Minutes*, p. 162. "S'il est vrai que la règle comporte des exceptions, il faut constater que la pratique l'a consacrée." De Visscher, *op. cit.*, p. 422.

failed to comply with the requirements of this rule is found in the replies of over twenty Governments to a request for information by the Preparatory Committee for the Codification Conference. The point was thus framed:

"Is it the case that the enforcement of the responsibility of the State under international law is subordinated to the exhaustion by the individuals concerned of the remedies afforded by the municipal law of the State whose responsibility is in question?"¹

This question was answered in the affirmative by the replies referred to,² and the principle (which was incorporated in Basis of Discussion No. 27),³ was subsequently approved by the Third Committee in 1930.

It is but a specific application of this rule that *no claim based upon a denial of justice may be predicated upon the decision of a lower court.*⁴ The alien must have unsuccessfully pursued all available modes of appellate revision and have been brought face to face with a definitive pronouncement of the highest judicial body before such a complaint will be receivable. This principle was likewise respected by the Third Committee at the Hague when it admitted that responsibility is engaged when a judgment "which is not subject to appeal" is incompatible with a State's international obligations.⁵ It was again recognized by the American-Turkish Claims Commission in the recent case of *Christo G. Pirocaco*, the opinion there stating:

"As a general rule, a denial of justice resulting from improper action of judicial authorities can be predicated only on a decision of a court of last resort. A litigant must exhaust his remedies before it can be said that he has had that final judicial determination of his case which the law affords."⁶

¹ *League of Nations Document*, C.44.M.21.1928.V, Point XII, p. 7.

² *League of Nations Document*, C.75.M.69.1929.V. *Bases*, Vol. III. See especially the replies of: Great Britain, p. 137; Germany, pp. 41-42, 136; Switzerland, p. 137; Holland, p. 45; Denmark, pp. 136-137.

³ This Basis ultimately gave way at the Conference to Article 4 of the draft convention providing that "The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State." *Minutes*, p. 236. Compare Article 12 of the *Resolutions* adopted by the *Institut de Droit International* at its Lausanne Session, *Annuaire* (1927), Vol. 3, p. 334.

⁴ De Visscher, *op. cit.*, p. 423. See Hyde, *I International Law*, pp. 506 ff., and compare Hatschek, *Völkerrecht im Grundriss*, p. 195.

⁵ *Minutes*, p. 237.

⁶ Nielsen's *Opinions and Report*, p. 587, at p. 599.

Failure to appeal has on more than one occasion been the ground for an international tribunal's refusal to render an award in cases of alleged denial of justice.¹

2. Justification for the Rule. — Several considerations may be laid hold of to justify the existence and maintenance of a rule that the alien must resort to domestic remedies for redress of his grievances. Its principal *raison d'être* lies in the fact that since the injury was suffered *in* the territorial State, the Sovereign of the *locus* must in equity be allowed to do justice according to the manner instituted for that purpose before foreign States may properly file complaints. It may in fact be utterly pointless for them to proceed in advance of an adjudication by the local courts, as the proceedings may culminate in a judgment favorable to the alien, rendering international action unnecessary. Or, the facts which are brought to light in the course of those proceedings may be such as to deter a foreign office from intervening.²

Assuming that the damage was allegedly caused by an original violation of international law, the delinquent State must be allowed the right to investigate the charge, to appreciate and — if need be — to discharge, its responsibility. Fairness demands that it be given the first opportunity of considering with its own courts the various points of law and fact which are raised by the claim and of ascertaining on the basis of their determinations whether reparation is to be made.³ On the other hand, in so far as the case is not one based upon an initial breach of international law, the territorial State undoubtedly has the right to insist upon adjudicating all issues which fall within its competence under municipal law. And this right will continue to survive just so long as the presumption of uniformity between national institutions and the requirements of international law has not been upset by a denial of justice against which there is no effective appeal.

¹ "The umpire does not conceive that any government can... be made responsible for the misconduct of an inferior judicial officer when no attempt whatever has been made to obtain justice from a higher court." Thornton, U., in the *Jennings, Laughland & Co.* case, (U. S. v. Mexico), Moore, *Arbitrations*, p. 3135 at p. 3136. See also the *Burn, Pratt, Ada and Ana* cases, *ibid.*, pp. 3140, 3141, 3143 and 3144, resp.; the *Mechanic* (United States v. Venezuela), *ibid.*, p. 3210; *Snow and Burgess* case, Dunn, *op. cit.*, p. 218; *Smith* case, *ibid.*, p. 219; *David J. Adams* case, (United States v. Great Britain), *Nielsen's Report*, p. 524 at p. 531.

Contra: Garrison and Fretz case, Dunn, *op. cit.*, p. 202; *Jonan* case, *ibid.*, p. 204.

² *Foulke*, *op. cit.*, p. 28.

³ *Decision* in the *Finnish Ships* case, p. 24. See also *Borchard*, *op. cit.*, pp. 240-241.

In this manner, respect is preserved for national autonomy and dignity with a consequent diminution of interstate friction. The local remedy rule is not only a rule of practical convenience — since the function performed by national courts considerably alleviates the burden of international jurisdictions¹ — but it is an indispensable balance-wheel between *municipal* control and *international* control, maintaining a desirable equilibrium between the jealously guarded prerogatives of State sovereignty (or rather the exclusive jurisdiction implied therein), and the superior exigencies of international law.² The value of the rule has been well perceived by M. Politis, who declared at the Hague Conference that the gravity and exceptional character of international responsibility, as well as the apparently privileged character which it confers upon foreigners in contrast with nationals, necessitated that the facts alleged as the violation of a State's international obligations should be doubly clear and certain. For this reason, he proposed that the rule should be made as wide as possible. "It is a guaranty for the State; it respects its independence; it makes it possible to avoid unnecessary disputes. Only those cases which are really worthy of consideration should be allowed to come before international courts."³ These observations should amply suffice to take the disparaging sting out of the remark that the plea that local remedies have not been exhausted "may perhaps not infrequently be regarded as somewhat technical." It is undoubtedly true, as Nielsen has said, that this plea is not concerned with the fundamental question whether a wrong was initially committed by authorities of a respondent government.⁴ But such a plea, although jurisdictional in character, is greatly concerned with the essential issue whether the international action is premature and whether an international tribunal should entertain it. Nothing is gained by designating the local remedy rule as a mere "technical defense."

3. Qualifications of the Rule. — It must not, however, be imagined from what has preceded that the concept of "exhausting local remedies" is a rigid, mechanical device which demands absolute

¹ Eagleton in *R. D. I. L. C.* (1935), p. 508.

² De Visscher, *op. cit.*, p. 423.

³ *Minutes*, p. 67.

⁴ Nielsen, C., dissenting, in the *International Fisheries* case, (*U. S. v. Mexico*), *Opinions* (1930-31), p. 239.

In order to be able to continue its work without delay, the Committee will be grateful to be put in possession of the replies of the Governments before October 15th, 1926.

The Sub-Committee's report is annexed.

Geneva, January 29th, 1926.

(signed) Hj. L. Hammarskjöld,
Chairman of the Committee of Experts.
Van Hamel,
Director of the Legal Section of the Secretariat.

ANNEX REPORT OF THE SUB-COMMITTEE

M. Guerrero, *Rapporteur*
M. Wang Chung-Hui

1. *Whether and, if so, in what cases a State may be held responsible for damage done in its territory to the person or property of foreigners.*

* * *

Acts performed in the Exercise of Judicial Functions

If there is one general principle concerning which there can be no discussion, it is respect for the majesty of the law. As between self-respecting States, there can be no greater insult than to question the good faith of municipal magistrates in their administration of justice.

There are certain other principles as unquestioned and as widely observed as the above. For instance, the principle that all interference or claim to interference with the regular course of justice in another State is tantamount to attack on that State's internal sovereignty.

Here we have certain legal standards, as categorical as they are precise, created by the will of all countries as rules of conduct to be observed in all circumstances of the life of the international community.

As regards the duty of affording judicial protection to foreigners, it is sufficient that they should be granted a legal status, which they can assert through appropriate laws and independent tribunals to which they are allowed access on the same footing as nationals. Neither more nor less.

The decisions of these tribunals must always be regarded as being in conformity with the law. None but a judge of the country is entitled to interpret that country's law. Even if he makes a mistake his judgment must be accepted; the dignity of justice and the character of modern States demand this.

The opinion that a State is not responsible for a judicial error committed by its tribunals is so firmly implanted in the minds of nations that legal publicists in all countries have criticised — and often very harshly criticised — the arbitral award under which De Martens declared the Netherlands

to be responsible for the judicial error committed by its courts in the case of the Australian vessel *Costa Rica Packet*.

This is equivalent to stating that the community of nations admits no appeal against judicial errors other than that which the *lex loci* itself may afford to foreigners as well as nationals, and that, if no provision is made for appeal, both parties must acquiesce and cannot claim to invoke any responsibility at all on the part of the State in which the case was heard.

The same principle must apply to sentences which have been termed "unjust" or "manifestly unjust."

Nothing could be more dangerous than to admit the possibility of rehearing, elsewhere than in the courts of the country, a judicial decision alleged to be contrary to justice. An opening would thus be afforded for abuses of every kind, for the most serious violations of internal sovereignty and for countless international conflicts.

As States are at present organised, each being bound to respect the institutions of the others, any endeavour to create, at a given moment, a special court having power to overrule the national judicature would be unthinkable.

Unless we are ready to upset the one true basis of international law — the collective will of States — we will not entertain the supposition that States, when they entered the community, ever contemplated an abridgment of the dignity and authority of their own courts of law. That, however, would be the final result of rehearing a case where no provision for appeal existed under the legislation of the State concerned; and yet the advocates of the theory of international responsibility, in connection with judicial decisions vitiated by *manifest or flagrant injustice*, would inevitably be led to provide for some such rehearing.

Where would they find a *super-judge* competent to determine the existence of such injustice? And, supposing that they could discover such a personality, what would become of the principle of the equality of States, a principle on which the international community is based, and which cannot be disregarded without shaking the whole edifice of its foundations?

Moreover, to admit the possibility of international proceedings being brought in another country, in opposition to the original *lex loci*, would be contrary to the international rule under which nationals of a foreign State cannot claim more favourable treatment than nationals. This would, however, be the result if foreigners had an international appeal open to them in addition to the remedies offered by the national court.

We should not continue this reasoning any further had not a number of modern legal publicists unfortunately come forward in favour of this view of international responsibility. We must therefore persist in our argument, and we shall substantiate our contention — that no international recourse is admissible against municipal judgments — by quoting certain cases. These cases demonstrate the repugnance with which requests for intervention on these lines have almost invariably been received.

In 1885, when the Government of the United States of America received a request of this kind, the Secretary of State, Mr. Bayard, sent a letter to the American Minister in Mexico in which he said: "This Department is not a tribunal for the rehearing of decisions of foreign courts, and we have always laid down that errors of law and even of fact, committed by these tribunals, do not afford a motive for any intervention on our part."

Another American Secretary of State, Mr. Marcy, adopted a similar line in writing to the United States Minister in Chile, Mr. Starkéatter: "Irregularities committed in the case of an American citizen in Chile, unless they amount to a *refusal of justice*, afford no grounds for intervention by the United States."

When Great Britain and Portugal submitted to arbitration the question of the alleged *manifest injustice* of a decision given by the Corte de Relação, the arbitration tribunal stated: "While we unhesitatingly admit that the decision was erroneous, we cannot agree that it was manifestly unjust. It would be manifestly unjust to hold the Portuguese Government to account for faults imputable to the courts of that country. According to the Portuguese constitution, these courts are absolutely independent of the Government and therefore the Government can exert no influence over their decisions. The British Government cannot disregard this fact without at the same time disregarding the whole existence of Portugal as a civilised State, and that is obviously not the intention of the British Government."

As these views were expressed in cases in which the party concerned happened to be a small State, we can well imagine the reception which a great Power would accord to a claim to hold it responsible for an unjust decision given by its magistrates.

In every State the independence of the judicature and respect for the law are recognized as such fundamental principles that even when the courts are called upon to apply the rules of private international law, which, as a result of an international treaty, fall within the scope of the State's own laws, they are not made a subject in doing so to the supervision of their Government (resolution of the Institute of International Law at its session at The Hague in 1875).

Another theory which is quite as inadmissible is that international responsibility is incurred through abnormal delay in the administration of justice.

No State can claim to possess courts so efficient that they never exceed the time-limit laid down in the laws of procedure. The larger the State, the greater the number of cases brought before its judges, and consequently the greater the difficulty of avoiding delays, sometimes quite considerable delays.

If we agree that the State is responsible neither for judicial errors nor for the manifest injustice of judicial decisions, nor for abnormal delay in the administration of justice, are we to infer from this that the State has

no responsibilities in regard to the manner in which it dispenses justice? Certainly not. Its international responsibility may become seriously involved.

We have already shown that the State owes protection to the nationals of foreign States within its territory, and must accord such protection by granting foreigners the necessary means for defending their rights. But these means can only be such as are made available by the laws and courts of the country and by the authorities responsible for public order and security.

In the case in question the State would not be fulfilling its duty towards other States if it did not allow foreigners to have access to its courts on the same terms as its own nationals, or if these courts refused to proceed with an action brought by a foreigner in defence of the rights which are granted to him and through the means of recourse which are provided under the domestic laws.

Such responsibility would arise as the result of *ad enial of justice*.

In saying "on the same terms as its own nationals", we desired to emphasise the necessity of equality as regards access to the means of recourse open to all persons under the same jurisdiction. Thus, if the nationals of a State are allowed to appeal from the decision of a court of first instance, the same privilege must be accorded to foreigners when their recognised rights are in dispute.

The decision of a judicial authority, in accordance with the *lex loci*, that a petition submitted by a foreigner cannot be entertained should not, however, be regarded as a *denial of justice*. The State has fulfilled its duty by the very fact that the local tribunal has been able to give a decision regarding this request.

Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, although, in the circumstances, nationals of the State would be entitled to such access.

In conclusion, therefore, we infer that a State, in so far as it is bound to afford judicial protection, incurs international responsibility only if it has been guilty of a *denial of justice*, as defined above.

* * *

VI

*Conclusions*¹

The conclusions we are about to draw are the logical outcome of the principles by which we have consistently been guided in preparing this

¹ As reproduced here, the conclusions of the report contain amendments made by M. Guerrero as a result of the discussion in the Committee of Experts.

report — and which we hold to be the only possible basis for the elaboration of rules likely to secure the approval of all States.

Were we to depart from these guiding rules, were we to seek to codify principles regarding which the collective will is uncertain or actually divided, our endeavours would be useless; indeed, we should be encouraging the establishment of a series of continental systems and codifications of law — which already exist in outline — the sole result being to create unending sources of disagreement.

We should not lose sight of the fact that the object of our task is to establish rules which may be embodied in international conventions, and that these conventions, to be effective, require the consent of all, or nearly all, the countries of the world.

These are our conclusions:

* * *

6. The duty of the State as regards legal protection must be held to have been fulfilled if it has allowed foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights.

It therefore follows:

(a) That a State has fulfilled its international duty as soon as the judicial authorities have given their decision, even if those authorities merely state that the petition, suit or appeal lodged by the foreigner is not admissible;

(b) That a judicial decision, whatever it may be, and even if vitiated by error or injustice, does not involve the international responsibility of the State.

7. On the other hand, however, a State is responsible for damage caused to foreigners when it is guilty of a *denial of justice*.

Denial of justice consists in refusing to allow foreigners easy access to the courts to defend those rights which the national law accords them. A refusal of the competent judge to exercise jurisdiction also constitutes a *denial of justice*.

* * *

(Signed) Gustavo Guerrero,
Rapporteur.

APPENDIX III

ACTS OF THE CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW

(Held at the Hague from March 13th to April 12th, 1930)

MINUTES OF THE THIRD COMMITTEE

Responsibility of States for Damage caused in Their
Territory to the Person or Property of Foreigners ¹

NINTH MEETING

Wednesday, March 26, 1930 at 4 P.M.

Chairman: M. BASDEVANT

17. CONSIDERATION OF BASES OF DISCUSSION Nos. 5 AND 6.

The Chairman :

Translation: To-day we have to take up the consideration of Bases of Discussion Nos. 5 and 6. ...

If you refer to the observations contained in the Brown Book, (Document C.75 M.69.1929.V) you will notice that the Preparatory Committee, when it drew up Basis No. 6, intended particularly to provoke a discussion, as it noted that, on the points covered by this basis and on other points more or less related thereto, there were great divergences between the replies submitted by the various Governments. That is not surprising, since this problem of the State's responsibility arising out of acts of the judicial authorities is so complex.

I would remind you of the principles this Committee has adopted by decisions that were unanimous, save perhaps for a few abstentions which were rather in the nature of temporary reservations.

Those principles are that international responsibility presupposes three

¹ Official No.: C.351(c).M.145(c).1930.V., pp. 103 ff.

essential factors: first, damage; second, an act or omission imputable to the State; third, an act contrary to international law.

As regards the second factor, there is no difficulty: the Courts are obviously organs of the State.

As to the damage, when we consider the problem of the State's responsibility on account of the procedure, acts, decisions or possible negligence of its judicial authorities, it should be noted that damage may occur in two ways. Damage may be caused by a private individual to a foreigner. In that case naturally there is, in principle, no responsibility on the part of the State; but it is the State's duty to ensure foreigners remedies such as may rightly be expected from it. If, by chance, the State has in any particular case failed to ensure such remedies, its responsibility is involved. That is clearly seen in the elementary case of a refusal to judge.

There is, however, another possibility. The damage may, if I may so put it, be caused directly by the Courts. Suppose, for instance, that either in a criminal or in a civil case, a judge, in giving a decision, exceeds his authority according to international law. That was the position in the *Costa Rica Packet* case. In those circumstances there is no denial of justice, but solely an infringement of international law which involves the State's responsibility.

The third factor, if there is to be any responsibility at international law, is the performance of an act which is unlawful according to that law. We must be quite clear on that point. Everybody agrees that an error on the part of a judge is not enough to involve a State's responsibility. That view is in harmony with practice and with the decision of international courts. International responsibility can arise only if in the operation of the Courts there is shown to be some failure to comply with the State's international obligations. Thus when, as the result of a claim, a case of this kind happens to come before an international judge, the latter — and this point must not be overlooked — is not at all in the same position as a judge of appeal. He does not consider the case from the same point of view. He has to consider one point only: was there, on the part of the national judge, any infringement of the State's international obligations?

That is how the problem should be stated. It is more complex and more delicate than the problems we have hitherto considered. I shall not consider it more deeply. I wish merely to remind you of principles on which there can be no hesitation. I think I have classified the questions rather than tried to solve them. I declare open the discussion of Bases Nos. 5 and 6.

Abd El Hamid Badaoui Pacha (Egypt):

Translation: The special position of the judicial power seems to have made it somewhat of a residuary power. When an act cannot be ascribed to any other organ, it is ascribed to the judicial power. I would, in

particular, point out that, under the name of denial of justice or something more or less similar to denial of justice, there is a tendency to consider a judicial decision which correctly interprets a legislative provision that is itself incompatible with international obligations as an act imputable to the judicial power. In my view, the decision of the judicial power is merely the occasion which demonstrates the legislator's infringement of his international obligations.

Further, the fact that the judicial organisation does not offer sufficient guarantees has also been held to be imputable to the judicial power. Here again the failure is merely on the part of the legislator, whose duty and responsibility it is to enact laws laying down the principles of that organisation and providing for its mechanism.

I pass over other infringements, which are often wrongly imputed to the judicial power, and I come to paragraph (2) of Basis No. 5 by which the State is made responsible for a judicial decision which is final and without appeal and is incompatible with the treaty obligations or other obligations of the State.

This paragraph is, as it were, inserted between two forms of denial of justice. On the one hand there is the refusal to allow a foreigner access to the courts and, on the other hand, there is unconscionable delay on the part of the courts, which is assimilated to denial of justice. In their different forms these two cases represent the idea of denial of justice. They should therefore be connected with each other in order to bring out the fact that denial of justice is an infringement of an international obligation.

But is the judicial power under any international obligation whatever, apart from the obligation not to commit a denial of justice? In my opinion there is no other obligation. The obligation to ensure an effective administration of justice or the prohibition of a denial of justice is an obligation which is essentially international in character. It is the only obligation incumbent upon the judicial power. Whether denial of justice be understood in a narrow sense or in an extremely wide sense, it is in point of fact the only infringement that can be ascribed to the judicial power.

As to other obligations, let me take the typical example afforded by the question of the treatment of foreigners. In the subject with which we are concerned, this really constitutes the very basis of all international obligations incumbent upon the legislature, the judicial power and the executive power. This question of the treatment of foreigners was to have been the subject of a Convention at the Paris Conference, which, however, did not achieve its purpose.

But suppose the question had, in fact, been embodied in a Convention laying down the State's obligations in this respect. Suppose, further, that a final judicial decision, in a case in which a particular foreigner was concerned, had involved an interpretation, of one of the provisions of that

Convention. The State to which that foreigner belongs does not accept the interpretation which it thinks to be entirely wrong. If the basis be accepted as it stands, it would in such a case be possible to bring the question before an international court. But, if the judicial power has any well-recognized prerogative, it has surely the right to make a mistake.

This right to give a mistaken judgment is removed by paragraph (2), since that paragraph would make it possible for one of the States concerned to invoke the responsibility of the other on the ground of an interpretation which, though mistaken, was merely an interpretation or appreciation of facts. Yet the matter at stake would be solely a question of false interpretation or violation of interpretation and in no sense a question of denial of justice in the strict sense of the term.

The objection may be raised: "But will you leave international treaties and international conventions at the mercy of national courts, which may make as many mistakes as they like and may distort and misconstrue them?" I say: "No, I do not leave them in that position, but I do not make them a matter for judicial responsibility. I make them the cause of direct responsibility and of direct discussion between States."

According to the Statute of the Permanent Court, one of the matters that may be submitted to international arbitration is the interpretation of a treaty. If, on any particular point in an international convention prescribing the State's obligations, the judicial power gave an interpretation that other States did not accept, that very fact would be a reason for international proceedings. This would, however, be quite independent of the fact which gave rise to that final decision. The decision given by the international court will be law, but it will be so from the time at which it is given, and not retrospectively, with regard to the matter which led to the international proceedings.

If paragraph (2) of this basis is to be retained, I do not see any reason for speaking of denial of justice, since, in accordance with its international obligations, a State is necessarily bound never to deny justice to foreigners. If paragraph (2) is to be understood in its most general sense, I really wonder whether there is any need to mention the special case of denial of justice. Why should we waste time over the meaning and scope of denial of justice, since, even in its widest sense, it is always an infringement of an international obligation?

Thus, denial of justice could be the only reason for that indirect international responsibility which is designed to ensure compensation to a State for acts of the judicial power. A wrongful interpretation which violates an international obligation can never be the cause of international responsibility from the standpoint we are now considering; otherwise, we should definitely take away the judicial power's right to make a mistake, its right to deliver sovereign decisions on questions of interpretation.

All judicial decisions concerning foreigners would, if the States to which those foreigners belonged did not accept them, be liable to be taken before an international court. This view of the matter in no way deprives the State concerned of its means of rectifying the results of an erroneous judicial decision, because it might simply start proceedings with regard to any other obligation or the interpretation of any other provision of an international convention. As, in a disputed question, the attitude of both parties may be justified, it is from the time when the international court decides the law that the law is determined and is binding on the State. Once the point of law has been settled, there would clearly be a case of infringement of an international obligation if the courts continued in their error, or if the State did not take precautions to confirm the judicial interpretation by a legislative interpretation which its courts would be bound to apply. Such a legislative interpretation would be the surest means, if the State feared that its courts might persist in their error even after the international decision.

If ever national judicial decisions in the same sense were repeated after a contrary international decision, there would be an infringement of a well-defined international obligation. Thus, if the question be considered from this standpoint, we should avoid many causes of friction between States which would certainly disturb international relations and impede the proper application of any ultimate convention on the question of international responsibility.

The question of denial of justice itself will have to be considered during this discussion. It involves two ideas that are absolutely different. First there is the *formal* idea, the scope of which is limited to the simple fact of the refusal to give justice, or, in more precise terms, the refusal to allow access to the courts. If need be, we may add the somewhat similar idea of unconscionable delay. Secondly, there is the extremely wide *material* idea that there is a denial of justice whenever a decision is manifestly unjust. That is the theory adopted and supported by the United States of America. This Basis of Discussion seems to some extent to acquiesce in this view, for paragraph (4) speaks of a judicial decision prompted by ill-will towards foreigners as such, or as subjects of a particular State. Basis No. 6, too, applies this idea in very vague terms.

Personally, I should not think we were unreasonable if we decided to direct the progressive codification of international law towards making the formal idea of denial of justice wider and more elastic. Accordingly I should readily admit the case where a decision was manifestly prompted by ill-will towards foreigners. The very grounds of the decision would, I assume, clearly reveal that ill-will.

I should, however, hesitate to adopt Basis No. 6, as on the one hand that basis would make a State responsible, not on the ground of any act or decision by its judicial power, but on the ground of the judicial organisation itself, and that would be a repetition of Basis No. 2; while on

the other hand I should hesitate because this basis might imply that, whenever any State considers that a decision affecting the interests of its nationals is incorrect, that the procedure followed has not been satisfactory, or that the decision shows a tendency to partiality (even though that tendency cannot be described as definite ill-will), the State may put forward a claim or may invoke the responsibility of the State whose courts have given the decision in question.

I think the course it is proposed to follow would be a very dangerous one. It is very difficult to trace any line of demarcation between errors or differences in appreciation and what is called a manifestly unjust judicial decision. In this connection we are concerned particularly with independent organs which receive no instructions or recommendations from any quarter, whose authority and prestige depend on the respect with which their verdicts are regarded and the finality of their decisions. Accordingly, I think it is very dangerous to open any way that might mean that decisions affecting the interests of foreigners would from time to time, and at the will of the States to which those foreigners belong, be submitted to an international judicial body apart from those formal or material considerations such as a refusal of access of the courts or unconscionable delay (a question merely of computing time, which is a simple matter), or, finally, direct ill-will revealed by the very grounds of the decision. Beyond those limits I see no safety. All decisions affecting foreign interests might, on the pretext of manifest injustice, be subjected to supervision or review.

The conciliation conventions and the particular arbitration conventions that were invoked when Bases Nos. 5 and 6 were drawn up are in no way contrary to the interpretation I have just given of infringements of international obligations in general.

In conclusion, I should like to ask the Committee to consider the following question. Many systems of law provide municipal remedies in the case of denial of justice. What will happen when there is in fact a denial of justice and when some State, acting on the grounds of the damage suffered by its national, takes proceedings with a view to invoking international responsibility? Should a foreigner not be compelled to exhaust the municipal remedies for denial of justice, and should not the possibility of invoking international responsibility be strictly limited to the case in which the municipal remedy for denial of justice — in other words the proceedings themselves — has failed to give satisfaction? I assume, of course, that the claimant State will argue, that the rejection of the appeal is itself a denial of justice and therefore confirms the former denial of justice which led to the appeal. In any case the remedy must be employed, but it need be employed only once, for there must be an end, sooner or later, and there can be no obligation to continue to employ remedies which have become useless or impossible.

I had one last observation to make concerning the judicial power. It

included in Basis No. 6. We have done this because there seems to be a very essential distinction between the two classes of cases.

All the matters dealt with in Basis No. 6 — and I am referring now to the basis my delegation has proposed — deal with the responsibility of a State for a failure to fulfil the general fundamental obligation to provide means for the protection and enforcement of rights, to provide a law of procedure and tribunals which come up to that very general — indeed, not very exacting — international standard of justice and efficiency.

The term “denial of justice” is often used to cover the whole of that conception. Whether it is rightly so used, as a matter of terminology, I do not stop to consider. From the point of view of terminology, one may very easily criticise the use of the term in such a wide sense. Still, it is often used merely for convenience to cover all the cases included in this broad idea, that is to say, the cases where, in a given instance, the result shows that, either by the fault of the law of procedure, or it may be the fault of the judge — it may be one or the other — in that particular case the State has not come up to that minimum standard. Therefore, if we use for convenience the expression “denial of justice” in that very broad sense, my Basis No. 6 is an attempt to explain or amplify the cases covered by that conception.

Now I would like to turn to what is contained in Basis No. 5 of our draft.

It sometimes happens that a municipal court has to deal, even in a matter between private persons, with a question of public international law. It is not the usual case; speaking generally, it is comparatively rare, but sometimes it does happen. It may happen, for instance, in at least three types of cases. The court may be in effect interpreting a treaty.

Let us take as an example, say, a copyright convention, where a State has undertaken to give certain protection to copyright under certain conditions in its country. Of course, such protection has to be exercised through the courts, and in a given case, the court gives an interpretation, either a direct interpretation of the treaty (or the legislation implementing the treaty — this point is immaterial) which is in conflict with the convention.

Another case is that in which some question of immunity from the jurisdiction arises. It may be diplomatic immunity; it may be immunity which one sovereign State always has from the jurisdiction of another; or it may be a case of excess of jurisdiction, the exercise of jurisdiction in a case where the State does not possess any. We all remember, for instance, the *Lotus* case. Actually, it was held that in that case there was jurisdiction. But supposing the decision on the question of law had been the other way: there would then have been responsibility for the exercise of jurisdiction by the courts in a case where the State had no jurisdiction.

Another case of this kind is that in which an act has been committed against a foreigner, by an official or an organ of the State, which is con-

trary to international law, and the foreigner is pursuing his municipal remedy, as he must, and the municipal remedy fails to give any redress.

It seems to me that in these cases, where the municipal court is in effect deciding some question of public international law, the responsibility of the State is engaged if the decision is contrary to international law, and not, as in all the other cases, where there has been a denial of justice in the broad sense of the word. It seems to me that there is a clear distinction between all the other cases and the cases where the actual point, the issue which arises before the tribunal, is an issue turning directly on public international law. Where you have a question of public international law no State can set up its own opinion, or the opinion of its courts, as being final against anybody else. It is a question of international law, and therefore on such questions the decision of the international court must be the final one.

Now, in these cases, where a question of public international law is involved, it generally happens that it is only involved as one of the issues. First of all, there is the appreciation of the facts and, it may be, an appreciation of municipal law as well. Therefore, I maintain that, so far as the court is merely giving a decision appreciating the facts and coming to a decision on a question of fact, then of course you can only attack that decision on the very general grounds set out in Basis No. 6. It is only so far as the actual question of international law is concerned that the international court can virtually act as a court of appeal to the municipal court. The other qualification which is also important is that such a decision to create responsibility must be final and without further appeal being possible. All means of appeal must have been exhausted right up to the last court to which an appeal can be brought.

Now the cases in Basis No. 6 to my mind are absolutely and entirely different. Here you have the court applying its own municipal law, or fulfilling its ordinary duty of appreciating and coming to conclusions on questions of fact, or, it may be, applying private international law; it is all the same. In those cases there is certainly no international responsibility merely on the grounds that the court has come to a wrong conclusion on a question of fact. No international tribunal can presume to say whether the final court of appeal in any country has or has not rightly interpreted its own law. Indeed, in a recent interesting case, that of the Serbian bonds, before the Permanent Court of International Justice, the Court said most clearly that it would not presume or attempt to do that. It did not consider that to be within its functions, because it thought it was its duty as an international court, to hold that to be the municipal law which the final court of the country in question had proclaimed. If the final court of a country declared the law of that country, then the international tribunal must accept that as the law.

In all the cases covered by Basis No. 6, the responsibility of the State is only engaged if there has been, in the broad sense of the term, a denial

of justice. Responsibility only arises if it can be shown that the result of the proceedings is so clearly contrary to the elementary principles of justice that it constitutes an instance of the failure of the State to comply with the general fundamental obligation to provide a certain measure of justice and law within its territory.

It is a very difficult allegation to prove and one which cannot be lightly made. Still, there are cases where it happens. I will only give one instance which occurred a long while ago and which I recently read. A ship was coming into a port of a certain country and, when entering the harbour, it upset a little boat containing a couple of people rowing in the harbour. It was a pure accident and the navigating officer of the ship may or may not have been negligent, but that officer was arrested when he came on shore and prosecuted for murder; that is to say, he was prosecuted for the deliberate intention of killing two people in a boat which he never saw, never had seen and could have had no possible intention of harming at all. He was tried and ultimately the supreme court quashed the charge, but on that disgraceful accusation he remained for many months in prison under trying conditions.

These are very exceptional instances, but I hold that the State is liable in such cases under the grounds set out in Basis No. 6. You may call it, if you like, denial of justice, or you may give it another name.

Taking the formulation of Basis No. 6 as we have put it here, I should like, if I may, just to say a word about it, emphasising all the time that I by no means attach any particular weight to the wording at all. We have put it in this way:

“ A State is responsible for damage suffered by a foreigner as the result of the fact that by reason of defects in its laws of procedure or in the action of its courts in applying them... ”

It is necessary to make one point clear. It is not always the judge who is at fault, as Badaoui Pacha has said; it may be the legislature in laying down a faulty procedure under which justice cannot be had. But, from the point of view of responsibility, ultimately it is immaterial which of the two is responsible. Now here is No. 1:

“ He is not afforded in the courts a reasonable means of enforcing his rights, or is afforded means of redress less adequate than those afforded to nationals. ”

We deliberately say: “ less adequate ”, instead of “ being the same ” because there may be minor differences. The point is not that they should be exactly the same but that in their efficiency they should be not less adequate.

Then comes No. 2, which follows really the Preparatory Committee's draft:

“ A procedure is followed, or a judgment final and without appeal is rendered, vitiated by faults so gross as to be incompatible with the obligation of the State to provide a reasonably efficient judiciary and the guarantees indispensable for the proper administration of justice. ”

And Nos. 3 and 4 are as follows:

“ A decision is given which has manifestly been prompted by ill-will towards foreigners as such or as nationals of a particular State, or was due to corruption or pressure from the executive organs of the Government. ”

“ There has been unconscionable delay on the part of the courts. ”

Therefore, to conclude, there do appear to me to be these two entirely different classes of cases. Of course, you might include them all in one short sentence, if you like. You might include them all in a sentence saying that a procedure is followed or a decision is given which is contrary to the international obligations of the State. I fully realise that such a formula would cover everything, because even in the cases covered by Basis No. 6 the ground there is a failure to fulfill an international obligation — namely, the general international obligation to provide justice coming up to the general minimum standard.

M. Nagaoka (Japan) :

Translation: In principle, the Japanese delegation approves of Basis of Discussion No. 5. It has, however, proposed certain modifications, for the sole purpose of making the text clearer. I shall not take up the Committee's time by entering into any long explanation. With regard to paragraph (1) of this basis, however, I desire to make the following statement:

I understand that the provisions of this basis are not incompatible with the Imperial Procurator's right to decide, in accordance with paragraph 279 of the Japanese Code of Penal Procedure, not to sanction a prosecution. The paragraph in question says:

“ If, in view of the character, age and position of the accused persons and also of the circumstances connected with the delict and circumstances arising after the delict, the Imperial Procurator considers that prosecution is not necessary, he may refuse to sanction such prosecution. ”

Further, if a court rejects a request for a prosecution which is directly addressed to it by a foreigner (because, in Japan, a private individual is not entitled to prosecute), such action on the part of the court shall not be deemed to come within the terms of paragraph (1) of Basis of Discussion No. 5.

I request that this statement should be recorded *in extenso* in the Minutes.

M. d'Avila Lima (Portugal) :

Translation: The underlying principle of Basis No. 5, and particularly its earlier paragraphs, raises one of the clearest and, at the same time,

most delicate problems concerning the judicial organisation both from an internal and external point of view.

On the one hand, judicial equality rather than juridical equality has been accepted by the international community. But, on the other hand, we must determine how far and on what grounds foreigners are entitled to protest against the municipal judicial organisation of any State. Notwithstanding the claims made by certain schools of political reformers, who would abandon the old theory that the general structure of the State depends on the separation of the public powers, one postulate is still admitted — namely, that of the independence of the judicial power.

But (and here we begin to see the first compromise — quite a legitimate one — with the supreme requirements of the international community) the necessary conditions for the independence of any judicial system and the respect paid to such a system are directly dependent on the guarantee it furnishes for impartial, well-founded and just decisions. There must be equal justice for nationals and foreigners. There can be no doubt as to that principle, the means by which and the purposes for which it is applied. Hence, we may rightly and formally condemn any evasion and any form of denial of justice, for that would be a flagrant transgression of the most elementary demands of that legal heritage which, as it belongs to the family of nations, belongs also to any civilised society.

When may it be claimed that there has been denial of justice and when may a sovereign State be held responsible therefor? In our opinion, the first condition for any such claim must be the proof by the party concerned that he has appealed to all stages of the judicial organisation and that he has neither renounced nor overlooked any possibilities for securing redress. In the second place, we must distinguish between judicial decisions which merely disregard the elementary principles of justice and those which imply an infringement of international rules. It is only in this latter case that we hold that the State's responsibility clearly exists (Article 36 of the Statute of the Permanent Court).

It is more difficult to recognise and to lay down rules regarding cases of *error juris* and *mala fides*. All judicial systems in the world worthy of the name "progressive" provide remedies and means for claiming and proving that there have been formal errors.

Apart from quite exceptional cases — such, for instance, as proved ill-will towards foreigners and particularly towards the nationals of individual States — we think it dangerous and even wrong to adopt any clause which, in a general way, satisfies the claims mentioned above.

In conclusion, the State's responsibility for its judicial organisation is governed particularly by the following consideration: A State must be deemed to have fulfilled its duty when its courts offer all the necessary guarantees for impartiality and independence and when it grants to foreigners the right to take action and brings guilty parties before the judicial authorities.

M. Cavaglieri (Italy) :

Translation: As the Italian delegation desires to expedite the Committee's work as much as possible, it will limit itself to some very simple statements which are prompted by its spirit of conciliation and which seem likely to secure the greatest measure of agreement concerning Bases of Discussion Nos. 5 and 6.

The Italian delegation definitely supports the fundamental principle underlying these two bases — namely, that a State is responsible for the acts of its judicial power. The bases we have already considered referred to acts of the legislative power and of the executive power.

We must now consider acts of the judicial power.

In this connection, we cannot accept the idea expressed by several authors that a State is not responsible for acts of the judicial power owing to the independence which is a feature of that power. The independence of the judicial power is a fundamental principle in municipal law and in constitutional law, but is irrelevant in international law. According to international law, the acts of a State's judicial power are on the same footing as those of its legislative power or those which are simply administrative acts. Consequently, they involve the State's responsibility when they are contrary to the international obligations undertaken by the State.

The difficulty is to determine the cases in which a State is responsible for wrongful acts of the judicial authorities.

Of all the amendments submitted, the Italian delegation prefers the proposal of the Austrian delegation both for its learnness and for its conciliatory spirit. We think that proposal gives the solution of the problem before us in its simplest and clearest terms. It distinguishes clearly between the two cases in which a State is responsible for the acts of its judicial power. It says:

“ A State is responsible for damage suffered by a foreigner as the result of the fact that:

- “ 1. A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State;
- “ 2. There has been a denial of justice. ”

In the first case, that is to say, a judicial decision which is final and without appeal and is incompatible with the State's international obligations, we think there can be no doubt. If a final decision is contrary to a State's international obligations, whether they result from a treaty, from a principle of customary law, or from any other source, the State is certainly responsible.

The State is not bound to ensure to foreigners that the terms of a judicial decision shall be applied. Its duty is merely to provide them with regular and equitable judicial means of enforcing their rights.

The situation is different, however, in the exceptional case where the

terms of a final judicial decision are contrary to the obligations of the State concerned.

We could without difficulty give a large number of examples of this principle which, in our view, admit of no doubt. Suppose, for instance, that a final judicial decision denied to an ambassador or foreign diplomatic official the privileges that are ensured to him by the best-known and most widely recognised principles of international law. That would be a case in which the State is responsible, since the final judicial decision would be incompatible with the State's international obligations.

Other cases might easily be imagined. Suppose, for instance, that a State has undertaken by treaty to ensure certain rights to foreigners and that those rights are denied by a final judicial decision. That final decision on the part of the judicial organs of the State would be contrary to the state's international obligations.

I will give one more example before passing to the next point. Suppose that a State has recognised another Government. That recognition implies certain consequences. Suppose, further, that a final judicial decision in that State is at variance with that recognition as regards one of its consequences — for instance, as regards the laws of the Government recognised.

Those are cases in which a final judicial decision is certainly incompatible with the State's international obligations. We do not think there can be any doubt on that point.

A much more difficult case is mentioned in point 2 of the Austrian amendment, which the Italian delegation supports. It is the case of denial of justice. The Austrian delegation stops there. Indeed, if we think of all of the arguments and all the disputes that may arise with regard to the definition of denial of justice, we shall perhaps think it wiser to stop there.

Nevertheless, we consider that there are certain cases of denial of justice on which no doubt is possible. The first of these cases is that referred to in paragraph (1) of Basis No. 5 — the case in which a foreigner is refused access to the courts to defend his rights. We know how difficult it is to define a State's obligations towards foreigners, but if, amongst the few principles already recognised in this connection, there is one which seems absolutely certain and indisputable, it is, I think, the foreigner's right to judicial protection. Any State which denied that right would undoubtedly be infringing an obligation imposed by international law.

In a spirit of compromise, the Italian delegation would be prepared to abandon paragraphs (3) and (4) of Basis No. 5, which refer to "unconscionable delay on the part of the courts", and "the substance of a judicial decision manifestly prompted by ill-will toward foreigners as such or as subjects of a particular State." These two principles clearly contain much that is true, but we are bound to admit that they may lead to very divergent interpretations and to barely justifiable claims.

The Italian delegation could not, however, abandon the fundamental principle contained in Basis No. 6. We know how difficult it is to prove that the damage suffered by a foreigner is the result of the fact that the court has not offered all the guarantees indispensable for the proper administration of justice. We are almost bound to judge each case on its merits. Nevertheless, we think the principle is indisputable. If, through the composition of its courts or through its procedure, a State makes possible a decision which does not offer the minimum guarantees for the proper administration of justice which are inseparable from the idea of civilisation, we consider that it is guilty of a denial of justice and must be held responsible therefor.

In conclusion, the Italian delegation supports the fundamental idea that a State's responsibility may be involved by certain acts of its judicial power. It thinks that, when a final judicial decision is incompatible with a State's international obligations, the State is undoubtedly responsible. It thinks, further, that a State is responsible in the case of denial of justice, and that there is undoubtedly a denial of justice when a foreigner is refused access to the courts to defend his rights. It thinks, finally that there is denial of justice when a court does not offer the guarantees for the proper administration of justice which are inseparable from the very idea of civilisation.

* * *

20. CONSIDERATION OF BASES OF DISCUSSION Nos. 5 AND 6...¹

M. Leitmaier (Austria):

Translation: I had, I confess, prepared a lengthy speech in support of the Austrian proposal; but since the Italian delegate has been good enough to explain the meaning of that proposal and to give reasons for it much more clearly and much more eloquently than I myself could have done, I have only to thank him for the valuable support he has kindly given us.

M. Sipsom (Roumania):

Translation: Can the judicial power, in the performance of its jurisdictional function, involve the responsibility of the State through its decisions? That is the question we have to consider with regard to Bases Nos. 5 and 6, which are now before us.

In principle, the judicial power cannot, through its acts, involve the responsibility of the State, for the judicial power is not an organ for the fulfilment of obligations. In its function, which is to enunciate the law, it does not represent the State. All that can happen is that this jurisdiction may decide wrongly: it may give what is called an erroneous judgment.

Can a State, on the ground of such an erroneous judgment, invoke

¹ *Op. cit.*, pp. 112 ff.

another State's responsibility for the non-fulfilment of international obligations? No. What can happen then? Undoubtedly, when the judge's decision fails to recognise a law which has nevertheless been recognised by international undertakings, those obligations remain unfulfilled. The State is undoubtedly responsible for the non-fulfilment of an obligation, but not on the grounds of its judge's decision.

Consequently an erroneous decision is not of itself a cause of responsibility. Even if it is admitted, it is solely a municipal matter. It does not affect the rules of international law, as, in general, the courts are not asked to appreciate or deduce the rules of international law or the international obligations of States. The international relations between States do not theoretically come within the jurisdiction of municipal courts. There are, indeed, systems of law (our own, for instance) in which the judge is not asked to decide — is not allowed to decide, in fact — what is involved by the execution of an interpretation of a treaty. This, as in French law, constitutes a governmental act, which the judge is not allowed to criticise.

Hence it is incorrect to say that the State can incur any responsibility through acts of the judicial power in its jurisdictional capacity. The State is sometimes responsible through the non-fulfilment of its international obligations, but not through the judge's decision.

The only remedy against an erroneous judgment is afforded by the higher courts of the State, and is therefore identical with the remedy granted to a national of the country. The courts cannot treat foreigners differently from nationals.

This principle is admitted in the Roumanian Constitution; that is why I refer to it. From the standpoint of jurisdiction and of civil rights, foreigners are granted the same rights, under the same conditions, as nationals, but no more. That is the limit beyond which we cannot go.

Accordingly, if a national has no remedy against a decision of the municipal courts other than that offered by the higher courts, we cannot conceive of any further remedy being granted to foreigners.

That is my view, and I think it represents the maximum concession we can or ought to make to the equivalence of rights as between foreigners and nationals.

Accordingly, we cannot understand how anyone can claim that the State may incur responsibility through its jurisdictional function.

I come now to the second point. The courts sometimes exercise the right to give orders. Some of their acts do not come within their jurisdictional capacity. Those acts may give rise to damage. Is there any responsibility?

Suppose an examining magistrate or a public prosecutor takes certain measures against a foreigner. The courts act thus in pursuance of their right to give orders. If a foreigner suffers damage, can the State be held responsible?

The question must be solved, I think, by applying the idea of correlation in the responsibility for the actions of the courts towards nationals and towards foreigners. If there is any municipal remedy against abuse or error, I agree that it should be granted equally to the foreigner, but I cannot agree that more should be granted to him than to the national.

The theory of risks may again be invoked, and it may be claimed that the State ought to insure the foreigner against all the risks he is likely to incur within its territory. Thus, any mistaken, irregular or wrongful act on the part of the courts would entail damage, for which reparation should be made.

I think this theory of risk goes somewhat too far. I can understand that a person who starts an enterprise should bear the risk. He undertakes certain things: he must bear the risks.

I can understand, too, that the person who profits by anything should bear the risk. An employer, the head of a great industry, employs many workers. He profits by their work; he ought therefore to bear the risks incurred by all his workers.

But, if we admit the kind of risk which is associated with an enterprise which is inherent in the idea of profit, can we go farther and contemplate a risk that is imposed upon someone, that is to say, a risk without any corresponding profit?

Why should the State be bound to assume this obligation to insure any foreigner who cares to come within its territory when the foreigner knows perfectly well the extent of the guarantees offered by that State? Such a foreigner runs a risk; he derives advantage and profit. He ought to run the risk of being treated differently from the way in which he thinks he would be treated under a system of ideal justice.

There have already been many attempts to frame new theories of the judicial system, but they are not yet definitely accepted. An attempt has been made to construct a theory of insurance, of State responsibility based not on imputability but on risk. Such a view might, at most be approved at municipal law, but never at international law.

We must try to follow the evolutionary process and adapt ourselves to it. There are indeed, new theories to explain the ultimate nature of the State. They say it is a congeries of public services with an obligation to conduct the undertaking in a fitting manner. Accordingly, any public damage suffered by an individual should be made good by the whole of the taxpayers, that is to say, from the proceeds of taxation. The charges to be borne by the society are collected from members of the society. That could be understood as a division of public burdens between the individuals composing the same State, provided we accept this theory, which I think a bold one. But to extend this theory to foreigners, or rather to create it for their benefit, goes, I think, beyond the bounds of any possible legal theory. The reason for which such rights might be granted to the

members of a community is that they share in all the burdens of that community. They pay taxes, it is their activity which constitutes the capital from which compensation may be paid to the person who has run a risk. But for a person to claim that he is insured whereas he makes no contribution seems to me inadmissible. Accordingly, I do not think we can consider this second principle, and consequently I do not see how the State can have any responsibility towards foreigners on account of the way in which the judicial power operates, provided that power shows no partiality as between nationals and foreigners.

I turn now to Basis No. 5, and I can readily support the Italian proposal to accept the following part of that basis:

“A State is responsible for damage suffered by a foreigner as the result of the fact that he is refused access to the courts to defend his rights.”

Such a refusal would undoubtedly be a denial of justice. The State's international responsibility may be involved through that fact, provided the same right is accorded to nationals. But if the right to bring a certain case before the courts is not granted to nationals, it would be unreasonable for a foreigner to claim that he has been the victim of a denial of justice through the application of the common rule.

The State is also responsible for damage suffered by a foreigner as the result of the fact that a judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State. I accept that principle, but not as the direct consequence of the decision given by the judicial power. I accept it on the ground that the State has not fulfilled its international obligation, but the nonfulfilment of the obligation cannot be attributed to the courts, for it is not the duty of the judiciary to define or fulfil the State's international obligations.

As to paragraphs (3) and (4) of Basis of Discussion No. 5, we think they should be omitted. Paragraph (3) refers to “unconscionable delay on the part of the courts.” That would lead us to enter upon investigations that we should not undertake. I might go so far as to admit that, if such delay were only a cloak for a denial of justice, if it were absolutely tantamount to a denial of justice — and that would be a very serious matter and would require to be clearly proved and never merely presumed — we might accept this principle; nevertheless I should prefer this case to be omitted.

Finally, I think paragraph (4) is quite unacceptable, for it would have the effect of allowing an enquiry, not only as to the correctness or otherwise of any particular judicial decision, but also as to the good or bad faith of the judges.

I come now to Basis No. 6, and I regret that on this point I am unable to support the Italian delegation. That delegation accepts Basis No. 6 on certain conditions. In my view it is unacceptable in principle. It says:

“A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice.”

That is a very serious proposal, and I do not think any State could accept it. What do these conditions mean if not the right to examine the way in which justice is organised and administered in any particular State? And who is to examine, inspect and investigate? The other States. If the administration of justice is effectively organised in any country, or if, according to the euphemism employed by the British delegation, it is adequately organised, can other States be allowed the right to criticise and investigate? If so, where would the investigation stop? Would it be a formal investigation? Could it be said that justice was badly administered because there were three judges instead of five or on account of the particular method of appointing the judges? Would it be an investigation into a judge's capacity and honesty? How could we describe such a procedure? There is only one name for it; let us say it — it is investigation into the organisation of the judicial system of a country, an investigation carried out by one or more other countries. But what countries can claim to be the sole depositories of a form of civilisation which entitles them to enquire whether justice is well or badly organised?

If we go as far as that, we shall scrap the principle of sovereignty in so far as it implies independence. You cannot claim to be independent if you are subject to investigation. I adopt the spirit of the League of Nations, the spirit that guides modern evolution, and I can understand the limitation of sovereignty; but I adhere to the formula that is generally accepted, the only one that can be accepted — namely, self-limitation of sovereignty. That is the only formula that any independent State can accept. But I cannot understand any self-limitation imposed by others. That goes beyond my comprehension whether from the legal or from the moral standpoint.

Consequently, we cannot allow any indirect responsibility, any investigation which would be tantamount to a limitation of sovereignty. For that reason I do not think we can retain Basis No. 6, since in my opinion, it is out of harmony with the general principles by which we are bound together.

I have just received the French delegation's proposal, which reads as follows:

“A State is responsible for damage suffered by a foreigner as the result of the fact that:

1. He has wrongfully been refused access to the courts or there has been on the part of the courts wilful and unjustifiable delay such as to be equivalent to a denial of justice.”

That is, in point of fact, a definition of a denial of justice. It implies

a kind of investigation against which I protested but which, in these terms, might be accepted.

“2. A judicial decision which is final, every process of appeal having been exhausted, is incompatible with the international obligations of the State.”

In reality, those obligations would not be fulfilled, since a judicial decision cannot constitute the fulfilment of an international obligation on the part of the State.

This proposal suggests that Basis of Discussion No. 6 should be omitted, and I agree with it.

M. Matter (France):

Translation: I imagine that, when calmly studying this interesting brown volume containing the Bases of Discussion, each of us must have felt a certain uneasiness and anxiety on reading Bases Nos. 5 and 6. There was a double thread of argument which it was very difficult to reconcile.

On the one hand, there were the arguments which were so forcibly submitted, both yesterday and to-day, by our Egyptian, Portuguese and Roumanian colleagues, to the effect that in this connection we have to consider the independence of the judiciary. No one who has the honour to sit here respects the judiciary more than I.

On the other hand, they showed that if a foreigner enters a country he is entitled to share in all its advantages, but he cannot have rights that are not enjoyed by nationals of the country. We could not fail, however, to be struck by the weighty arguments advanced by the British delegation and eloquently urged yesterday by Mr. Beckett. There is one international duty above all others — the duty to ensure in every country impartial justice, equal for all, for foreigners as for nationals. This difficulty is perhaps still further increased by the way in which the Bases of Discussion have been drafted. It was pointed out yesterday that they are merely Bases of Discussion, drafts which make possible the consideration of the question in substance.

The Bases of Discussion follow a plan quite different from that adopted as regards the other failures to comply with international obligations for which the State may be responsible. In the case of failures on the part of the legislature and the executive and on the part of officials *qua* officials, mention is made only of the State's international obligations in general. The same principle is laid down in paragraph (2) of Basis No. 5, but there is in addition a list of cases, and we have that most unsatisfactory system which consists of stating a general principle and then giving a number of examples without any indication as to whether the list is exhaustive or merely illustrative.

The difficulty is still further increased when, on considering all the amendments submitted, we observe that, though they all assert the same

principle — namely, the necessity for the State to ensure a satisfactory administration of justice, each one gives examples. Why these particular examples and not others? Who can say whether, after a few years, other examples not given in the list may not be added, and once more the great difficulty arises as to the nature of the examples? Are they given simply as illustrations or are they exhaustive?

I was very glad to read the amendments, and yesterday I was pleased to hear one of the speeches delivered in this Committee. I was delighted to find the formula, submitted by M. Leitmaier, which we shall shortly adopt, as it gives us entire satisfaction. There was no need for me to propose any amendment; I had merely to make a slight correction which seems very much like an act of plagiarism.

I also had the pleasure yesterday of hearing my friend M. Cavaglieri make a speech which was admirable from every point of view. There was no need for me to make a speech.

Thus I had no text to frame, no speech to deliver. That is an ideal position for the head of a delegation.

Accordingly, I merely refer you to the explanations that have been given. As M. Cavaglieri rightly said, all the cases mentioned both in the brown book and in the various amendments — and also all those given by Mr. Beckett — are covered by the general formula submitted by M. Leitmaier.

So we have a solid basis, a basis for conciliation and compromise, and I was not at all surprised when my friend, M. Sipsom, accepted it. I was, indeed, particularly anxious that the French proposal should be handed to him before he concluded his speech.

Nevertheless, I have made slight textual changes for two reasons. First, I thought that the order of the cases mentioned by the Austrian delegate was perhaps not strictly logical. Before we can claim that the law has been broken, we must know whether the court is prepared to give a decision in the ordinary course of procedure. Denial of justice comes before the violation of the law, since the court can violate the law only by applying it.

What is meant by “denial of justice”? At Paris I consulted a series of texts from different codes of civil procedure which all give a very precise definition of denial of justice. All these codes, both of criminal procedure and of civil procedure, the Italian, Roumanian and German Codes, agree that there is a denial of justice when judges refuse to reply to applications or neglect to decide cases awaiting judgment.

There is another meaning to the words “denial of justice.” It is the common meaning. After losing a case, on returning broken-hearted from the law courts, the first cry of the unfortunate applicant is: “It is a denial of justice!” Often he means to accuse the judge of ill-will. Here we come within the terms of paragraph (4) of Basis No. 5.

Which of these two extremes shall we choose? Obviously the legal definition. But I think that in international law denial of justice has a wider meaning than in municipal law, although theorists do not absolutely agree on the definition of denial of justice.

A little precision is necessary. There must be a very clear definition. I have tried to give one in paragraph (1) of the proposal before you.

You may ask why I use the word "wrongfully". I do so because a court may rightly refuse to hear a case. There may be good reason for its claim that it has no jurisdiction either *ratione loci* or *ratione personae*. It would not be acting contrary to the law. It would merely be applying the municipal law.

As regards paragraph (3) of the Basis of Discussion, we have tried to make it a little more definite by adding "or there has been on the part of the courts wilful and unjustifiable delay such as to be equivalent to a denial of justice." I think that, *strictissimo sensu*, that is what denial of justice means in international law. Anything else that may be included in that definition and described as denial of justice will be found in paragraph (2) of the proposal before you.

Thus, this text covers all the cases mentioned, both in Bases of Discussion Nos. 5 and 6 and in Mr. Beckett's speech.

At the end of his illuminating remarks, Mr. Beckett said that it is the duty of every State to organise and administer justice satisfactorily, and any failures on the part of the State are covered by this formula. That is precisely what I have tried to say in rather general terms. This general formula covers all cases. You have, perhaps, noticed my great anxiety to find a solid basis for discussion, agreement and compromise. This formula, for which I give all the credit to M. Leitmaier and M. Cavaglieri (I would remind you of M. Cavaglieri's remarkable speech yesterday) seems to be acceptable by all. That is why I propose it.

As to the meaning of "international obligations", if I had spoken a few hours ago, I should perhaps have said that this definition was still disputed, but, after the statement made by our Rapporteur, M. de Visscher, you know that I can now refer to the Sub-Committee which you appointed. The legal basis of its text is undeniable, its legal consequences incontestable. I think everyone will be able to accept it. I attach no special importance to the wording of the French delegation's proposal which you have just received. I am prepared to accept any verbal modification, but I think the principle underlying this formula is one with which all those present must concur.

* * *

M. Ants Piip (Estonia) :

Mr. Chairman — The Estonian delegation desires to support the proposal made by the head of the French delegation, M. Matter, to combine

Bases Nos. 5 and 6 in a single one as previously suggested by the Austrian and United States delegations.

The formula presented covers in a precise and clear form, if not all, the majority of the cases foreseen in Bases Nos. 5 and 6 as drafted by the Preparatory Committee, to which a reference was made by the British delegate, Mr. Beckett. Indeed, the first paragraph is self-explanatory and contains a rule recognised at present by every nation.

There seems to be no such general agreement regarding the second paragraph because, up to this time, as was said here yesterday, very many writers and States have considered that the international responsibility of the State for the damage done to foreigners does not arise at all if the foreigners have access to the properly constituted courts. A decision of the national jurisdiction releases the State of its further responsibility towards foreigners. Accordingly, the second paragraph of the French proposal constitutes a certain innovation in international law; it is, we may say, *lex ferenda*. But this innovation is not very far-reaching, because it does not question the decisive value of the judgments of the national supreme courts, which will *in se* remain final also in the future.

No attempt has been made to introduce an appeal from the decisions of the national supreme courts to an international court to control or revise the municipal jurisdiction. Such an attempt was made, as you all know, regarding the decisions of the national prize-courts in the very progressive Twelfth Convention of the Second Peace Conference in this City, in 1907, but that Convention remains unratified at present. The real innovation consists in fixing the State's responsibility for the acts of the judicial branch of the Government, which principle has been already accepted by the Committee for the acts of the legislative and executive branches of Government in order to guarantee a minimum international standard of rights in the modern world.

Furthermore, since, according to Article 4 of our Constitution the rules of international law, universally recognised, are in force in Estonia as integral parts of Estonian law, we are also in favour of the principle of the international responsibility of States for the final acts of the judicial power in the same way as such responsibility arises for the acts of the legislative or executive powers.

M. Stęczkowski (Poland):

Translation: Gentlemen — I do not wish to enter into any details, as the Polish Government's reply to the questionnaire addressed to it clearly explains our point of view on the questions now under discussion.

I must admit that, when the Polish delegation framed its amendment, it was not aware of the French proposal, but it notes with pleasure that there is a certain similarity between the two.

There is, however, a difference between our proposal and that of the

French delegation. This difference is the outcome of our view that responsibility in regard to the judicial power must be limited.

The State's responsibility for acts or omissions on the part of its legislative and executive powers cannot be assimilated to its responsibility on account of acts of the courts.

We must, in the first place, consider the independence of the courts. This is a general principle which must be admitted as a principle of international law. Responsibility in this connection must be limited.

That is the object of our amendment, which reads as follows:

"A State is responsible for damage suffered by a foreigner as the result of the fact that:

1. The judicial authorities illegally resist the foreigner's exercising his rights (denial of justice)."

As you see, we also refer to denial of justice, but our formula follows the proposal made to the Pan-American Union by the American Institute of International Law.

The French proposal mentions access to the courts and wilful and un justifiable delay. Our proposal states that, if the judicial authorities illegally resist a foreigner's exercising his rights, the State is responsible. Fundamentally, our proposal is entirely in agreement with that of the French delegation.

The Polish delegation proposes that paragraph 2 should read as follows:

"2. A judicial decision not subject to appeal constitutes an evident breach of a precisely determined obligation of international law."

We think this wording obviates certain disadvantages attaching to the Austrian proposal, which refers merely to a final decision. We must, however, consider the case in which a judicial decision becomes final without all remedies being exhausted. That is the case when a decision by a court of first instance becomes final, because no appeal has been lodged.

The French proposal would correct this inaccuracy by introducing the principle of the exhaustion of remedies, and in that respect it is similar to the Polish proposal which, however, suggests a greater limitation by stipulating that a judicial decision must have been given by the highest court. That is not the same thing. The wording of the Polish proposal emphasises this difference. It is a fundamental condition, and, if it is not fulfilled, any intervention would be out of place.

If we wish to emphasise the independence of the courts, we must admit the State's responsibility only in extraordinary cases; for instance, when there is "an evident breach" of obligation. I have borrowed this argument from the Japanese delegation, which desired to insert the word "manifestly" in Basis of Discussion No. 5.

As regards the "breach of a precisely determined obligation of international law", I have taken this argument from the observations submitted by Belgium (Document C.75. M.69. 1929. V., page 43).

Basis of Discussion No. 6 has already been mentioned, and I think there is not much more to be said. I should, however, like to point out that this basis covers two cases: first, the nonexistence of such courts as are essential to a satisfactory administration of justice; secondly, the existence of such courts but with an unsatisfactory administration of justice.

If the organisation of the courts reveals certain defects and certain shortcomings, the fault cannot be laid to their charge, as such an organisation always depends upon a law. If a State has not organised its courts and has not passed a law providing for that organisation it is the legislative power which must be blamed, and which will involve the State's responsibility.

But if the courts are badly administered, that is another matter. If there are judges who are incapable of performing their duties, or who are guilty of corruption, they should be punished in some way, but then it was the duty of the executive power not to appoint such judges. We thus come back to the terms of our Basis No. 5. Basis No. 6 should be omitted, purely and simply.

M. Vidal (Spain):

Translation: On this important question of a State's infringement of an international obligation through the act of its judicial organs, the Spanish delegation desires to express its view in such a way that the meaning and purpose of its vote may be quite clear.

We think that a State is undoubtedly responsible in the case of a decision by its judicial power which is final and without appeal if that decision is contrary to an international obligation. We cannot borrow from municipal public law the argument as to the independence of the judicial power and apply it against this fundamental principle. That argument can be employed only to stop any intervention, by the State of which the injured person is a national, so long as the matter is pending before the courts of the State in the territory of which that person lives. But when those courts have given their decision and, contrary to pre-existing international obligations, have by that very decision caused damage to foreigners, the judicial organ — like the executive organ and the legislative organ — involves the responsibility of that State towards the other States concerned.

Having thus laid down the principle, we might sum up its consequences under the general heading "denial of justice". But when is there a denial of justice? If these words had any clear and undisputed meaning, the question would not arise. Unfortunately that is not the case, and the more opinions we hear, the more points of view that are expressed, the more we realise the difficulty of reaching the agreement desired.

In these circumstances there are two possibilities. We might try to define "denial of justice" so as to leave no doubt as to its meaning, or we might evade the difficulty, without solving it, by stating the principle and leaving the courts in each particular case, taking into account the circumstances involved, to determine whether or not there was any denial of justice.

In my opinion the first course would be the better. It is also the more difficult to follow. In the present state of the problem I fear the result of our work must be almost negative. Accordingly, in view of the real difficulty of this question, the Spanish delegation, though regretting that it is not possible at present to adopt any definite formula expressing the idea in all its implications, supports those who favour a limited notion of denial of justice.

From this standpoint I must say that, if a foreigner is refused access to the courts to defend his rights, that case clearly comes within the strictest and most limited conception of denial of justice, and the State is responsible *ipso facto*. The same is true of a judicial decision which is incompatible with international obligations, but the position is different in the cases mentioned in paragraphs (3) and (4) of Basis No. 5. I admit that delay in the administration of justice on the part of the courts, if it really amounts to unconscionable delay, should involve the responsibility of the State. But that raises a question of fact which is extremely difficult to prove and the consequences of which in practice might be most regrettable.

If this formula cannot be made more precise, it would perhaps be better to agree to this slight sacrifice and omit this paragraph in the interest of the general principle. I find that the French delegation's proposal is somewhat more definite and marks such progress that we should most seriously consider accepting it. But in the case of a judicial decision which is manifestly prompted by ill-will towards foreigners — however difficult that ill-will may be to prove — I think we are bound to admit the possibility and to say that, if the fact is proved, the State is responsible. I regret that the French proposal omits that point.

We come now to the most delicate question, that of Basis No. 6. Here, as in many other cases, it is much easier to lay down the principle than to frame rules for its application. It is certain that, if the courts of any country do not offer the guarantees indispensable for the proper administration of justice, the State must be held responsible for the defects in its judicial organ. But on what grounds can we judge the guarantees in question? What, indeed, are the minimum guarantees which are indispensable for the proper administration of justice? Who shall decide that the judicial organ is not capable of discharging its duties? This matter is particularly delicate because here we are not concerned with the actual judicial decision, but with the organ itself, the suitability of which is contested and its capacity called into question. The claimant State can hardly be qualified to settle the question on its own authority and,

though there still remains the international jurisdiction which we accept in the last resort, yet the question raises great difficulties and the solution proposed has very serious implications.

Accordingly, the Spanish delegation thinks it would be better to omit this basis unless it can be made so clear as to lessen the possibility of more or less disguised abuses.

In a spirit of compromise and caution we desired the omission, if possible, of paragraph (3) of Basis No. 5. In the same spirit of caution — although I recognise the soundness of the principle — I specifically ask for the omission of Basis No. 6, in view of the numerous difficulties involved by its application. As drafted, this basis would lead to more serious consequences than paragraph (3) of Basis No. 5. The idea underlying Basis No. 6 is not included in the restricted notion of denial of justice, and it is that restricted notion alone which seems to have reached the stage at which codification becomes possible.

We might, if necessary, admit only the case of clearly proved prevarication on the part of the judge. But even in that case no further remedy against the decision must be possible under the municipal law. In its present form, in which a refusal on the part of the organ entrusted with the administration of justice is envisaged, we think that the text of this basis is unacceptable and that its contents are dangerous for the sovereignty of States, and we ought to remember that that sovereignty also constitutes a fundamental principle of international law.

23. REFERENCE OF BASES OF DISCUSSION Nos. 5 AND 6 TO THE FIRST SUB-COMMITTEE.

The Chairman :

Translation: There are still eight names on my list of speakers, but M. Giannini wishes to submit a point of order. I must therefore ask him to speak first.

M. Giannini (Italy) :

Translation: We have heard several speakers and we now have before us eight proposed amendments. The Committee cannot agree to the proposals of the British and Indian delegations. The Portuguese delegation has submitted a radical proposal to strike out these bases. The addition proposed by our distinguished Danish colleague is, I think, based on treaties of arbitration and conciliation. There is also a Japanese amendment.

Apart from these proposals, there are four amendments submitted respectively by the delegations of Austria, France, Poland and the United States of America. These are more or less on similar lines.

For the reasons of expediency advanced by our Spanish colleague, the Italian delegation supports the proposal to omit Basis No. 6.

Apart from the divergences between the other delegations, the discussion has brought out one principle on which I think we all agree. The only question left for consideration is that of form. We must have some basis or other and we must take account of the first paragraph of the Austrian proposal.

Further, it seems that a certain measure of agreement has been reached concerning "denial of justice".

There are still some differences as to the form to be given to the text. I have no wording to propose. The French proposal, after mentioning a final decision, says: "every process of appeal having been exhausted." But, if a decision is final, it is obvious that every process of appeal has been exhausted. Again, our Polish colleague employs the expression: "not subject to appeal." If I do not observe the time-limit laid down for appeal, I have not come before the final court; nevertheless, the decision is again final.

All these questions are very difficult to settle in full committee. As our points of view have been brought into line and as time presses, we might refer this problem to the First Sub-Committee, to which would be added those delegates who intimated their desire to speak on this question and whom we have not yet heard, together with any other delegates who still wish to submit observations.

That Sub-Committee will be able to agree on a formula that will satisfy everyone. When it submits a text for our consideration, we shall still be able to amend it, but we shall have a definite text for discussion. It is very difficult to say "I accept this or that formula", when there are several before us.

The agreement which apparently has been nearly achieved will easily be reached in the Sub-Committee, and we shall thus save time. The Sub-Committee might meet on Monday, and to-morrow afternoon we could continue our discussion of the other questions on the agenda.

M. Guerrero (Salvador):

Translation: I support M. Giannini's proposal. I think that, apart from questions of drafting, agreement has almost been reached in the interesting discussion that has taken place. The Sub-Committee, which will be asked to consider the various amendments, will probably be able to submit a text. We shall perhaps find it easier to consider and adopt that draft.

M. Hackworth (United States of America):

I desire on behalf of the delegation of the United States to give my wholehearted support to the suggestion of the Italian delegate. We might go on debating these bases indefinitely in full committee, but I think the Sub-Committee could handle the matter more expeditiously and probably more efficiently.

* * *

ANNEX 128

THE
DIPLOMATIC PROTECTION OF
CITIZENS ABROAD

OR

THE LAW OF INTERNATIONAL CLAIMS

BY

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CHAPTER IV

INTERNATIONAL RESPONSIBILITY OF THE STATE

§ 73. General Principles.

In preceding chapters we have examined the rights of aliens and the responsibility of the state and its officers, in municipal law, for a violation of the rights of the alien. We are now prepared to examine the final phase of the obligation of the state toward the alien and its responsibility for an infringement of his rights. This phase is the international liability of the delinquent state toward the alien's home state.¹

In the absence of an international legislature or court of justice the standard of duty of the state toward aliens and its international

¹ Funck-Brentano and Sorel (*Precis du dr. des gens*, 1877, p. 224), state that it was at one time asserted by a certain school of international law that reciprocal responsibility of states was incompatible with full sovereignty, and that the state was the judge of its own responsibility. With the growth of international intercourse, that theory has long been abandoned.

The subject of state responsibility in international law has been more or less neglected by writers, notwithstanding its great importance. The best works on the theory of the subject are: Anzilotti, D., *Teoria generale della responsabilità dello Stato nel diritto internazionale*, Florence, 1902, published in French, considerably paraphrased, in 13 R. G. D. I. P. (1906), 5-29, 285-309, and Marinoni, Mario, *La responsabilità degli stati per gli atti dei loro rappresentanti secondi il diritto internazionale*, Rome, 1914. See also Benjamin, Fritz, *Haftung des Staats aus dem Verschulden seiner Organe nach Völkerrecht*, Breslau, 1909 (a Heidelberg dissertation). The following works devote some space to the subject: Leval, G., *La protection diplomatique*, Bruxelles, 1907, Part II, p. 125 *et seq.*; Tchernoff, T., *Protection des nationaux*, Paris, 1899, p. 271 *et seq.*; Lisboa, H., *Les réclamations diplomatiques*, Santiago, 1908. The subject is treated of briefly in the following general works: Oppenheim, I, ch. III, 206-225; Hall, 214-220; Halleck, I, ch. XIII; Hershey, ch. X; Pradier-Fodéré, I, §§ 196-210; Calvo, § 1261 *et seq.*; Fiore, §§ 659-679; Liszt, § 24; Triepel, 350; Gestoso y Acosta, I, 259-269; Olivart, I, 451-462; Seijas, III, 445-461 and in other volumes; Piédelièvre, I, 317-322; Bonfils, pt. I, ch. V; Bry, ch. X (1906 ed.), 454-461; Funck-Brentano and Sorel, 1877 ed., ch. XII, 224-230. Further literature will be cited under special topics.

responsibility for violation of its obligations may be considered the result of a gradual evolution in practice, states having in their mutual intercourse recognized certain duties as incumbent upon them. In the absence of a central authority to enforce this standard of duty upon the state of residence, international law has granted the home state of the alien who has suffered by a delinquency the right to demand and enforce compensation for the injuries sustained. The remedy for a violation of international duty toward aliens lies in a resort to diplomatic measures for the pecuniary reparation of the injury; and these measures may range from the diplomatic presentation of a pecuniary claim to war. Self-help, tempered by the peaceful instrumentalities of modern times, such as arbitration, is the ultimate sanction of international obligations. In this very fact lies the difficulty of the present subject, for powerful states have at times exacted from weak states a greater degree of responsibility than from states of their own strength. Nevertheless, fundamental principles have in the course of time, through a constant growth in the number of cases of protection and of international claims, become more clearly defined, so that a closer study of the subject may be fruitful of practical results.

It has already been remarked that international law imposes upon states the duty of according aliens certain rights and of assuring them of certain administrative and judicial protection. In almost every branch of international law, rules are found which limit the natural liberty of states by imposing upon them duties toward aliens. Any omission in these duties involves the responsibility of the delinquent state not only toward the individual directly (if so provided by municipal law), but also toward his home state, which in international theory is considered as injured in the person of its citizen. A state may limit its municipal responsibility by legislation, but not its international responsibility, which it incurs, under international law, to the national government of the alien. The national state enforces its own right, therefore, in presenting an international claim, although the pecuniary benefits of an indemnity may ultimately be awarded to the injured individual himself.

In considering the international responsibility of the state for de-

linquencies toward aliens, it may be well to recall certain fundamental principles.¹ An alien in entering a country submits tacitly to the local law, according to the rules of which his rights and duties are measured. If the local rules of civil and criminal law are applied to him without discrimination in the same degree as to nationals, he has no right to invoke the responsibility of the state for damage which he may sustain.² However unqualified this doctrine may be, as a matter of principle, the practice of the stronger nations in their relations with the exploited countries of the world has demonstrated that this axiom is conditioned upon the premise that the local civil and criminal law and its administration do not fall below the standard of civilized justice established by international law. Assuming that the international standard in a given case has not been transgressed by the municipal law of the state,—always a delicate and dangerous allegation—the duty of the alien's home state is confined to securing for him the benefit of the local law or indemnity for failure to extend it to him. In first instance the alien's right is measured by the municipal law of the state of residence.

Nor is the state a guarantor of the safety of aliens. It is simply bound to provide administrative and judicial machinery which would normally protect the alien in his rights. Even a treaty providing for "special protection" has been held not to be an insurance against all injury, but merely places aliens on an equality with citizens in this respect.³ As a general rule, moreover, the responsibility of the state for a failure to protect an alien is measured by its actual ability to protect.⁴

Again, before the international responsibility of the state may be invoked, the alien must under normal conditions exhaust his local

¹ The variations and modalities of and exceptions to these principles have been discussed *supra* under Aliens or will be treated under the special topics of this chapter.

² *White (Gt. Brit.) v. Peru*, July 1863, award April 13, 1864, Moore's Arb. 4967; *La Forte (Gt. Brit.) v. Brazil*, Jan. 5, 1863, Moore's Arb. 4925; McDonald's case (*Gt. Brit.) v. Prussia*, Calvo, III, § 1279. Cushing, Atty. Gen. in 7 Op. Atty. Gen. 229, 234.

³ Wadsworth, U. S. commissioner, in *Prats (Mex.) v. U. S.*, July 4, 1868, Moore's Arb. 2889; *Baldwin (U. S.) v. Mexico*, April 11, 1839, Moore's Arb. 2859.

⁴ Mr. Sherman, Sec'y of State, to Mr. Dupuy de Lôme, July 6, 1897, For. Rel., 1897, 516. But see Benjamin, *op. cit.*, 27.

remedies and establish a denial or undue delay of justice, which in last analysis is the fundamental basis of an international claim.¹

The liability of a state must be predicated on the violation in some respect of its international obligations. For present purposes our inquiry is confined to the duties of the state toward aliens. Some of the topics relating to this subject, such as admission, exclusion and expulsion, extradition, military service, civil rights, jurisdiction, arrest and imprisonment, etc., have been discussed under the head of Aliens. In the present and the following chapters we shall examine the responsibility of the state for injuries sustained by aliens during mob violence, civil war, international war and under other circumstances.

AUTHORITIES OF THE STATE

§ 74. Different Classes of Authorities.

Before examining these questions, however, it will first be necessary to determine the agencies, instruments or persons whose acts may render the state responsible—in other words, who are authorities of the state. This question is one of vital importance, as is apparent from the fact that general claims conventions usually provide that the state shall be held liable only for injuries inflicted upon the persons or property of foreigners by the “authorities” of the state. Our first inquiry therefore, will be directed toward establishing who are authorities or organs of the state, for whose action the state is directly responsible, and in the second place, who are the persons for whose acts towards aliens the state is held to indirect—or, as Oppenheim puts it, *vicarious*—responsibility, this indirect responsibility being predicated upon a negligent failure to prevent or punish the commission of the injurious act or to open to the injured alien the necessary judicial recourse against the individual wrongdoers.

Under the first head, we shall discuss those agencies of government whose acts may be said to represent the acts of the state, *i. e.*, the legislative, executive and judicial organs of the state. Here also will be considered the extent to which *de facto* governments, constituent states and minor political subdivisions of the state may be regarded as authorities. Under the second head, we shall discuss the position

¹ *Infra*, § 127 *et seq.*

of minor officials, soldiers and individuals, and the circumstances under which their acts may render the state internationally liable. The order of discussion will deviate somewhat from the above classification.

I. LEGISLATIVE AUTHORITIES

§ 75. Acts of Legislation.

The legislature is an organ of the state for whose acts the state is directly responsible.¹ It has been noted that in municipal law no action lies against the government for acts of legislation unless the statute itself or the constitutional law of the state so prescribes. But a statute is no defense against a breach of international obligations. When acts of legislation,—among which may be included administrative decrees and ordinances having the force of law—have been deemed violative of the rights of aliens according to local or international law, foreign governments have not acquiesced in the theory of the non-liability of the state and have on numerous occasions successfully enforced claims for the injuries sustained by their subjects. Good offices or remonstrances are often employed to prevent legislation deemed prejudicial to national interests. Where such an act is indirect violation of international law, responsibility is clear. Thus, since the Paris Declaration of 1856 blockades to be internationally recognized as binding must be effective. The attempts of some states, therefore, by legislative act or decree to establish a paper blockade of ports in the hands of insurgents have met with opposition from the home governments of nationals whose rights were thus prejudiced.² The mere closure of a port within its control or a decree of non-intercourse is ordinarily within the police power of the state and not a violation of international law.³

¹ Bonfils-Fauchille, 6th ed., § 325; Chrétien, *op. cit.*, § 208; Clunet, Consultation, *op. cit.*, 25; Audinet in 20 R. G. D. I. P. 5, 22.

² De Caro (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 817; Martini (Italy) *v.* Venezuela, *ibid.* 845; Orinoco Asphalt Co. (Germany) *v.* Venezuela, *ibid.* 588; Minister Furniss to the Haitian Secretary for Foreign Affairs, Nov. 28, 1908, For. Rel. 1908, 442. An executive decree comes within the same principle. French Co. *v.* Peru, Tchernoff, *op. cit.*, 299 note. Protest of U. S. against Guatemalan decree of 1909, For. Rel. 1909, p. 344.

³ Award of President of Chile on the claims of British subjects against Argentine

The institution of a governmental industrial monopoly, while not involving any municipal responsibility of the state unless so prescribed by the legislature, has on several occasions afforded ground for an international claim in behalf of aliens who had previously engaged in the industry now monopolized by the state. So, the sulphur monopoly of Sicily established by decree of July 9, 1838 was held on arbitration to be an interference with vested rights and to involve the international responsibility of that government.¹ The protests of Great Britain and France resulted in Uruguay's receding from its position in establishing a state monopoly of life insurance in its law of 1912. Italy in a similar case maintained its right to establish such a monopoly,² notwithstanding the opinion of many jurists that by so doing it incurred international responsibility.

Every state has the right to impose customs duties, which may be changed at the discretion of the government. There is no vested right in importers under the customs law which they may count upon.³ Nevertheless, it is unusual for governments to make sudden and unexpected changes in these laws or to apply them to previous transactions. Thus, Secretary of State Fish protested against certain Spanish customs laws in Porto Rico which imposed a heavy export tax on sugar and molasses, and were applied to preëxisting contracts of American citizens, concluded when no tax was in force.⁴ In the absence of treaty stipulation, there is nothing to prevent a government from legally imposing different import duties in one section of

for losses arising out of a decree of Feb. 14, 1845 prohibiting vessels from Montevideo to enter Argentine ports, Moore's Arb. 4916; Poggioli (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 870. The case is different where the state is estopped by contract from closing a port. Martini (Italy) v. Venezuela, *ibid.* 819. The state may legally suspend traffic on a river flowing through it. Faber (Germany) v. Venezuela, Feb. 13, 1903, Ralston, 626, 630.

¹ 30 St. Pap. 111-120; La Fontaine, Pasicrisie, 97. See also Savage (U. S.) v. Salvador, Moore's Arb. 1855. Such right may be considered vested by treaty, contract, legislative act or even, it has been contended, by custom.

² *Supra*, p. 126.

³ Beckman (Germany) v. Venezuela, Feb. 13, 1903, Ralston, 599.

⁴ Mr. Fish, Sec'y of State, to Mr. Lopez Roberts, Spanish minister, April 3, 1869, Moore's Dig. VI, 752. The U. S. has on several occasions instructed its representatives abroad to use their good offices to prevent proposed increases of tariff duties deemed prejudicial to American interests.

its territory from those charged in another section.¹ The debasement of the currency by legislative decree, impairing the rights of American citizens, has on one or two occasions met with the earnest remonstrance of the United States.²

2. EXECUTIVE AND ADMINISTRATIVE AUTHORITIES

§ 76. Limitations upon their Power. Contractual Relations.

The organs of the state in its executive and administrative branch are determined by municipal constitutional law. In a few cases, the acts of the rulers of the state have been held to be internationally binding upon the state.³ But as a general rule, the power of the head of the state and of the cabinet ministers and higher officials to involve the state in responsibility is tested in first instance by municipal law.⁴ This is especially so in the matter of contractual obligations. The power of officers of the government, superior and inferior, to bind the government is limited by their legal authority to enter into such obligations.⁵ This authority is generally strictly

¹ *Bronner (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2871.

² Moore's Dig. VI, 753-754. *Venezuelan bond cases, Aspinwall (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3641-42. Claims were paid by Venezuela for the operation of the "stay" or "espera" law of 1849, which improperly provided for the extinction or suspension of debts due from Venezuelan debtors to foreign creditors. But the Act of Congress of 1862 making paper money legal tender was held not to involve the Government in liability, although it unfavorably affected preëxisting contracts. *Adams (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3066.

³ Murat's orders to confiscate American vessels rendered the Government of the two Sicilies responsible. *The Neapolitan Indemnity*, Moore's Arb. 4575. Pres. Zaldivar by his own contract bound Salvador to sell the Salvadorean Government Printing Office to an Italian subject. *For. Rel.*, 1888, I, 77, 120.

⁴ Halleck, I, ch. XIII, §§ 3-4; Oppenheim, I, 211; Attorney-General Cushing in 7 Op. Atty. Gen. 238. *Day and Garrison (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3563. *De facto* authorities, however, although not acting in strict accordance with the Constitution, may by their acts bind the nation. *Dreyfus (France) v. Chile*, July 23, 1892 (award, July 5, 1901), *Descamps & Renault, Rec. int. des traités du xx^e siècle*, 1901, pp. 396-398.

⁵ See *supra*, p. 170 (municipal responsibility) and *infra*, p. 299 (contract claims) and cases of *Wallace, Beales, Zander, and Trumbull* (an exceptional case) there cited. See also *Bernadou (U. S.) v. Brazil*, Moore's Arb. 4620; *Widman (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3467; *Kearney (U. S.) v. Mexico*, *ibid.* 3468; *Rowland (U. S.) v. Mexico*, March 3, 1849, *ibid.* 3458; *Alvarez (U. S.) v. Mexico*,

construed. The President of a country cannot legally grant or alter the terms of concessions to foreigners, if the constitutional law of the country requires the approval of Congress for such acts. Those dealing with agents of the state are ordinarily bound by their actual authority, and not, as in private law, by their ostensible authority. But in the Trumbull case,¹ the apparent authority of a diplomatic officer to contract was held sufficient to bind his government, and in the Metzger case,² Judge Day expressed the opinion that the "limitations upon official authority, undisclosed at the time to the other government," do not "prevent the enforcement of a diplomatic agreement."

Again, presumably on the theory of quasi-contract or unjust enrichment, the state is liable for the wrongful acts of its officers from which it derives a benefit. Thus the taking of private property for the public use or benefit has always been an accepted ground of international claim for compensation.³ Similarly, for wrongful seizures and for excess or unjust collections of customs duties or taxes by revenue officers the government is responsible.⁴

April 11, 1839, *ibid.* 3426; Smith (U. S.) *v.* Mexico, March 3, 1849, *ibid.* 3456; Sturm (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 2756. This question was argued in the Hemming case before the British-American Claims Commission, Aug. 18, 1910, Great Britain contesting the general rule. No award has yet been made (1914).

¹ On equitable considerations, in Trumbull (Chile) *v.* U. S., Aug. 7, 1892, an award was made on the ground that claimant in Chile had a right to assume that the U. S. minister in engaging his legal services was authorized so to do, and that he was not bound by the limitations of R. S., § 3732. Neither diplomatic officers nor consuls, in the absence of specific instructions, have authority to employ counsel in extradition or other government cases. Cons. Reg., §§ 517, 530.

² Metzger (U. S.) *v.* Haiti, Oct. 18, 1899, For. Rel. 262.

³ Ashmore (U. S.) *v.* China, 1884, Moore's Arb. 1857; Baldwin (U. S.) *v.* Mexico, April 11, 1839, *ibid.* 3235; Metzger (Germany) *v.* Venezuela, Feb. 13, 1903, Ralston, 578; De Garmendia (U. S.) *v.* Venezuela, Feb. 17, 1903, *ibid.* 10; Putegnat's Heirs (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3720. See also *infra*, p. 169. Even where the original taking of property is lawful, its unreasonable detention has been held to warrant an award. Baldwin, *supra*; Shaw (U. S.) *v.* Mexico, April 11, 1839, Moore's Arb. 3265; Bischoff (Germany) *v.* Venezuela, Feb. 13, 1903, Ralston, 581.

⁴ Monnot (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 171; Smith (U. S.) *v.* Mexico, April 11, 1839, Moore's Arb. 3374; Lewis (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 3019; *Only Son* (U. S.) *v.* Great Britain, Feb. 8, 1853, *ibid.* 3404; Mr. Davis to Mr. Foster, June 23, 1883, Wharton, I, 158.

§ 77. Tortious Acts.

It is when we come to deal with the international responsibility of the state for the torts of its administrative and executive officers that more serious difficulties are encountered. Some of the problems that at once present themselves are these: Did the officer act as an agent of the state, or in his personal capacity? Is the state, therefore, or he alone liable? Was he a superior officer whose acts within the scope of his authority directly bind the state, or an inferior or minor official against whom judicial remedies must be pursued and for those acts the state is not liable except in case of failure to afford judicial recourse to the person injured, or itself to punish the delinquent official? An examination of the cases shows the subject to be in the utmost confusion, and the distinctions just mentioned very vaguely drawn. Oppenheim and Hall remark that the wrongful acts of administrative officials (these officers being under the disciplinary control of the executive) are presumably acts sanctioned by the state, until such acts are disavowed, the authors punished, and pecuniary reparation made.¹ Strictly construed, this would make of the state practically a guarantor of the efficiency and correct operation of its administrative agencies. As a matter of fact the state is not responsible either for all its administrative officers or for all their acts. It may be said, first of all, that for such of their acts as are personal and outside the scope of their functions, they alone are liable and the duty of the state is limited to affording the injured person judicial recourse against the officer according to local law. As will be seen, this rule has even been extended to the official acts of some minor officials. It must be added, however, that notwithstanding the fact that the local law of most countries grants a private right of action against wrongdoing minor officials, foreign governments, especially in dealing with the weaker countries of Latin-America, have not been willing to confine their injured subjects to the dubious and often futile legal remedy against the officer, but have had recourse to diplomatic

¹ Oppenheim, I, 218; Hall, 214. Quoted with approval in *Metzger (Germany) v. Venezuela*, Feb. 13, 1903, *Ralston*, 578, and *Gage (U. S.) v. Venezuela* (by Bainbridge, Amer. commissioner) *ibid.* 165. *Maal (Netherlands) v. Venezuela*, Feb. 28, 1903, *Ralston*, 914 (government liable, "unless they reprimand, punish or discharge" the officer).

interposition when the wrongdoing official acted in his capacity as an agent of the government.

While it is generally admitted that the strict rules of agency do not apply to the relations between the government and its officers so as to make the former liable for all wrongful acts of the latter within the scope of their authority,¹ still international commissions have not always been guided by the distinction, and awards have been made on proof of the mere fact that an officer of the government committed the injury in question. Where the act has been that of a higher official or supreme authority in a given jurisdiction, the presumption is that it was an act of the state and the government has ordinarily been held to incur a direct responsibility.² An express or tacit ratification of the act clearly casts liability on the state.³ There have, however, been numerous cases of injuries by administrative officers, where no inquiry was directed toward establishing their superior or inferior official character or the possibility or fact of judicial recourse or punishment, government liability being predicated on the mere malfeasance or non-feasance of officers upon whom a distinct governmental duty was incumbent.⁴ Under this head, customs authorities

¹ See *dictum* by Duffield, Umpire, in *Christern (Germany) v. Venezuela*, Feb. 13, 1903, *Ralston*, 523.

² Even the possibility of legal recourse against the officer would hardly free the state from liability. See *Johnson (U. S.) v. Peru*, Dec. 4, 1868, *Moore's Arb.* 1656 (in addition, a decree for redress had been left unexecuted). See also *dictum* in *Oberlander and Messenger (U. S.) v. Mexico*, March 2, 1897, *For. Rel.*, 1897, 386 citing *Calvo, III*, 120, and *Cinecua (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 3127 (original in *MS. Op. I*, 14, 15, not quoted in *Moore*); *Lalanne and Ledour (France) v. Venezuela*, Feb. 19, 1902, *Ralston*, 501; *Post-Glover Co. (U. S.) v. Nicaragua*, March 22, 1900, *For. Rel.* 835 (governor of a province); *Magee (Gt. Brit.) v. Guatemala*, 1874 (flogging and unlawful imprisonment by order of *Commandante*), 65 *St. Pap.* 875. But see *Bensley (U. S.) v. Mexico*, March 3, 1849, *Moore's Arb.* 3018, where Government was held not liable for personal act of Governor of a constituent state of Mexico.

³ *Eclipse (U. S.) v. Mexico*, March 3, 1849, *Moore's Arb.* 3397; *Comp. Gen. des Asphaltes (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *Ralston*, 338; *Fiore, Nouv. dr. int. pub.* (*Antoine's trans.*), §§ 667, 668.

⁴ *Mr. Everett to Mr. Carvallo*, Feb. 23, 1853, *Moore's Dig. VI*, 741. (It was sought to hold Chile liable for spoliations by "officers" of Chile.) *Moses (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 3127; *Henriquez (Netherlands) v. Venezuela*, Feb. 28, 1903, *Ralston*, 896; *Crossman (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *ibid.* 298;

have frequently been held to be authorities whose unlawful acts involve a direct responsibility of the state.¹

§ 78. Diplomatic, Naval and Military Officers.

Diplomatic officers are considered authorities of the state with respect to all acts within the apparent scope of their authority.²

The heads of the military arm of the government, the commander of vessels and of armed land forces are presumed to represent the state in their official acts, and to involve its responsibility for unlawful acts inflicting injury upon aliens.³

In the cases of commanders of vessels, even if the government dis-

Culliton case in Colombia, 22 Op. Atty. Gen. 32, Feb. 7, 1898; *Canada* (U. S.) v. Brazil, March 14, 1870, Moore's Arb. 1733; see also *supra*, p. 185, note 1.

¹ For wrongful collections of customs and confiscation of goods, see *supra*, note 4, p. 184. For unlawful seizures and detentions of vessels and unjustifiable refusal to clear vessels, see *Labuan* (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3791; *William Lee* (U. S.) v. Peru, Jan. 12, 1863, *ibid.* 3405; *Sibley* (U. S.) v. Mexico, April 11, 1839, *ibid.* 3045; *Hammond* (U. S.) v. Mexico, Apr. 11, 1839, *ibid.* 3241; *Lalanne* (France) v. Venezuela, Feb. 19, 1902, Ralston, 501; *Ballistini*, *ibid.* 503; *Comp. Gen. des Asphaltes* (Gt. Brit.) v. Venezuela, *ibid.* 336. See also revenue cases in Moore's Arb. 3361-3407. Where seizures have been based on alleged violations of local law, international commissions will, virtually as a court of appeal, reëxamine the legality and regularity of the seizure. *Phare* (France) v. Nicaragua, Oct. 15, 1879, La Fontaine, 225, Moore's Arb. 4870; *Havana Packet* (Netherlands) v. Dominican Rep., March 26, 1881, La Fontaine, 241, Moore's Arb. 5036; *Butterfield* (U. S.) v. Denmark, Dec. 6, 1888, Moore's Arb. 1204; *Consonno* (Italy) v. Persia, June 5, 1890, La Fontaine, 342. As to sanitary authorities, see *Lavarello* (Italy) v. Portugal; Sept. 1, 1891, La Fontaine, 411.

² In *Trumbull* (Chile) v. U. S., Aug. 7, 1892, Moore's Arb. 3569 the rule was extended to include acts within the minister's ostensible authority. It is probable that a lease signed by a diplomatic representative of a foreign government would bind his government.

A consul's authority to bind his government would be more strictly construed. Responsibility for unauthorized acts when acting in the interests of private persons, *e. g.*, the settlement of estates, has been held to rest upon the consul and not upon the government. For wrongful official acts such as unlawful refusal to clear vessels, the government has been held responsible. (*Comp. Gen. des Asphaltes*, Gt. Brit. v. Venezuela, Ralston, 336.) The advice of a consul or of a minister as to what his government will consider contraband, as to what cargo is exempt, as to what class of trade is permissible, etc., does not bind his government. *The Hope*, 1 Dodson, 229; *The Joseph*, 8 Cranch, 451; *The Benito Estenger*, 176 U. S. 568, 574.

³ *Maninot* (France) v. Venezuela, Feb. 19, 1902, Sen. Doc. 533, 59th Cong. 1st sess. 44, 70.

avows the act, indemnities have been awarded. Thus, in 1868 the cabinet at London disapproved the conduct of a captain of an English ship of war which without orders bombarded the city of Cape Haitien and blockaded the port. Great Britain indemnified the French and German merchants whose property and goods were thereby destroyed. Similarly, a violation of frontiers, collision of a private vessel with a national public vessel through the latter's fault, or the illegal capture of private vessels involves the responsibility of the state.¹ Unlawful captures by privateers involve the responsibility of the state,² but not the acts of a vessel which has revolted against the government.³

By article 3 of the Hague Convention of 1907 concerning the laws and customs of war on land, the state is made liable for all acts committed by persons forming part of its armed forces.⁴ In the case of pillage by uniformed soldiers, the state is ordinarily only responsible if they are under the command of officers.⁵

Police officials are not usually held to be "authorities" of the state. Nevertheless when the duty is incumbent upon them to prevent a violation of law, and they forsake their preventive function and actually

¹ Bry, 5th ed. (1906), p. 461; Case of the *Panther*, 1906 (Brazil) v. Germany, Oppenheim, 219 (violation of Brazilian territory); The Schooner *Henry* (U. S.) v. Peru, March 17, 1841, Moore's Arb. 4601 (seizure of vessel); *Confidence* (Gt. Brit.) v. U. S., Feb. 8, 1853, Moore's Arb. 3063 (collision); *Lindisfarne* (Gt. Brit.) v. U. S., Aug. 18, 1910, 7 A. J. I. L. 875. See also 14 Clunet (1887), 598, Bonfils, § 329, Calvo, § 1265, and Moore's Dig. VI, § 1008. Congress occasionally refers to the courts the complaints of aliens arising out of collisions between foreign ships and U. S. public vessels. S. 4273, 63rd Cong., 2nd sess. See also 23 Stat. L. 496 and *supra*, p. 166.

² France v. New Grenada, Ecuador and Venezuela, 49 St. Pap. 1301; Great Britain v. Buenos Ayres, July 19, 1830, 18 St. Pap. 685, La Fontaine, 92; U. S. v. Venezuela, May 1, 1852, Malloy, Treaties, 1910, II, 1842.

³ Case of the Peruvian vessel *Huascar*, 68 St. Pap. 745. A decree rejecting responsibility for her acts had been issued by Peru, May 8, 1877. Even in the absence of a decree, her responsibility is doubtful.

⁴ Oppenheim, I, 218; Hall, 214; Adams (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3065. For appropriations of private property and unnecessary devastation, see cases in Ralston's International Arbitral Law, § 605 *et seq.*, and *infra*, §§ 80, 104. Baasch and Römer (Netherlands) v. Venezuela, Feb. 28, 1903, Ralston, 909. Speyers (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2868 (tariff promulgated by commanding general). A military occupant may establish a nationally valid tariff. McCalmont (Gt. Brit.) v. U. S., Feb. 8, 1853, Moore's Arb. 2866.

⁵ *Infra*, p. 193.

participate in such violation, their action seems to involve a direct responsibility of the state.¹

§ 79. Minor Officials.

The presumption that the international responsibility of the state is engaged by the unlawful acts of its agents does not as a general rule extend to the tortious acts of minor officials, unless the government by some delinquent action of its own—either failure to afford redress in its courts to the injured individual or to punish the guilty officer—may be considered as having adopted or sanctioned the wrongful act. This is especially true of such personal and malicious acts as are outside the scope of the officer's real or apparent authority. It has already been noted that the municipal law of different countries varies as to the responsibility for a wrongful act of an officer, some states, such as the United States and various countries of Latin-America denying all responsibility for torts of officers and remitting the injured individual solely to his action against the officer, and other states, such as France and Germany, assuming a large measure of responsibility for its officer's official acts but denying liability for his personal acts.² That the rule of international law first above mentioned has suffered numerous exceptions, we have already had occasion to note; yet an examination of a great many cases confirms the view that as a general principle the state is not responsible for the wanton or unlawful acts of its minor officials, unless it has directly authorized, or after notice, failed to prevent, the act, or by failure to arrest, try or punish the guilty offender, or to allow free access to its courts to the injured parties, it may be charged with actual or tacit complicity in the injury.³ One important reason for this rule is that the wrongful act of the minor official is not presumed to be the act of the state until

¹ Panama riot, July 4, 1912; A riot which occurred at Panama April 2, 1915, in which a policeman killed a U. S. soldier, will probably render the Panaman government liable; Claim of Shipley in Turkey, For. Rel. 1903, 733; Cesarino (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 770.

² *Supra*, §§ 55, 60.

³ Calvo, § 1263 *et seq.*; Bonfils, § 330; Fiore, *op. cit.*, § 667; Moore's Dig. VI, §§ 999-1000; Anzilotti, in 13 R. G. D. I. P. (1906), 288-292. The Salvadorean law of Má y 10, 1910 concerning claims against the government is based on these principles, as expounded by Fiore.

some state organ, either a higher court or superior administrative authority, by some independent action or omission, has tacitly ratified the act.

In contractual cases, it is usually a necessary condition of direct governmental liability, that the officer be employed by the government, and be not merely a municipal officer. Nor does the fact that the government issues licenses to particular persons, such as pilots, or grants certain monopolies of public service to individuals make the licensee or monopolist an agent of the state capable of engaging its direct responsibility.¹

It seems clear that for personal acts of local or minor officials plainly outside of their authority and not incidental to their functions, the officer alone and not the government is responsible.² Difficulty arises because the line between personal and official acts is often exceedingly vague. Even if the tort of the officer is within the scope of his functions, unless the government actually benefit by the tort, it has often been held that the only remedy is against the officer and not against the government,³ although, as has been observed, such a state of facts has frequently been held a ground of state liability, especially in Latin-America.

¹ *Horatio (U. S.) v. Venezuela*, Dec. 5, 1885, 3023; Cushing in 7 Op. Atty. Gen. 237 (Montano case); *Mark Gray (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 33.

² See Mr. Bayard to Mr. West, June 1, 1885, For. Rel. 1885, 457 (wanton killing of an arrested person by a sheriff after execution of the writ, due to personal malice. This ruling has, however, been called in question); *Bensley (U. S.) v. Mexico*, March 3, 1849, Moore's Arb. 3018 (forcible seizure of a boy). See extracts in Moore's Dig. VI, 742-743. *Wilson (U. S.) v. Mexico*, March 3, 1849, Moore's Arb. 3021 (cheat practiced by a municipal guard); *Cahill (U. S.) v. Spain*, Feb. 11, 1871, *ibid.* 3066 (ruin of business by alleged machinations of minor official—probably *dictum*). But where an assault is connected with an officer's official duty, the government has been held liable. *Metzger (Germany) v. Venezuela*, Feb. 13, 1903, Ralston, 578 (incidental to taking property for public use). So where police officers commit a wanton assault, *supra*, note 1, p. 189, and "La Masica" case (Gt. Brit.) *v. Honduras*, Memoria de . . . relaciones exteriores, 1911-12.

³ Atty. Gen. Griggs in 22 Op. Atty. Gen. 64, May 4, 1898 (illegal seizures of vessels); Akerman, Atty. Gen., in 13 Op. Atty. Gen. 553 (act of corruption of inferior judge in Brazil); Cushing in 7 Op. Atty. Gen. 237; *Slocum (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3140; *Forrest (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 2947; Mr. Tripp to Mr. Mix, Oct. 11, 1893 and Mr. Uhl to Mr. Tripp, Nov. 17, 1893, For. Rel., 1894, 23-26 (blunder of local officers in Austria).

International commissions have repeatedly held that in order to hold the government liable for the acts of an officer the claimant must resort to the courts of the country and show an unsuccessful appeal for redress against the officer.¹

It has been held that the government must have had notice or been notified of the injury before it could be made responsible.²

A government may often release itself from liability by punishing the officer,³ for example, by fine, reprimand and dismissal from office,⁴ although, in flagrant cases, indemnities have been demanded and paid. The Court of Claims has held that a mere disavowal of the act is not sufficient internationally to relieve the government from liability.⁵ In dealings with countries of the Far East and with certain countries of Latin-America in which disorder is not an abnormal condition, a request for punishment of the officer is often combined with a demand for a suitable indemnity.

It has already been observed that the responsibility of the state for the acts of minor officials must ordinarily be predicated upon some independent delinquency of its own. Some of these circumstances upon which a complicity of the government is presumed and a resultant liability is founded are the following: a ratification or tacit adoption of the wrongful act;⁶ a negligent failure or refusal to prevent

¹ The rule applies to the acts of inferior judges as well as to other minor officials. *Blumhardt (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 3146; *Wilkinson (U. S.) v. Mexico*, *ibid.* 3145; *Smith (U. S.) v. Mexico*, *ibid.* 3146; *Burn (U. S.) v. Mexico*, *ibid.* 3140; *Jennings et al. (U. S.) v. Mexico*, *ibid.* 3135; *Leichardt (U. S.) v. Mexico*, *ibid.* 3133; *Cramer (U. S.) v. Mexico*, *ibid.* 3250; *Bensley (U. S.) v. Mexico*, March 3, 1849, *ibid.* 3016; *Wilson (U. S.) v. Mexico*, *ibid.* 3021; *De Zeo (Italy) v. Venezuela*, Feb. 13, 1903, *Ralston*, 693; *Croft (Gt. Brit.) v. Portugal*, Award Feb. 7, 1856, *Moore's Arb.* 4979.

In flagrant cases, however, this appeal for judicial redress has not been required. *Davy (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *Ralston*, 410.

² *Horatio (U. S.) v. Venezuela*, Dec. 5, 1885, *Moore's Arb.* 3024; *Isaiah Stetson case (U. S.) v. Brazil*, *For. Rel.* 1895, I, 52-59 (two soldiers convicted and sentenced to penitentiary for murder of U. S. citizens in street brawl).

³ *Kellett (U. S.) v. Siam* (award Sept. 20, 1897), *Moore's Arb.* 1862.

⁴ *Wright Claim v. Guatemala*, 1908, *For. Rel.*, 1909, 354-355; *Pierce (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 3252; *Maal (Netherlands) v. Venezuela*, Feb. 28, 1903, *Ralston*, 914; *Panama police assaults of July 4, 1912*.

⁵ *Straughan v. U. S.*, 1 Ct. Cl. 324.

⁶ *Montano (Peru) v. U. S.*, Jan. 12, 1863, *Moore's Arb.* 1630 (approval by Sec'y of

the wrong, there being opportunity therefor;¹ a refusal to investigate an assault or other injurious act,² or negligence in investigating a case;³ a failure to furnish access to the courts to the injured individual⁴ or by a pardon depriving an injured party of all redress against the guilty offenders;⁵ or a failure to try to arrest and punish the offender⁶ even though no request for such punishment was made.⁷ As will be seen hereafter, these circumstances have also served to fasten liability on the state where the injury was committed by an individual. (*Infra*, § 87.)

When a citizen of the United States is injured abroad by a minor official of a foreign government, the Department of State usually calls upon the foreign government to manifest its disapproval of the conduct of its officer, by reprimanding, dismissing, or punishing the guilty official and in addition often demands the adoption of measures to prevent a recurrence of the offense, and in flagrant cases, a pecuniary indemnity. When the guilty officials are police officers,

State Marcy of the wrongful act of a marshal in negligently failing to execute a private judgment). *Braden v. U. S.*, 16 Ct. Cl. 389 (ratification by Congress of unauthorized act); *Miller (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2974 (appointing the wrongdoer to high office in the government—*Dictum* by Lieber); see also *Bovallins and Hedlund (Sweden and Norway) v. Venezuela*, March 10, 1903, Ralston, 952.

¹ *Jonan (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3251; *Kellett (U. S.) v. Siam*, *supra*, *ibid.* 1862, La Fontaine, 604; *Schooner Hope (U. S.) v. Brazil*, Jan. 24, 1849, Moore's Arb. 4615; *Stubbs (U. S.) v. Venezuela*, 1903 (U. S. brief, Morris' Report, 122); Panama police assaults, July 4, 1912, MS. Dept. of State; *Garrison (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3129 (prevention of appeal by unlawful intrigues); *Arménie claim (France) v. Turkey*, 1894, 2 R. G. D. I. P. (1895), 623.

² *Bark Jones (U. S.) v. Great Britain*, Feb. 8, 1853, Moore's Arb. 3050. See also Rule 3 of Nicaraguan Mixed Claims Commission, 1911.

³ Panama police assaults, July 4, 1912; *De Brissot et al. (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 2967 (laxness in investigating).

⁴ *Calvo*, § 1263. This is of course equivalent to a denial of justice.

⁵ *Cotesworth and Powell (Gt. Brit.) v. Colombia*, Dec. 14, 1872, Moore's Arb. 2050, 2082, and case of Joy, a British subject in Colombia, decree of Dec. 7, 1868, cited at p. 2085.

⁶ *Wilson case (U. S.) v. Nicaragua*, 1894, For. Rel., 1894, 470 *et seq.*; *Zambrano case (Mexico) v. U. S.*, For. Rel. 1904, 473-482; *De Brissot (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 2967; *Maal (Netherlands) v. Venezuela*, Feb. 28, 1903, Ralston, 914; *Davy (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *ibid.* 410; *Dominique (France) v. Venezuela*, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 185, 207.

⁷ *Bovallins (Sweden and Norway) v. Venezuela*, March 10, 1903, Ralston, 952.

whose special duty it is to protect the person and property of individuals, a flagrant case arises which calls for prompt demands for redress and indemnity.¹

§ 80. Soldiers.

Soldiers are an integral part of the military arm of the government. Soldiers may be considered authorities rendering the state liable for their acts when they are under the command of officers or are carrying out public duties of the state. On the other hand, practice has fairly well established the rule that the state is not responsible for the wrongful acts of unofficered soldiers, whether incident to a belligerent operation or merely wanton and unauthorized acts of robbery and pillage.² The claimant's remedy is against the individual wrongdoer. To render the government liable for the unlawful acts of its

¹ Assaults by police in Panama upon sailors of U. S. S. *Columbia*, 1906, and *Buffalo*, 1908, For. Rel. 1909, 474, 485, 491; also assaults of July 4, 1912 and April 2, 1915. Assault on H. B. Miller of U. S. S. *Tacoma* by police in Santiago, Cuba, 1909.

² Plundering and pillaging incident to attack. *Vesseron (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2975, and following cases before same commission; *Dresch, ibid.* 3669; *Michel, ibid.* 3670; *Weil, ibid.* 3672; *Antrey, ibid.* 3672; *Denis, ibid.* 2997; *Friery, ibid.* 4036; *Cooper, ibid.* 4039; *Buentello, ibid.* 3670; *Schlinger, ibid.* 3671; *Tripler, ibid.* 2997; Rule 3 of Nicaraguan Mixed Claims Com. 1911 (all cases of marauding, pillaging, or robbery incident to military operations, attacks on towns, etc.). *Parker (U. S.) v. Mexico*, Moore's Arb. 2996; *Foster (U. S.) v. Spain*, Feb. 12, 1871, *ibid.* 2998; *Vidal (France) v. U. S.*, Jan. 15, 1880, *ibid.* 2999; *Castelain (France) v. U. S.*, *ibid.* 3000; *Hayes (Gt. Brit.) v. U. S.*, May 8, 1871, *ibid.* 3688; *Henriquez (Netherlands) v. Venezuela*, Feb. 28, 1903, *Ralston*, 911; *Shrigley (U. S.) v. Chile*, Aug. 7, 1892, Moore's Arb. 3712; *Bacigalupi (U. S.) v. Chile*, May 24, 1897 (extending convention of Aug. 7, 1892), No. 42, Report of Commission, 1901; *Magoon's Reports*, 343; *Edgerton (Gt. Brit.) v. Chile*, Recl. pres. al Trib. Anglo-Chileno, I, 126 (All cases of wanton and unauthorized acts of pillage or violence). See also *Crossman (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *Ralston*, 299. *Mr. Bayard to Mr. Buck*, Oct. 27, 1885, For. Rel. 1885, 625; *Magoon's Reports*, 338, 342; *Claim of Laurent and Lambert v. U. S.*, For. Rel. 1907, I, 392, especially Solicitor's memorandum, 396-398.

But see *Eigendorff (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2975, and *Pears' case (U. S.) v. Honduras*, For. Rel. 1900, 674-702 (negligently shot by sentinel; indemnity of \$10,000 paid). *Young's case (U. S.) v. Peru*, Moore's Dig. VI, 758-759; *Campbell's case (U. S.) v. Haiti*, Moore's Dig. VI, 764 (assault by soldiers; \$10,000 indemnity paid). See also assaults by police officers, note preceding.

soldiers the claimant must prove¹ that they were under the command or orders or control or in the presence of superior officers,² or that the officers negligently failed to take the necessary precautions to prevent the unlawful acts³ or to punish the known offenders.⁴ In France and Germany, it will be recalled, soldiers under command or in the accomplishment of public duties are held to be authorities of the state for whose acts the government is municipally responsible. When the injurious act may be construed as a military necessity⁵ or as war damages (*infra*, § 98 *et seq.*) the government is relieved from liability. However, if private property unlawfully taken by soldiers without authority is applicable to the proper use of the army and actually appropriated to army use, the government has been held liable.⁶ Governments have occasionally paid damages for pillaging by government troops,⁷ and if indemnities are awarded

¹ Weil, *supra*, Moore's Arb. 3671; Vidal, *ibid.* 2999, Hayden, *ibid.* 2995; Culberson, *ibid.* 2997 and other cases cited in last note.

² Wilkins (U. S.) *v.* Mexico, March 3, 1849, Moore's Arb. 2993; Terry and Angus, *ibid.* 2995; Standish, Parsons and Conrow (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3004; Webster, *ibid.* 3004; Dunbar and Belknap, *ibid.* 2998; Newton and Lanfranco, *ibid.* 2997; Jeannaud (France) *v.* U. S., Jan. 15, 1880, *ibid.* 3000; Roberts (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 142; Ruden (U. S.) *v.* Peru, Jan. 12, 1863, Moore's Arb. 1653; Delgado's case *v.* Spain, Moore's Dig. VI, 761; Etzel's case *v.* China, For. Rel., 1904, 168-176, Moore's Dig. VI, 765.

³ Jeannaud, *supra*, Moore's Arb. 3000; Latorre (Gt. Brit.) *v.* Chile, 1891, Reclam. pres. al Trib. Anglo-Chileno, II, 88; De la Cruz (Mexico) *v.* U. S., July 4, 1868, MS. Op. II, 527 (not in Moore); Kunhardt (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 63, 69; Shrigley (U. S.) *v.* Chile, Aug. 7, 1892, Moore's Arb. 3712. See Wadsworth, American commissioner, in Moore's Arb. 2437; Anciana (Mexico) *v.* U. S., *ibid.* 3007 (mustering out U. S. soldiers on Mexican territory held negligent).

⁴ Watkins and Donnelly (Gt. Brit.) *v.* U. S., May 8, 1871, Hale's Rep. 45; De la Cruz (Mexico) *v.* U. S., July 4, 1868, MS. Op. II, 527; Eigendorff (U. S.) *v.* Mexico, Moore's Arb. 2975, and Wadsworth's *dictum*, *ibid.* 2437; Anciana (Mexico) *v.* U. S., July 4, 1868, *ibid.* 3007; Maninot (France) *v.* Venezuela, Feb. 17, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 44, 70.

⁵ Webster (U. S.) *v.* Mexico, Moore's Arb. 3004; Jeannaud (France) *v.* U. S., Jan. 15, 1880, *ibid.* 3000.

⁶ Lavell and other cases (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 3688; Vidal (France) *v.* U. S., Jan. 15, 1880, *ibid.* 2999; Rule 4 of Nicaraguan Mixed Claims Com. 1911.

⁷ *E. g.*, Chile in several cases before Anglo-Chilean tribunal of 1891, Strobel's report, item V, For. Rel. 1896, 35. This allowance was probably due to the wording of the protocol.

to other foreigners, the United States would probably demand equal treatment for its citizens.

Inasmuch as commanding officers are to a certain broad extent responsible for the conduct of soldiers under their command, it may happen that in certain cases of proved negligence or carelessness on the part of such officers in failing to prevent an act of depredation by troops, the government may be charged with liability. It is in this sense that we must understand the somewhat ambiguous instruction of Secretary Bayard in 1885, the concluding sentence of which reads: "But the mere fact that soldiers, duly enlisted and uniformed as such, committed acts 'without orders from their superiors in command' does not relieve their government from liability for such acts."¹

3. JUDICIAL AUTHORITIES

§ 81. Position of Courts and Judges.

The highest courts are authorities whose wrongful acts involve the state in liability. In well-regulated states, the courts are more independent of executive control than any other authorities, not excepting the legislature.² Their errors, therefore, in all systems of civilized justice give rise merely to such rights of appeal as are provided in local municipal law, but do not give rise, in civil cases, either to an action against the judge or against the state. It has been observed³ that certain foreign countries and recently two states in this country accord a right to claim indemnity from the state for an erroneous conviction in criminal cases. For flagrant acts of corruption or malfeasance in office a personal action against the judge is sometimes granted, although on principle a judge is responsible for official wrongs not to third persons but to the state alone. He may be indictable for malicious usurpation of power, but the state is not liable for such abuse of authority.

¹ Mr. Bayard to Mr. Buck, Oct. 27, 1885, For. Rel. 1885, 625. See also *Maninot (France) v. Venezuela*, Feb. 17, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 44, 70.

² Hall, 215; Oppenheim, 216; *Fabiani (France) v. Venezuela*, Feb. 24, 1891, Moore's Arb. 4878, at 4906; *Croft (Gt. Brit.) v. Portugal*, award of Hamburg Senate, Feb. 7, 1856, 50 St. Pap. 1288, Moore's Arb. 4979; Tchernoff, *op. cit.*, 268, 288.

³ *Supra*, p. 129.

These principles of municipal law are observed in the international relations of states, so that as a general rule the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort.¹ In a subsequent chapter (*infra*, § 127 *et seq.*) the whole question of denial of justice will be examined in detail. Our present inquiry will be confined to an examination of the cases in which liability has been sought to be fastened upon governments for the acts of their judicial authorities, not amounting technically to a denial of justice.

The Department of State has on a number of occasions expressed its adherence to the rule that a government is not responsible for the mistakes or errors of its courts.² For excess of jurisdiction by the

¹ There are exceptions to the rule, for unjust judgments have at times served as a ground of diplomatic interposition even where there was no technical denial of justice. This is approved by Triepel (p. 350, note 3) and Wheaton (Dana's ed., § 391), but is opposed by Phillimore, II, 4; Creasy, 337; and Liszt, 9th ed., 182, on the ground that the state has fulfilled its duty by referring the matter to independent courts. Anzilotti insists strongly on the distinction between unjust judgments reached without violation or misapplication of municipal or international law, and violations of law amounting to a denial of justice. Only in the second case does he find any international responsibility. 13 R. G. D. I. P. (1906), 21-25, 296-298. This just theoretical distinction is not usually observed in international practice; the line between an unjust judgment reached by proper observance of the forms of justice and a denial of justice is exceedingly vague, for responsibility is often asserted in either case.

² Mr. Marcy, Sec'y of State, to Chevalier Bertinatti, Dec. 1, 1856, Moore's Dig. VI, 748 (court exceeding jurisdiction). Mr. J. C. B. Davis to Mr. Chase, Jan. 10, 1870, *ibid.* 750; U. S. v. Dunnington, 146 U. S. 338, 351. Nor is the judge personally responsible for his errors to third parties. Mr. Davis to Mr. Chase, Jan. 10, 1870, Moore's Dig. VI, 750; Tchernoff, 288.

The rule has been supported by international tribunals. Barron, Forbes and Co. (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 2525; Yuille, Shortridge & Co. (Gt. Brit.) v. Portugal, March 8, 1861, La Fontaine, 378; Alfaya (U. S.) v. Spain, Feb. 12, 1871, not in Moore.

By way of exception, Great Britain granted to an American citizen (Lillywhite) compensation for his erroneous conviction and imprisonment in New Zealand, to which even a British subject would not have been entitled. For. Rel. 1901, 231-236. Similarly, France paid a heavy indemnity to Great Britain for the erroneous conviction and detention of Mr. Shaw, a British subject, in Madagascar, 19 Hertlet's Com. Treaties, 201-203. See also *Bark Jones* (U. S.) v. Great Britain, Feb. 8, 1853, Moore's Arb. 3051, where an erroneous assessment of costs was considered a ground of government liability. In addition, the government declined to investigate, on remonstrance.

courts Secretary Marcy denied any international responsibility of the state, although he admitted a personal responsibility of the judges.¹ Nevertheless Prof. de Martens in the Costa Rica Packet case,² one of the most important of recent arbitrations, held the Dutch Government liable for the (as he found) wrongful exercise of jurisdiction by a Dutch court over a British captain on account of certain alleged offenses committed beyond the three-mile limit. Notwithstanding the fact that the court found it had no jurisdiction and acquitted the defendant, de Martens held the Netherlands government liable for having ordered the detention and for certain hardships connected therewith. Few arbitral awards have been more severely criticized than the decision in the Costa Rica Packet case.³

While, on principle, the erroneous or merely unjust decision of a court involving no unlawfulness or irregularity in procedure should not involve the state in responsibility,⁴ the failure of the higher courts to disapprove violations of national or international law by minor officials or other authorities fixes an international responsibility upon the state,⁵ and a flagrant or notorious injustice is not easily distinguishable from a denial of justice. Similarly, the judgment of a court in violation of a treaty⁶ or of international law serves to render the state responsible.

¹ Mr. Marcy to Chevalier Bertinatti, Dec. 1, 1856, Moore's Dig. VI, 748. *Contra*, Earl Granville to Mr. Morier, Sept. 30, 1881, 74 St. Pap. 1172.

² *Costa Rica Packet* (Gt. Brit.) *v.* Netherlands, May 16, 1895, Moore's Arb. 4948-4954; 89 St. Pap. 1181 *et seq.*, 1284.

³ Baty, *International law*, 197, 227-231. See also the following articles on the case: A. E. Blès in 28 R. D. I. (1896), 452-468; Jules Valéry in 5 R. G. D. I. P. (1898), 57-66; Gustave Regelsperger in 4 R. G. D. I. P. (1897), 735-745; Tchernoff, *op. cit.*, 290.

⁴ The earlier writers considered an unjust judgment a ground for reprisals, and equivalent to a denial of justice. See citations from Grotius, Bynkershoek and Vattel referred to by Wheaton, *Dana's Wheaton*, § 391. This view is approved by Wheaton and Triepel, *supra*, p. 350, note 3.

⁵ *E. g.*, many decisions of prize courts supporting unlawful captures. *Dana's Wheaton*, §§ 392, 396. See Kane's notes on Convention with France of July 4, 1831, p. 31 and unlawful exactions of duties by Denmark at Kiel, confirmed by Danish courts, 20 St. Pap. 838, and Danish indemnities under treaty of March 28, 1830, *Dana's Wheaton*, § 397.

⁶ *Van Bokkelen* (U. S.) *v.* Haiti, May 24, 1888, Moore's Arb. 1807, 1822; *La Fontaine*, 307; *Yuille, Shortridge and Co. (Gt. Brit.) v. Portugal*, March 8, 1861, 61 St. Pap. 841; *La Fontaine*, 377-385.

It is a fundamental principle that the acts of inferior judges or courts do not render the state internationally liable when the claimant has failed to exhaust his local means of redress by judicial appeal or otherwise,¹ for only the highest court to which a case is appealable may be considered an authority involving the responsibility of the state.²

The regularity and legality of a court's practice and procedure are to be judged by the local law, which need not, however, manifest the liberal principles of Anglo-American law. For example, even in countries in which the inquisitorial system of criminal law prevails, a fair application of the law to aliens and citizens alike removes all ground of complaint on the part of foreign countries, even of those adopting the accusatory system. Provided the system of law conforms with a reasonable standard of civilized justice and provided that it is fairly administered, aliens have no cause for complaint in the absence of an actual denial of justice.³

The personal acts of judges either in their private capacity or so grossly violative of their judicial functions that they may be held personal acts, do not entail any liability of the government. For their private acts they are liable as other individuals.⁴ It is not always easy to distinguish personal acts from wrongful official acts. The

¹ *Supra*, p. 191, note 1, and cases of Blumhardt, Burn, Smith and Jennings, there cited.

² French indemnity of 1831, Moore's Arb. 4472-73; The Van Ness Convention with Spain, Feb. 17, 1834, *ibid.* 4544.

³ *E. g.*, in Trumbull (Chile) *v.* U. S., Aug. 7, 1892, Moore's Arb. 3255-61, where claimant was ultimately acquitted of a charge of violating the neutrality laws, it was held that he was not entitled to an indemnity, for he had been "regularly indicted, tried, and acquitted in accordance with the ordinary proceedings of courts of justice, and that he had been subjected to no improper treatment." See also White (Gt. Brit.) *v.* Peru, award April 13, 1864, Moore's Arb. 4967, at 4968; Ullman, *De la responsabilité de l'Etat en matière judiciaire*, Paris, 1911 (extract from Lapradelle's and Politis' *Recueil des arbitrages*, v. II); *Forte* (Gt. Brit.) *v.* Brazil, award June 18, 1863, 53 St. Pap. 150, Moore's Arb. 4925; Mr. Webster, Sec. of State, to the President in Thrasher's case, 2 Wharton, 613, and other extracts in 2 Wharton, §§ 230 and 230a.

⁴ Thus the fraud and corruption of a municipal judge were held by Attorney General Akerman in the *Caroline* case against Brazil not to involve the liability of Brazil and the U. S. returned a portion of an indemnity already paid (18 Stat. L. 70); 13 Op. Atty. Gen. 553. See also *Rebecca* (U. S.) *v.* Mexico, March 3, 1849, Moore's Arb. 3008 (judge fled with money deposited in court).

latter usually involve the liability of the state if they are not remedied by higher courts and result in an actual injury or denial of justice to aliens.¹

As in the case of minor officials and even of individuals, the government must assume liability for such wrongful acts of its judges or courts as it negligently fails to prevent or punish, or against which judicial recourse is closed to the injured individual.² The failure of administrative authorities to execute a judgment³ may be appropriately considered as a denial of justice.

RESPONSIBILITY FOR POLITICAL SUBDIVISIONS OF THE STATE

§ 82. Responsibility of Central Government for its Constituent Parts.

The question is often raised as to whether the central government is liable for the breach of a contract by one of its political subdivisions or for a tort committed by an officer of a constituent state under circumstances rendering that state responsible. In international relations the national government is alone responsible for the proper safeguarding of the rights of foreigners, and aliens have the right to look to the central government in the case of violation of treaty rights and international obligations of the nation by its constituent parts.⁴

¹ *Cotesworth and Powell (Gt. Brit.) v. Colombia*, Dec. 14, 1872, Moore's Arb. 2050 at p. 2084, parag. 9 (negligent absence of judge from his official post). Mr. Seward, Sec'y of State, to Mr. Webb, Dec. 7, 1867, 2 Wharton, 615 (fraudulent decision). In the case of *Meade v. Spain*, Spain acknowledged her liability for the palpable misconduct of her judicial tribunals. Moore's Arb. 3238.

² *Jonan (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3251 (failure of Mexican government to prevent illegal assumption of jurisdiction by its courts, on remonstrance. It is presumed government had the necessary power). *Cotesworth and Powell (Gt. Brit.) v. Colombia*, Moore's Arb. 2050, 2085 (condonation of illegal act of judge by an amnesty or pardon, thereby also depriving claimant of all appellate recourse or redress); *Bark Jones (U. S.) v. Great Britain*, Feb. 8, 1853, Moore's Arb. 3051 (refusal to investigate an unjust judgment, but on the contrary sustaining it after remonstrance); Holtzendorff, *Handbuch*, II, 74; Fiore, *Dr. int. codifié*, §§ 339, 340; Calvo, I, § 348; Pradier-Fodéré, I, § 402; Bluntschli, § 340.

³ *Montano (Peru) v. U. S.*, Jan. 12, 1863, Moore's Arb. 1630, 1634; *Fabiani (France) v. Venezuela*, Feb. 24, 1891, *ibid.* 4878, at p. 4907; *Polak v. Egypt*, 3 Clunet. (1876), 499.

⁴ Oppenheim, 210; Phillimore, I, 194; Triepel, 359 *et seq.*; Anzilotti in 13 R. G. D. I. P. (1906), 301 and authorities there cited.

In the matter of contracts entered into with corporate subdivisions of a general government a distinction is recognized, and it has been held that in the absence of a definite benefit to the central government or other factor indicating national liability for the debt, the general government is not liable for contractual debts due from or by its cities, villages or their inhabitants.¹ Especially is this true where the debt is contracted by the municipality or commonwealth in its corporate character as a fiscus for distinctly corporate purposes.² Where, however, there has been some benefit to the general government, or some control over or interest in the contract by the general government, the latter has been held liable for breach of the contract by a constituent state or municipality.³

¹ Thompson (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3484; Nolan (U. S.) *v.* Mexico, *ibid.* 34-84; La Guirara Light and Power Co. (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 181; Thomson-Houston Co. (U. S.) *v.* Venezuela, *ibid.* 169 (*dictum*). But see *contra* Ballistini (France) *v.* Venezuela, Feb. 19, 1902, *ibid.* 503, 506 (no reason given for award).

² Thus, the United States has been held not responsible for the repudiation of state bonds nor a guarantor of their payment (Schweitzer *v.* U. S., 21 Ct. Cl. 303), nor for the bonds of a territory, although the governor was appointed by the President and Congress failed to disapprove the issue of the bonds or their repudiation. Florida Bond Cases, Gt. Brit. *v.* U. S., Feb. 8, 1853, Moore's Arb. 3594-3612. Similarly, the U. S. is not liable for the debts [or torts] of officers of a Territory organized under Congressional legislation. (Mr. Bayard to Mr. West, June 1, 1885, For. Rel. 1885, 452.) Mexico was held not liable for the repudiation by Texas of a contract (scrip) representing land in Texas, that state having later seceded from Mexico. Union Land Co. *v.* Mexico, March 3, 1849, Moore's Arb. 3448, 3451.

³ Participation of the minister of public works in a contract with a municipal council and an exemption from the payment of federal customs duties. Rudloff (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 182, 197. See also Daniel (France) *v.* Venezuela, Feb. 19, 1902, *ibid.* 507, 509 and Dominique (France) *v.* Venezuela, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 207 (various degrees of national interest in the contract). Beckman (Germany) *v.* Venezuela, Feb. 13, 1903, Ralston, 598, 599 (forced loans—quasi-contract—exacted by a constituent state, the proceeds of which were used for the defense of the entire nation). See also Baasch and Römer (Netherlands) *v.* Venezuela, Feb. 28, 1903, Ralston, 906 and Bolivar Ry. Co. (Gt. Brit.) *v.* Venezuela, Feb. 13, 1903, *ibid.* 391; Ballistini (France) *v.* Venezuela, Feb. 19, 1902, Ralston, 503, 506 (supplies furnished to a constituent state—no reason given for the award); Metzger (U. S.) *v.* Haiti, Oct. 18, 1899, For. Rel. 1901, 271 (central government had assumed diplomatic negotiations for settlement of claim against municipality; held an agreement binding on government). See also extracts quoted in Ralston's International arbitral law, §§ 457-467.

The international responsibility of the nation or central government for the acts of its political subdivisions or dependencies, such as suzerain and vassal states, protectorates, constituent states under a real or personal union, or federation or confederation of states¹ depends generally upon the extent to which the political subdivision or dependency has constitutionally been deprived of independent international personality. If the central authority undertakes by treaty or otherwise to represent its constituent parts in international affairs, it must discharge the resulting obligations, although constitutionally the fulfillment of many of these duties may in first instance be delegated to the political subdivisions of the nation.² Constitutional arguments do not avail to excuse the non-performance of international duties,³ although the constitutional inability of the United States to compel the states to satisfy the treaty obligations of the nation has often furnished a controversial ground for contesting its legal liability.⁴

The torts committed against aliens by officers or authorities of a political subdivision of a nation, under circumstances which would render the subdivision responsible, generally bind the central government to indemnify the injured alien.⁵ The reason for this, as has

¹ Westlake, I, ch. III; Tchernoff, 188-193. On constituent states see Donot, M., *De la responsabilité de l'état fédéral à raison des actes des états particuliers*, Paris, 1912, p. 100 *et seq.* On protectorates see Hall, *Foreign powers and jurisdiction*, § 96, and Jenkins, H., *British rule and jurisdiction, etc.*, Oxford, 1902, p. 175.

² In a *dictum* by Plumley, Umpire, in *Davy (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *Ralston*, 411, a difference was deduced from the constitutional character of the bond existing between the constituent state and the central government, in the fact that in the case of some countries, *e. g.*, Venezuela, where the states are carved out of the national domain and formed in accordance with the national wishes, the federal government is held to more direct responsibility for the acts of its constituent states than in the case of a country like the United States where the federal government merely has delegated powers, sovereignty being reserved in the separate states.

³ Lord Clarendon to Mr. Erskine, April 21, 1870, 65 St. Pap. 669, *Baty*, 152 (case in Greece); Speech of Senator Edmunds, June 3, 1886, *Cong. Record* v. 17, part 5, p. 5186; Mr. Fish, Sec'y of State, to Mr. Partridge, March 5, 1875, *Moore's Dig.* VI, 816 (case in Brazil); *De Brissot (U. S.) v. Venezuela*, Dec. 5, 1885, *Moore's Arb.* 2949-2967; *Trumbull (Chile) v. U. S.*, Aug. 7, 1892, *ibid.* 3569. See article by Despagnet, "Les difficultés venant de la constitution de certains pays," 2 R. G. D. I. P. (1895), 181 *et seq.*

⁴ Generally without success. See *infra*, § 91.

⁵ Little, Commissioner in *De Brissot and Rawdon case (U. S.) v. Venezuela*, Dec. 5,

already been observed, is that the state is a unit in its international relations; and in view of the inability of a constituent political subdivision of the state to commit an international delinquency on its own responsibility alone, the parent government is bound to answer for it.¹

§ 83. Succession of States and Apportionment of Debts.

The matters connected with the distribution of public obligations in the case of the division of a state into distinct states, or the cession of a portion of one state to another have engaged the attention of numerous writers without having led to any definite conclusion except that no universal rule of international law on the subject can be said to exist.²

1885, Moore's Arb. 2949, 2967; Davy (Gt. Brit.) *v.* Venezuela, Feb. 13, 1903, Ralston, 411; Torreny (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 162 (local police officer); Jones (U. S.) *v.* Mexico, March 3, 1849, Moore's Arb. 3019 (illegal detention of vessel by governor of a state); *Montijo* (U. S.) *v.* Colombia, Aug. 17, 1874, Moore's Arb. 1421, 1443; Dominique (France) *v.* Venezuela, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 206 (municipality). See also Knapp and Reynolds claims, Moore's Dig. VI, 800 (connivance of local authorities in brigandage).

¹ It is on this theory that the United States has on several occasions felt itself constrained to award indemnities to aliens injured under circumstances rendering the states responsible for the injury. Foreign governments are not compelled to look to the constituent states for the vindication of the treaty rights of their nationals, and the inability of the federal government to compel the states to observe these rights or make reparation for their violation lays the foundation for the liability of the United States. Presidents Harrison, McKinley, Roosevelt and Taft and the authors of numerous bills introduced in Congress to give the federal courts jurisdiction over offenses against aliens, considered the police and judiciary of the state in such cases as federal agents. See *infra*, p. 226 (mob violence) and footnote 1. In this respect, the constitutional inability operates in the same way as a negligent failure to bring local officers to justice. De Brissot and Davy cases, footnote 1, *supra*.

If local officers depend for their authority on the central government, they may be considered government agents. Baasch and Römer (Netherlands) *v.* Venezuela, Feb. 28, 1903, Ralston, 906.

² The details of this exceedingly interesting subject, which may become of renewed importance at the conclusion of the present European War, can hardly be discussed here. It is a very complicated subject, and precedents depend so largely upon the special facts and circumstances of each case, that conclusions of principle are not easily deducible. The ablest discussions of the subject, involving the transmission and divisibility of obligations arising out of public debts, general and local, and out of contracts and concessions will be found in Westlake, I, 58 *et seq.*; Keith, Arthur B. The theory of state succession, London, 1907, ch. VIII; Huber, Max, Die Staatensuccession, Leipzig, 1898, § 125 *et seq.*; Schönborn, W., Staatensuccessionen, in Handbuch des Völkerrechts, II, 2, Stuttgart, 1913, pp. 55-60, 80-84, 96-109, 113,

As a general rule, however, it may be said that the state, through all changing forms of government,¹ is responsible for the debts of its titular government and even of general *de facto* governments. Public debts are not extinguished by the division of a state into distinct states, whether by war or by mutual consent.² According to the weight of authority among international law writers, however, there appears to be no legal obligation on the part of a seceding province or on the part of a country taking over a certain portion of territory from another country to assume some share of the national debt *when the identity of the parent state is maintained*.³ They recognize, however, a moral obligation to assume a proportionate share of the general debt of the parent government which has been incurred for the benefit of the entire country.⁴ Many of the continental writers supported by the evidence of numerous treaties, erect the moral obligation into a legal one, whereas the Anglo-American publicists—possibly influenced by the fact that their countries have been annexing and conquering countries—and in turn supported by various treaties, such as the treaties following the Franco-Prussian War of 1871 and the Spanish-American War of 1898, and the treaties of cession of Louisiana, Florida, New Mexico and California, assert vigorously the merely moral character of the obligation. Moreover, no uniform rule for the apportionment of the debt has ever been agreed upon,⁵ a further evidence of the non-legal

117-118; Appleton, H., *Des effets des annexions de territoires sur les dettes, etc.*, Paris, 1894 (part 2 of a doctoral dissertation); and Cavaglieri, Arrigo, *La dottrina della successione de stato a stato, etc.*, Pisa, 1910, ch. II, § 11, p. 89 *et seq.*; see also Moore's Dig. I, § 96 *et seq.*

¹ Westlake, I, 58; Oppenheim, I, 122; Halleck, I, 96. See also Zouche, Brierly's trans., § 66, in which Aristotle's contrary view is cited. The rule of the text, which was favored by Grotius, II, 9, § 3, is now uniformly adopted. Moore's Dig. I, 249 *et seq.*; *Bolivar Ry. Co. (Gt. Brit.) v. Venezuela*, Feb. 17, 1903, Ralston, 394; *Neapolitan Indemnity, convention of October 14, 1832*, Moore's Arb. 4579. For *de facto* governments see *infra*, p.

The U. S., as a military occupant, however, was not liable for the debts of Cuba. *Griggs, Atty. Gen.*, 22 *Op. Atty. Gen.* 384.

² Hall, 91, 92. *Case of the ship Tarquin (U. S.) v. Brazilian Indemnity*, Jan. 24, 1849, Moore's Arb. 4617.

³ Hall, 92; Oppenheim, 129, and authorities cited; Magoon's Reports, 189, 190.

⁴ Oppenheim, 130, 131; Hall, 92; Keith, *op. cit.*, 60 *et seq.*, and authorities cited.

⁵ See different principles set forth by Huber, *op. cit.*, § 134.

character of the obligation. In the case of a debt raised for the purposes of the ceded territory or charged upon its local revenues, it is held by the majority of writers, who cite numerous treaties in support, that the obligation passes with the land to its new owners.¹ While reason and authority favor this rule, it is not altogether certain that the annexing state contracts a legal obligation to pay the debts secured upon local revenues, and it is fair to conclude that it is not bound to pay war debts contracted by the conquered state or province for the very purpose of resisting conquest and annexation. Nor is a new independent state split off from a parent state legally obliged to assume any share of the debts of the parent state, although some of them may have been incurred in its special behalf. Thus, the American colonies in 1783 assumed no part of the general debt of Great Britain; on the other hand, the Spanish-American colonies practically all undertook to pay a portion of the debt of Spain.²

According to strict principles of international law, the parent state which has lost a province by conquest or cession, remains liable for all but local debts of the transferred province contracted for local purposes. On equitable grounds, a reduction of the debt has, at times, been allowed by creditor governments, especially when the debt was incurred through the separated province.³ Where the identity of the parent state is destroyed, the conquering or annexing power or the new state becomes

¹ This was one of the contentions in the *Hodgskin and Landreau claims v. Chile* both diplomatically and before the arbitral tribunal under convention of Aug. 7, 1892. The right of claimants to certain guano deposits in Peru was in question. It was contended that the obligation of Peru passed to Chile on the cession of the guano territory. The Tribunal (Goode, U. S. commissioner, dissenting) held that the claim was personal only against Peru, and did not pass with the land. Moore's Arb. 3571-3590. In the diplomatic correspondence, the U. S. seems to have contended that the satisfaction of the Peruvian obligations, pledged upon the transferred guano deposits, was a moral obligation of Chile. This is the better view, but Westlake (I, 63, 1st ed.) believes the obligation to have been legal. Westlake here adopts the view of the continental writers. See Keith, *op. cit.*, 60, 63. See claims of France v. Chile, July 23, 1892 (Award, July 5, 1901), Descamps & Renault, *Rec. int. des traités du xx^e siècle*, 1901, p. 188 *et seq.* In support of the text, see also Hall, 92. Magoon's Reports, 178, 189. See extracts in Moore's Dig. I, 339 *et seq.*

² Moore's Dig. I, 342-343.

³ Claim of Chilean S. S. *Lautardo v. Colombia*, reduced by a third after secession of Panama, which had been responsible for the original wrong. For. Rel. 1907, I, 293.

heir to the debts of the destroyed country.¹ The ceded or seceding territory, however, is liable for local debts,² although, as observed, there is much difficulty in establishing what is a local debt. It has been noted that a general debt, even when made a lien upon local revenues, is not a local debt and an obligation *in rem*. A local debt is one incurred only for strictly local purposes, and is the only one which carries to the annexing state or new state created, a legal obligation to pay. It is important in all cases to establish whether the debt has been contracted for local or for national purposes.³

It is stated by practically all the authorities that the annexing state becomes liable for all the concessions and contracts of the annexed state. For this view, they find support in numerous treaties and court decisions. Nevertheless, the fact that bankrupt states could thus impose enormous obligations on their successors, and that war debts would thus legally have to be paid, weakens to such an extent the force of the contention, that it may with justice be said that the successor is bound to satisfy only such contractual and other obligations of the annexed state as appeal to him as fair and reasonable, equitable considerations, however, dictating the maintenance of all obligations not founded in fraud or against the public interest.⁴

DE FACTO GOVERNMENTS

§ 84. Different Kinds. Transmission of Obligations.

The internal political changes which a state may undergo do not affect its international personality. In the rapid change of government to which some states have been subject, certain parties have secured control and exercised the powers of government, without compliance with constitutional or strictly regular forms. This control may extend over the entire nation or over certain parts only. It becomes important then to determine when such control of the administration may be said to have become a *de facto* government, and to

¹ Oppenheim, 129; Hall, 99; Halleck, 98; Dana's Wheaton, note 18.

² Oppenheim, 131; Hall, 92; 23 Op. Atty. Gen. 187.

³ Magoon's Rep. 190; 23 Op. Atty. Gen. 187. The authorities are unsatisfactory on many of the points here discussed. See footnote in Hall, 93-94.

⁴ The ablest discussion of this matter has been found in Keith, *op. cit.*, 66-72.

what extent the acts of such a provisional government are binding upon the nation.¹

It is necessary first to distinguish between the powers of a *de facto* government which has displaced the *de jure* government within the whole or practically the whole nation, as, *e. g.*, the government of Cromwell, of Napoleon I, and of the Republic of 1848 in France, and a *de facto* government which controls only a limited portion of the national territory, as the Confederate government did in the United States. The former may be called a "general" *de facto* government, which resembles closely a lawful government, and the latter, a "local" *de facto* government or government of paramount force. The legal consequences of this distinction are important.²

A general government *de facto*, having completely taken the place of the regularly constituted authorities in the state, binds the nation. So far as its international obligations are concerned, it represents the state. It succeeds to the debts of the regular government it has displaced, and transmits its own obligations to succeeding titular governments.³ Its loans and contracts bind the state, and the state is responsible for the governmental acts of the *de facto* authorities. In general, its treaties are valid obligations of the state. It may alienate the national territory, and the judgments of its courts are admitted to be effective after its authority has ceased. An exception to these rules has occasionally been noted in the practice of some of the states of Latin-America, which declare null and void the acts of a usurping

¹ Rougier, A., *Les guerres civiles et le droit des gens*, Paris, 1903, 481 *et seq.*; Wiesse, C., *Le droit international appliqué aux guerres civiles*, Lausanne, 1898, 235 *et seq.* If the *de jure* successor of such a *de facto* government is the government the latter has itself displaced, it is then known as the "intermediary" government. See also Moore's Dig. I, 41 *et seq.*; Ralston, *International arbitral law*, §§ 430, 448-456; and Gaudu, Raymond, *Essai sur la légitimité des gouvernements dans ses rapports avec les gouvernements de fait*, Paris, 1914.

² *Williams v. Bruffy*, 96 U. S. 176, 186; *Thorington v. Smith*, 8 Wall. 1, 8-10.

³ The Neapolitan Indemnity Oct. 14, 1832, Moore's Arb. 4575-4589. (Two Sicilies admitted liability for acts of Murat's government.) Treaty of July 4, 1831 between U. S. and France admitted liability of France for acts committed during the Empire. See Wiesse, *op. cit.*, 246; *Miller (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2974; *Republic of Peru v. Dreyfus*, L. R. 38 Chancery Div. 348, and particularly decision of Franco-Chilean Tribunal of Arbitration in Lausanne, 1901, in claim of Dreyfus Bros, Descamps and Renault, *Rec int.*, etc., 1901, 396-398.

de facto intermediary government when the regular government it has displaced succeeds in restoring its control.¹ Nevertheless, acts validly undertaken in the name of the state and having an international character cannot lightly be repudiated, and foreign governments generally insist on their binding force.² The legality or constitutional legitimacy of a *de facto* government is without importance internationally so far as the matter of representing the state is concerned.³

The responsibility of the state for the acts of a local *de facto* government involves more delicate questions. Such a local government *de facto* may be maintained by military force within a portion of a larger territory, either as an enemy making war against the invaded nation—a military occupant—or as a revolutionary organization resisting the authority of the legitimate government or of other factions contending for national control. The power of such a *de facto* government to involve the responsibility of the state depends largely upon its ultimate success, so that most of its international acts, *e. g.*, treaties, etc., are affected with a suspensive condition. Nevertheless, even if it fails, definite executed results follow from its merely temporary possession of administrative control within a defined area. These may be considered briefly.

A temporary occupant or local *de facto* government carries on the functions of government, supported usually directly or indirectly by military force.⁴ It may appoint all necessary officers and designate their powers, may prescribe the revenues to be paid and collect them,

¹ Wiese, *op. cit.*, 244 *et seq.* We cannot enter into any detailed discussion of the various kinds of governmental acts which survive the downfall of a usurping *de facto* government. This is largely a question of constitutional law. Pradier-Fodéré, I, § 134.

² Thus Peru, notwithstanding art. 10 of its Constitution and its law of 1886, declaring void the acts of the usurper Pierola, was held liable on contracts which he had made. *Dreyfus (France) v. Chile*, July 23, 1892 (award July 5, 1901), Descamps and Renault, *Rec. int.*, etc. 1901, 396-398.

³ Bluntschli, §§ 44, 45, 120; Holtzendorff, II, § 21; Pradier-Fodéré, §§ 134, 149; Rivier, II, 131, 440; Rougier, 481; *Dreyfus (France) v. Chile*, Franco-Chilean Arbitration, Lausanne, p. 290, and authorities there cited, and Gaudu, *op. cit.*

⁴ Moore's Dig. I, 45 *et seq.*; VII, 257 *et seq.*; 2 Op. Atty. Gen. 321; 9 *ibid.* 140; Magoon's Reports, 11 *et seq.*; Hall, part 3, chap. IV; Oppenheim, 204 *et seq.*; Bordwell, P., *Law of war*, Chicago, 1908, ch. VIII and IX; Spaight, J. M., *War rights on land*. London, 1911, ch. XI and XII.

and may administer justice.¹ Foreigners must perforce submit to the power which thus exercises jurisdiction, and a subsequent *de jure* government cannot expose them to penalties for acts which were lawful and enforced by the *de facto* government when done. The temporary *de facto* government may legislate on all matters of local concern, and in so far as such legislation is not hostile to the subsequent *de jure* government which displaces it, its laws will be upheld.² A military occupant as a general rule is forbidden to vary or suspend laws affecting property and private personal relations or which regulate the moral order of the community. If he does, his acts in so doing cease to have legal effect when the occupation ceases. Political and administrative laws are subject to suspension or modification in case of necessity.³

The collection of taxes and customs duties within the territory and during the period of occupancy or of the local *de facto* government relieves merchants and taxpayers from the obligation of a subsequent second payment, upon the same goods, to the succeeding *de jure* government.⁴ Such a temporary government may levy contributions on the inhabitants for the purposes of carrying on the war, but they must not savor of confiscation. It may seize property belonging to the state and may use it. It may receive money due the state and give receipts in the name of the state.⁵ This applies only to debts payable within the territory and period of occupancy.

Debts due *by* the state cannot be confiscated or the interest sequestered by a temporary occupant,⁶ and private property must be respected. The occupant or local *de facto* government cannot alienate

¹ The German legislation for the occupied territories of Belgium has been collected and edited by C. H. Huberich and A. Nicol-Speyer. The Hague, Nyhoff, 1915. 108 p.

² *Bruffy v. Williams*, 96 U. S. 176, 185; *U. S. v. Home Ins. Co.*, 22 Wall. 99; *Sprott v. U. S.*, 20 Wall. 459, 464. But the *de jure* government which ousts a usurping *de facto* government (*e. g.*, the Confederates) may disregard all its acts which contributed to its support, except that it cannot collect taxes and duties a second time.

³ Hall, 475-476.

⁴ *U. S. v. Rice*, 4 Wheaton, 246; *Mazatlan and Bluefields cases*, Moore's Dig. I, 49 *et seq.*; *Cases in U. S. Civil War and in Colombia*, *ibid.* VI, 995-996. Message of the President, For. Rel. 1900, xxiv; *MacLeod v. U. S.* (1913), 229 U. S. 416, 429.

⁵ Magoon's Reports, 261, citing Phillipmore and Halleck.

⁶ Moore's Dig. VII, 306 and authorities cited in note, p. 308.

any portion of the public domain.¹ The fruits thereof may be sold, but only that part accruing during the period of occupancy.² A local *de facto* government may become the owner of movables, which it may sell and hypothecate. A succeeding government takes such mortgaged property as rightful owner, subject to the liens thus created in good faith.³ As a general rule, however, a succeeding *de jure* government is not liable⁴ for debts contracted by a displaced local *de facto* government.⁴

A person dealing with a local *de facto* government assumes the risk of his enterprise. The *de facto* government may issue paper money, and private contracts stipulating for payment in such money will be enforced in the courts of the succeeding *de jure* government.⁵ Under compulsion, a government has at times admitted liability for the wrongful acts of previous local *de facto* governments.⁶

Having in a general way described the differences between a general and a local *de facto* government and their power to transmit responsibility, it is now necessary to examine the criteria of a *de facto* government, and the legal results of one of them in particular, namely, recognition by the claimant's own government.

¹ *Coffee v. Groover*, 123 U. S. 1; *Georgiana and Lizzie Thompson (U. S.) v. Peru*, Moore's Arb. 1595, 4785; *Munford v. Wardwell*, 6 Wall. 423, 425.

² *Georgiana and Lizzie Thompson claim (U. S.) v. Peru*, *supra*. Art. 55 of the Hague Regulations provides that a military occupant shall be regarded as the administrator and usufructuary of the public buildings of the state. See *Maccas, Salonique occupée et administrée par les Grecs*, 20 D. I. R. G. P. (1913), 207-242.

³ *U. S. v. Prioleau* (1865), 35 Law Jour. Chancery Rep. N. S., 7; *U. S. v. McRae* (1869), L. R. 8 Equity, 69; *Hallett v. The King of Spain*, 1 Dow and Cl. 169; *The King of the Two Sicilies v. Wilcox*, 1 Sim N. S. 332. But see *Barrett (Gt. Brit.) v. U. S.*, May 8, 1871, Hale's Rep. 153, Moore's Arb. 2900, where it was held that Confederate cotton, seized by the U. S., was not subject to a lien created by contract between claimant and the Confederate states.

⁴ Don Miguel loan of 1832 was not binding on Portugal. Rougier, 523.

⁵ *Thorington v. Smith* (1868), 8 Wall. 1, 9 (contract made on a sale of property, and not in aid of the rebellion); *Hanauer v. Woodruff*, 15 Wall. 439, 448. As to the general effect of the acts of the Confederate government, see *Baldy v. Hunter*, 171 U. S. 388, 400.

⁶ *E. g.*, Lord J. Russell made his recognition of the Juarez government in Mexico conditional upon the admission of responsibility for the acts of the Miramon and Zuloaga governments. Lord J. Russell to Sir C. Wyke, March 30, 1861, 52 St. Pap. 237, Moore's Arb. 2906.

§ 85. Criteria of De Facto Government. Effect of Recognition.

The existence of a *de facto* government is a question of fact. Tests in establishment of this fact are the possession of supreme power in the district or country over which its jurisdiction extends,¹ the acknowledgment of its authority by the people or the bulk of them by their rendering it habitual obedience "from fear or favor,"² and finally the recognition of the government as *de facto* by foreign governments.³ While each of these tests is persuasive, none of them alone is conclusive, except as recognition or failure to recognize by the claimant's own state may operate as an estoppel.

In municipal courts, recognition in fact by the political department of the government is essential to judicial notice of the *de facto* character of a foreign provisional government.⁴ In one case at least, it has been held that such act or failure to act by the government was not binding on an international tribunal.⁵ The burden of proving that a particular government is a government *de facto* rendering the nation responsible falls upon the claimant.⁶ It has been held in several cases that recognition, while important as evidence, does not create a *de facto* government,⁷ nor is such recognition conclusive of its existence in fact. The failure of the United States, however, to recognize certain foreign

¹ *Mauran v. Insurance Co.*, 6 Wall. 1; *Nesbitt v. Lushington*, 4 Term. 763.

² Opinion of Wadsworth, Commissioner in *McKenny (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2882. But a local *de facto* government generally controls by force and not favor. See also *U. S. v. Price*, 4 Wheat. 253, and citations from Austin and Halleck in the case of *Day and Garrison (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3553-54 and *Henriquez (Netherlands) v. Venezuela*, Feb. 28, 1903, Ralston, 899. See also *Janson (sic in original) v. Mexico*, July 4, 1868, Moore's Arb. 2902, 2930 and *dictum* by Wadsworth in *Cucullu (U. S.) v. Mexico*, *ibid.* 2877.

³ *Thorington v. Smith*, 8 Wall. 1, 9.

⁴ *City of Berne v. Bank of England*, 9 Vesey, 347; *The Manilla*, 1 Edw. Adm. 1; *Rose v. Himely*, 4 Cranch, 241; *Gelston v. Hoyt*, 3 Wheat. 246, 324; *U. S. v. Palmer*, 3 Wheat. 644.

⁵ *Jarvis (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 150. See also *Day and Garrison (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3560 (although it was considered an important element in arriving at the fact).

⁶ *Day and Garrison (U. S.) v. Venezuela*, *supra*.

⁷ *Cucullu (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2873, 2877; *McKenny (U. S.) v. Mexico*, *ibid.* 2883 (recognition of Zuloaga government in Mexico by U. S. Minister and other foreign ministers held not to establish its *de facto* character as a fact); *Jarvis (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 150.

governments as *de facto*, has been held binding upon its own citizens and to estop them from asserting rights based upon the *de facto* character of the government in question. ¹ It will be noticed hereafter (*infra*, p. 235) that the recognition of the belligerent character of a revolutionary movement releases the legitimate government from liability to the subjects of the recognizing power for the acts of the revolutionists.

While international commissions have held almost uniformly that only a *general de facto* government can involve the responsibility of the state,² it was held in one case,³ which has been sharply criticized⁴

¹ *Jarvis (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 150 (the Paez Government in Venezuela); *Janson (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2902 (the Maximilian government in Mexico); *Schultz (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2973 (recognition of Juarez government by U. S. estopped claimant from asserting Miramon government as the *de facto* government of Mexico).

A question has been raised whether the acts of the Huerta government in Mexico are binding on Mexico, and hence upon the Carranza or other government which may ultimately be established. Huerta's government having been at least a *general de facto* government—it was indeed recognized as the *de jure* government by various European powers—its acts normally bind the nation. But the further question arises whether a declaration of the President of the United States to the effect that "he will not recognize as legal or binding anything done by Huerta since he became Dictator," *i. e.*, subsequent to Huerta's dissolution of the Mexican Congress and the arrest of certain deputies, October 10, 1913, has any effect upon the international obligations of Mexico, or operates as an estoppel upon citizens of the U. S. to whom Huerta's government incurred obligations subsequent to October 10, 1913. As against foreign governments, it would seem that the alleged statement of the President does not alter the obligations of the Mexican nation under general principles of international law. As regards citizens of the U. S., it is very doubtful whether Mexico can avail itself of any such declaration to escape obligations properly incurred and due by the nation or its authorities under recognized principles. On Mexican loans, see note by Thomas Baty in 39 *Law Mag. & Rev.* (1914), 470.

² *Day and Garrison (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3548, 3553 (*dictum*); *Henriquez (Netherlands) v. Venezuela*, Feb. 28, 1903, Ralston, 889.

The acts of local *de facto* government were held not to bind the state in *Georgiana* and *Lizzie Thompson (U. S.) v. Peru (supra)*, and in the Don Miguel loan.

Again, *e. g.*, Mexico was held not responsible for the acts of the Maximilian government: *Janson (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2902; *Stückle, ibid.* 2935; *Baxter, ibid.* 2934. Nor for those of the Zuloaga and Miramon governments: *Cucullu, ibid.* 2873; *McKenny, ibid.* 2881 and cases cited p. 2885. Nor U. S. for acts of the Confederate states, *Prats (Mexico) v. U. S., ibid.* 2886.

³ *Baldwin (U. S.) v. Mexico*, April 11, 1839, Moore's Arb. 2859–2866, where the

⁴ *Lapradelle and Politis, Recueil des arbitrages, I, 466–467.*

that the state was responsible for the wrongful acts of a local *de facto* government.

wrongful acts of a "junta" established for six months in a state of Mexico were held to render Mexico responsible.

See also *Central and South American Telegraph Co. (U. S.) v. Chile*, Aug. 7, 1892, Moore's Arb. 2938, 2942 (where a local *de facto* government was held entitled to take advantage of a concession permitting the "government" to suspend a cable service).

CHAPTER VIII

INTERNATIONAL RESPONSIBILITY OF THE STATE—Continued. DENIAL OF JUSTICE

§ 127. Meaning of the Term.

In last analysis, a denial of justice is the fundamental basis of an international claim. It connotes some unlawful violation of the rights of an alien. The term, however, is used in two senses. In its broader acceptation it signifies any arbitrary or wrongful conduct on the part of any one of the three departments of government—executive, legislative or judicial. The term includes every positive or negative act of an authority of the government, not redressed by the judiciary, which denies to the alien that protection and lawful treatment to which he is duly entitled. Under the head of aliens, and in the preceding chapters on the responsibility of the state, we have discussed the question of the liability of the government for many of those injuries which may be inflicted on aliens in violation of municipal law, international law, treaties or the ordinary principles of civilized justice. These are denials of justice in the broader sense. For example, a wrongful expulsion, false imprisonment, confiscatory breach of contract, wanton pillage by officered government troops, confiscation of property by legislative act or executive decree, failure to punish a criminal offense, all constitute different forms of denial of justice.

In its narrower and more customary sense the term denotes some misconduct or inaction of the judicial branch of the government by which an alien is denied the benefits of due process of law. It involves, therefore, some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process. It is in this sense that the term will be considered in the present discussion.¹

¹ The distinction between the broad and narrow meaning of denial of justice was considered in the case of *Fabiani (France) v. Venezuela*, Feb. 24, 1891, *Moore's Arb.* 4878, discussed by R. Floyd Clarke in 1 *A. J. I. L.* (1907), 389 *et seq.*

Some reference was made to denial of justice in the discussion of the responsibility of the state for the acts of judicial authorities, although it was there attempted to avoid any treatment of those specific violations of right or due process by the courts which have come to be known as denials of justice. For the present purpose, an undue delay of justice or manifestly unjust judgment may be considered as equivalent to a denial of justice.

Before undertaking any detailed discussion of the subject, it may be well to note that no definition of denial of justice as used in the broader sense is feasible. As was said by Secretary of State Gresham:

“The general ground of diplomatic intervention . . . in behalf of private persons is a denial of justice, and the question whether there has been, or is likely to be, such denial is one that can be determined only on the circumstances of each particular case as it may arise.”¹

§ 128. Conditions Incident and Precedent to Diplomatic Interposition.

It is also important to note that the claimant government determines for itself whether a denial of justice warranting diplomatic interposition has taken place. In other words, not only is it frequently an uncertain standard to which a given violation of an alien's rights may be referred, but his own government (and not the local government) is the judge of the perpetration of a denial of justice by the state of residence. Thus Secretary of State Blaine aptly said:

“Where the question presented is whether the Government of a country has discharged its duty in rendering protection to the citizens of another nation,” it cannot “be conceded that that government is to be the judge of its own conduct.”²

And Secretary Fish in this connection remarked:

“Foreign governments have a right, and it is their duty, to judge whether their citizens have received the protection due to them pursuant to public law and treaties.”³

In this fact lies the primary condition for the all too frequent abuse, by strong states, of the rights of weaker countries.

¹ Mr. Gresham, Sec'y of State, to Mr. Sheehan, Aug. 25, 1894, Moore's Dig. VI, 272.

² Mr. Blaine, Sec'y of State, to Mr. Dougherty, Jan. 5, 1891, Moore's Dig. VI, 805.

³ Mr. Fish, Sec'y of State, to Mr. Foster, Dec. 16, 1873, Moore's Dig. VI, 265. See also Mr. Bayard to Mr. Morgan, April 27, 1886, *ibid.* VI, 668.

On the other hand, it is to be noted that as a general rule the exhaustion of local remedies is considered a necessary condition precedent to recourse to diplomatic interposition. Only when these remedies have been exhausted, and a denial of justice established, does formal diplomatic espousal of a claim, as opposed to the use of good offices, become proper. Claimant governments dispense with the requirement of exhausting local remedies when those remedies appear insufficient, illusory or ineffective in securing adequate redress.¹ It may be noted, however, that before a denial of justice has actually been perpetrated, and while the case is still pending, foreign governments may use their good offices to see that their citizens abroad receive the benefits of due process of law, in order that a denial of justice may be avoided.

It has already been observed that the state is not responsible for the mistakes or errors of its courts,² especially when the decision has not been appealed to the court of last resort. Nor does a judgment involving a *bona fide* misinterpretation by the court of its municipal law entail, on principle, the international liability of the state. Only if the court has misapplied international law, or if the municipal law in question is in derogation of the international duties of the state, or if the court has willfully and in bad faith disregarded or misinterpreted its municipal law, does the state incur international liability. There is, however, no international obligation of the state to see to it that the decisions of its courts are intrinsically just.³ While in theory an unjust judgment reached by proper observance of the rules of international law and the forms of civilized justice does not render the state liable,⁴ it will be noticed hereafter that in practice the rule is not usually observed. An unjust judgment has on numerous occasions been regarded as not internationally binding, even in the

¹ The necessity to exhaust local remedies is for our purposes considered a limitation on diplomatic protection. The matter is discussed, *infra*, § 381 *et seq.*

² *Supra*, p. 195. See also Mr. Marcy to Baron de Kalb, July 20, 1855, 2 Wharton, 505, and Mr. Bayard to Mr. Morrow, Feb. 17, 1886, Moore's Dig. VI, 280. Mansfield's opinion in the Silesian loan case, cited by Randolph, Atty. Gen., in Pagan's case, 1 Op. Atty. Gen. 25, 32.

³ Anzilotti in 13 R. G. D. I. P. (1906), 22. See also Pomeroy (Woolsey's ed. 1886); § 205, to the effect that no state warrants the infallibility of its courts.

⁴ *Infra*, p. 340, note 5.

absence of any violation of due process of law or irregularity in procedure.¹

Excess of jurisdiction by the courts was held in the celebrated Costa Rica Packet arbitration to entail international responsibility, although Secretary of State Marcy in 1856 denied this rule.² The degree of responsibility incurred by the state through the misfeasance of its judges in their official or private capacities has already been considered.³

Before taking up specific examples of denial of justice, it may be well to recall certain fundamental general principles. The rule that those who resort to foreign countries are bound to submit to the local law as expounded by the judicial tribunals is disregarded only under exceptional circumstances, namely, when palpable injustice has been voluntarily committed by the courts.⁴ Secretary of State Bayard in 1886 remarked that "when application is made to [the] Department for redress for the supposed injurious actions of a foreign judicial tribunal, such application can only be sustained on one of two grounds:

"(1) Undue discrimination against the petitioner as a citizen of the United States in breach of treaty obligations, or

"(2) Violation of those rules for the maintenance of justice in judicial enquiries which are sanctioned by international law."⁵

The limitations implied in the latter principle must be clearly understood. They are intended to limit formal diplomatic interposition to cases in which the judicial proceedings have violated the universally recognized principles of civilized justice. For example, the system of criminal law in force in many countries is harsher than that applied in American courts; *e. g.*, the inquisitorial system prevails in many foreign countries, and trial by jury, habeas corpus and those many safeguards which our laws provide for the benefit of the accused

¹ *Infra*, p. 340.

² *Supra*, p. 196. See, however, the assertion of liability by Earl Granville, Sept. 30, 1881, 74 St. Pap. 1172, and account in Baty, 172-175.

³ *Supra*, § 52.

⁴ Mr. Forsyth, Sec'y of State, to Mr. Semple, Feb. 12, 1839, Moore's Dig. VI, 249.

⁵ Mr. Bayard, Sec'y of State, to Mr. Morrow, Feb. 17, 1886, *ibid.* VI, 280, 2 Whar-
ton, 649. See also Grotius, III, ch. 2, § 5; Vattel, II, ch. 18, § 350; Pradier-Fodéré,
§ 403; G. F. de Martens, Précis, § 96; Baty, 163 *et seq.*, 172, 233; Phillimore, 3rd ed.,
II, 4.

are unknown.¹ Yet an American citizen who resorts to such a country is bound to submit to its laws and judicial system, and his own government is justified in intervening in his behalf only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized or if, in a specific case, they have been wrongfully subverted by the courts so as to discriminate against him as an alien or perpetrate a technical denial of justice.² Treaties usually stipulate that citizens of the contracting parties shall have free access to the courts and such other safeguards for the regular conduct of judicial proceedings and the proper administration of justice as is provided by the local law for natives. But apart from treaty obligation it is believed that aliens must be accorded appropriate judicial recourse for the due protection of their rights.

Even those states of Latin-America which seek to confine the diplomatic interposition of foreign governments on behalf of their citizens to its narrowest limits admit that a denial or undue delay of justice (after exhaustion of local remedies) is a valid ground for such intervention.³ A few states have attempted to narrow the scope of diplomatic interposition still further by providing a legislative definition of the term "denial of justice."⁴ The law of Salvador of September 29, 1886, for example, provides (art. 40) that

"It is to be understood that there is a denial of justice only when the judicial authority refuses to make a formal declaration upon the principal subject or upon any incident of the suit . . . ; consequently, the fact that the judge may have pronounced a decision or sentence, in whatever sense it may be, although it may be said that the decision is

¹ *Supra*, p. 97. See Webster's report to the President in Thrasher's case, Dec. 23, 1851, 2 Wharton, 613; Mr. Marcy, Sec'y of State, to Mr. Jackson, Apr. 6, 1855, *ibid.* 614; Mr. Frelinghuysen, Sec'y of State, to Mr. Lowell, Apr. 25, 1882, For. Rel., 1882, 230. See also 2 Wharton, § 230 a.

² See, *e. g.*, Mr. Marcy, Sec'y of State, to Mr. Fay, Nov. 16, 1855, Moore's Dig. VI, 655. Same to Mr. Jackson, Apr. 6, 1855, *ibid.* 275. Same to Mr. Starkweather, Aug. 24, 1855, *ibid.* 264.

³ *Infra*, p. 843.

⁴ Honduras, Law of April 10, 1895, art. 35, 87 St. Pap. 706; Salvador, Law of Sept. 29, 1886, arts. 39, 40 and 41, 77 St. Pap. 116-118, For. Rel., 1887, 69 *et seq.*; Guatemala, decree of Feb. 21, 1894, art. 42, 86 St. Pap. 1281 *et seq.* See *infra*, p. 846, and Moore's Dig. VI, 267 *et seq.*

iniquitous or given in express violation of law, cannot be alleged as a denial of justice."

In other words, if a decision has been rendered, however iniquitous it may be, it would seem that a "denial of justice" may no longer be alleged. Secretary Bayard in declining to admit that Salvador could thus make the decisions of its courts internationally binding, added that while "it may be admitted as a general rule of international law that a denial of justice is a proper ground of diplomatic intervention, this . . . is merely the statement of a principle and leaves the question in each case whether there has been such denial to be determined by the application of the rules of international law."¹

It is hardly to be supposed that any foreign state, even among those which have concluded treaties with Latin-American republics providing for a renunciation of diplomatic interposition in all cases except denial of justice, would consider itself bound by a municipal legislative interpretation of the term "denial of justice." Diplomatic representations against these municipal laws have in fact been made.²

The action of a government in protecting its citizens abroad when their grievances appear capable of redress by judicial means, is in first instance confined to securing for them, usually by informal representations, free access to the local courts and an equality of treatment with natives.

It having been established that a state should not and generally does not interfere officially in the causes of its citizens brought before the local tribunals or in cases in which they are subject to the jurisdiction of the local law, except in the event of a denial of justice or notorious injustice, it becomes necessary to determine under what circumstances a denial of justice may be said to have occurred.

§ 129. "Denial of Justice" in International Practice.

Undoubtedly the absence of any impartial tribunal from which justice may be sought,³ the arbitrary control of the courts by the government,⁴

¹ Mr. Bayard to Mr. Hall, Nov. 29, 1836, For. Rel., 1837, 80-81.

² *Infra*, p. 847.

³ Mr. Cass, Sec'y of State, to Mr. Dimitry, March 3, 1860, 2 Wharton, 615. Mr. Bayard, Sec'y of State, to Mr. Buck, Nov. 1, 1836, Moore's Dig. VI, 267. See also *infra*, § 383.

⁴ *Idler (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3517.

the inability or unwillingness of the courts to entertain and adjudicate upon the grievances of a foreigner,¹ or the use of the courts as instruments to oppress foreigners and deprive them of their just rights² may each and all be regarded as equivalent to a denial of justice, excusing a resort to local remedies and warranting diplomatic interposition. Justice may also be denied by studied delays and impediments in the proceedings, which in effect are equivalent to a refusal to do justice.³ These principles apply with equal force to administrative authorities acting in a judicial or quasi-judicial capacity.⁴

Justice may be denied in the course of judicial proceedings in ways too diverse to recount in detail. It may be profitable, however, to mention some of the cases in which a denial of justice has been held to exist by the government of an injured individual or by an arbitral commission. For this purpose we may discuss (1) the denial of justice arising prior to the trial or hearing of a case, including a wrongful failure by the authorities to have recourse to judicial proceedings; (2) various forms of denial of justice or notorious injustice in the course of the trial or of judicial proceedings; and (3) acts occurring after the trial, including a grossly unfair decision, which have been construed as a denial of justice.

Among the first class of acts, in which the denial of justice is predicated upon wrongs inflicted by governmental authorities prior to trial, in willful disregard of due process of law, may be mentioned the arbitrary annulment of concession contracts without recourse to judicial proceedings;⁵ the seizure or confiscation of property without legal process;⁶

¹ Phillimore, II, 4, cited by Mr. Bayard, Sec'y of State, to Mr. McLane, June 23, 1886, Moore's Dig. VI, 266; *Tagliaferro (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 765.

² Mr. Marcy, Sec'y of State, to Baron de Kalb, July 20, 1855, 2 Wharton, 505; Mr. Buchanan, Sec'y of State, to Mr. Ten Eyck, Aug. 28, 1848, Moore's Dig. VI, 273; Mr. Marcy, Sec'y of State, to Mr. Clay, May 24, 1855, *ibid.* 659.

³ *Fabiani (France) v. Venezuela*, Feb. 24, 1891, Moore's Arb. 4878 at 4895, and authorities there cited.

⁴ Akerman, Atty. Gen., in 13 Op. Atty. Gen. 547; *Poggioli (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 869.

⁵ *Supra*, p. 292.

⁶ 2 Wharton, § 235, For. Rel., 1885, 525 (trespasses and evictions); Mr. Bayard, Sec'y of State, to Mr. Thompson, Mar. 9, 1886, Moore's Dig. VI, 704; Mr. Bayard,

unlawful arrest or detention of a person;¹ the unduly long detention or imprisonment without trial or allegation of offense of persons accused of crime,² either in violation of municipal law³ or of treaty;⁴ the execution of an accused person without trial;⁵ the detention and confiscation of vessels without legal process;⁶ inexcusable delay in investigating the circumstances of a charged offense preliminary to a criminal prosecution;⁷ permitting a guilty person to escape or failure to institute proceedings against such a person;⁸ the intentional obstruction of claimant's attempt to obtain judicial redress;⁹

Sec'y of State, to Mr. Buck, Jan. 19, 1838, *ibid.* 254; Hammond (U. S.) *v.* Mexico, Apr. 11, 1839, Moore's Arb. 3241; Cheek (U. S.) *v.* Siam, Moore's Arb. 1899-1908, For. Rel., 1897, 461-480 (violation of treaty and of Siamese law).

¹ *Supra*, p. 98.

² Mr. Frelinghuysen, Sec'y of State, to Mr. Lowell, Apr. 25, 1882, For. Rel., 1882, 230, Moore's Dig. VI, 276; Mr. Bayard, Sec'y of State, to Mr. Jackson, July 26, 1886, *ibid.* 281. Cases before Spanish Treaty Claims Com., Final Report, p. 14. *Supra*, p. 99.

³ Driggs (U. S.) *v.* Venezuela, Dec. 5, 1885, Moore's Arb. 3125; Molière (U. S.) *v.* Spain, Feb. 12, 1871, *ibid.* 3252; The *Jane* (U. S.) *v.* Mexico, April 11, 1839, *ibid.* 3119; Kelley (U. S.) *v.* Mexico, Mar. 3, 1849, Opin. 312 (not in Moore). *Supra*, p. 99.

⁴ Mr. Buchanan, Sec'y of State, to Mr. Campbell, Dec. 11, 1848 (holding citizen "incommunicado"), Moore's Dig. VI, 274; *Ingrid* case, S. Rep. 824, 63d Cong., 2nd sess., H. Doc. 1172, *ibid.*; Sartori (U. S.) *v.* Peru, Jan. 12, 1863, Moore's Arb. 3120 (imprisonment without formal commitment and undue delay, 48 hours, in taking claimant's declaration); Cases before Spanish Treaty Claims Com., Final Report, p. 14. In time of war, the strict requirements of civil process are often suspended. Stetson (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3131. *Supra*, p. 99.

⁵ *Portuondo* (U. S.) *v.* Spain, Feb. 12, 1871, Moore's Arb. 3007. The killing of Cannon and Groce by Zelaya without trial, instead of their treatment as prisoners of war, inasmuch as they were taken while fighting in the ranks of the revolutionists, constituted the basis of the U. S. claim against Nicaragua, 1909.

⁶ The *Jane* (U. S.) *v.* Mexico, April 11, 1839, Moore's Arb. 3119 (detention); Andrews (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 2769; Stetson (U. S.) *v.* Mexico, *ibid.* 3131 (violation of treaty). *Supra*, p. 99.

⁷ Mr. Blaine, Sec'y of State, to Mr. Ryan, June 28, 1890, Moore's Dig. VI, 282; Renton claim *v.* Honduras, For. Rel., 1904, 352, 363; Bark *Jones* (U. S.) *v.* Great Britain, Feb. 8, 1853, Moore's Arb. 3054; Andrews (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 2769.

⁸ Cases of Robert, in Spain, 1876 and of Capt. Cornwall in 1871, G. de Leval, § 99. See also *supra*, p. 218 and notes.

⁹ Mr. Evarts, Sec'y of State, to Mr. Fairchild, Jan. 17, 1881, Moore's Dig. VI, 656; Ballistini (France) *v.* Venezuela, Feb. 19, 1902, Ralston, 503.

unlawful change of venue;¹ fixing an unreasonably brief time in which to sue;² or illegal change in the personnel of the court or the use of other unlawful means to influence the court's decision.³

The methods by which justice may be denied in the course of a trial or judicial proceedings are too numerous to detail. In a general way, the conduct of a trial with palpable injustice⁴ or in violation of the settled forms of law or of those rules for the maintenance of justice which are sanctioned by international law⁵ warrants diplomatic interposition. Thus, for example, a violation of the rules of municipal law or procedure or of treaties, by which injustice is perpetrated or a foreigner is unduly discriminated against,⁶ by the refusal to hear testimony

¹ *Bark Jones (U. S.) v. Great Britain*, Feb. 8, 1853, Moore's Arb. 3048 (Opinion by Upham).

² Mr. Hay, Sec'y of State, to Mr. Dudley, Mar. 28, 1899, Moore's Dig. VI, 1003.

³ *Idler (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3517; *Cases in Mexico, 1912-1914*.

⁴ Mr. Evarts, Sec'y of State, to Mr. Langston, April 12, 1878, 2 Wharton, 623, Moore's Dig. VI, 623; Mr. Bayard, Sec'y of State, to Mr. Jackson, Sept. 7, 1836, Moore's Dig. VI, 680; Mr. Fish, Sec'y of State, to Mr. Cushing, Dec. 27, 1875, 2 Wharton, 621. *The Rebecca*, Mr. Bayard, Sec'y of State, to the President, Feb. 26, 1887, Moore's Dig. VI, 666-668 (U. S. did not press this case to successful settlement).

⁵ Vattel, Chitty-Ingraham ed., 165. Mr. Bayard, Sec'y of State, to Mr. Morrow, Feb. 17, 1886, Moore's Dig. VI, 280; *Parrott (U. S.) v. Mexico*, Mar. 3, 1849, Moore's Arb. 3009; *Cotesworth and Powell (Gt. Brit.) v. Colombia*, Dec. 14, 1872, Moore's Arb. 2050, 2081.

⁶ Mr. Marcy, Sec'y of State, to Mr. Fay, Nov. 16, 1855, Moore's Dig. VI, 655; Mr. Marcy to Baron de Kalb, July 20, 1855, 2 Wharton, 505; Mr. Bayard to Mr. Morrow, Feb. 17, 1886, Moore's Dig. VI, 280; *Rozas (U. S.) v. Spain*, Feb. 12, 1871, Moore's Arb. 3124 (trial by military proceedings contrary to treaty); *Van Bokkelen (U. S.) v. Haiti*, May 24, 1888, *ibid.* 1812, 1845 (denial of right to make assignment, contrary to treaty); *Cotesworth and Powell (Gt. Brit.) v. Colombia*, Dec. 14, 1872, Moore's Arb. 2050, 2084 (absence of judge from official duties involving special damage); *Garrison (U. S.) v. Mexico*, July 4, 1868, *ibid.* 3129 (gross irregularities, and prevention of appeal by intrigue; *Idler (U. S.) v. Venezuela*, Dec. 5, 1885, *ibid.* 3517 (illegal change in personnel of court, and wrongfully invoking of obsolete remedy by government ending claimant's litigation in court); *Diana, Gardner (U. S.) v. Great Britain*, Nov. 19, 1794, *ibid.* 3073 (unjust order to pay costs under art. VII of Jay treaty); *The Neptune (U. S.) v. Great Britain*, Nov. 19, 1794, *ibid.* 3076 (arbitrary valuation and sale of captured cargo). The condemnation by a Russian prize court of the S. S. *Oldhamia* was considered by Sir Edward Grey as a denial of justice because against the weight of evidence. Misc. No. 1 (1912), Cd. 6011, p. 17; *Pradel (U. S.) v. Mexico*, July 4, 1868, *ibid.* 3141 (fine in course of illegal trial). See Bullis

on behalf of a defendant charged with crime,¹ or an undue or needless delay in the trial or decision of a case,² have all been construed as denials of justice. When feasible and where an effective remedy seems probable, all modes of appellate revision must be exhausted before diplomatic interposition becomes proper. It may be noted that irregularities in the course of judicial proceedings, not amounting technically to a denial of justice or an undue discrimination against a citizen (as an alien), have not been considered as a ground for the interference of the United States.³ It may not always be easy to determine when an irregularity is sufficiently gross so as to become a denial of justice.

A denial of justice after trial may be said to occur when the proper authorities of a foreign country refuse to execute the laws as interpreted by the courts of the country or to give effect to the decisions of the courts;⁴ when they fail to punish guilty offenders, or mete out inadequate punishment;⁵ when they grant a pardon or amnesty by which the alien plaintiff is deprived of the right to try the question of liability;⁶ when they unlawfully prevent an appeal by the claimant;⁷

(U. S.) *v. Venezuela*, Feb. 17, 1903, Ralston, 169, 170 (*dictum*) for criteria of denial of justice. For the position of the U. S. when an alien's treaty rights are violated by state authorities, see *supra*, § 45.

¹ Mr. Conrad, Acting Sec'y of State, to Mr. Peyton, Oct. 12, 1852, 2 Wharton, 613, Moore's Dig. VI, 275; Mr. Bayard to Mr. Jackson, Sept. 7, 1886, Moore's Dig. VI, 680; *The Schooner Good Intent v. U. S.*, 36 Ct. Cl. 262.

² Mr. Frelinghuysen, Sec'y of State, to Mr. Morgan, Mar. 5, 1884, Moore's Dig. VI, 277, 2 Wharton, 637; Protocol between France and Venezuela, Feb. 11, 1913, Suppl. to 7 A. J. I. L. (July, 1913) 218 (15 months' delay in judgment of municipal court gives international tribunal jurisdiction). See also the *Sally, Hays (U. S.) v. Great Britain*, Nov. 19, 1794, Moore's Arb. 3101-19. *Supra*, p. 99.

³ Mr. Marcy, Sec'y of State, to Mr. Starkweather, Aug. 24, 1855, Moore's Dig. VI, 264; Mr. Olney, Sec'y of State, to the President, Feb. 5, 1896, For. Rel., 1895, I, 257. Gross irregularities were considered a denial of justice in *Garrison (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3129; *Idler (U. S.) v. Venezuela*, Dec. 5, 1885, *ibid.* 3510, 3517, 3524, and other cases cited in footnote 6, page 338.

⁴ *E. g.*, neglect or refusal to execute judgment. *Montano (Peru) v. U. S.*, Jan. 12, 1863, Moore's Arb. 1630, 1634; *Fabiani (France) v. Venezuela*, Feb. 24, 1891, *ibid.* 4878 at 4893, 4907 (in violation of treaty); *Claim of W. R. Grace v. Peru*, Mr. Neill to Mr. Hay, Sec'y of State, Nov. 19, 1903, For. Rel., 1904, p. 678.

⁵ *Supra*, p. 218, notes 2 and 3.

⁶ *Supra*, p. 218, note 6.

⁷ *Garrison (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3129.

or inflict unnecessarily harsh, cruel or arbitrary punishment upon a prisoner.¹

It is also to be noted that a grossly unfair or notoriously unjust decision may be and has been considered as equivalent to a denial of justice.² According to the older authorities, a judicial sentence notoriously unjust, to the prejudice of an alien, entitles his government to interfere for reparation even by reprisals.³ But the inference is that this doctrine is intended to apply primarily to the decisions of prize courts and not to those of municipal courts construing municipal law.⁴

§ 130. Extent to which Unjust Judgment of Municipal Court is Internationally Binding.

This brings us to one of the most difficult questions in international practice, namely, the extent to which an unjust judgment of a municipal court is internationally binding. When the court merely errs as to fact or the interpretation of its municipal law there appears to be, on principle, no ground for international reclamation, provided the court was competent and observed the regular forms of law.⁵ Given good faith, a fair opportunity to the alien to be heard, and the absence of discrimination between native and foreigner, it would seem that the judgment of a municipal court interpreting municipal law is internationally conclusive, even if in error. In practice, however, governments have assumed an extended right to protest diplomatically against the judgments of foreign courts affecting their citizens, when they consider the decisions grossly unjust. It may be added that the earlier

¹ *Supra*, p. 99.

² Mr. Evarts, Sec'y of State, to Mr. Foster, April 19, 1879, Moore's Dig. VI, 696 (collusive judgment); Bronner (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3134; Barron (Gt. Brit.) v. U. S., May 8, 1871, *ibid.* 2525, Hale's Rep. 164; Idler (U. S.) v. Venezuela, Dec. 5, 1885, *ibid.* 3491, 3510. See also *Comegys v. Vasse*, 1 Peters, 193.

³ Dana's Wheaton, §§ 391-393, quoting Grotius, Bynkershoek and Vattel.

⁴ Dana's Wheaton, § 392.

⁵ Grotius, Bk. III, ch. 7, § 84; Vattel, II, ch. 18, § 350; Klüber, 2nd ed., 1874, § 57; Fiore, Dr. int. pub., Antoine's trans., §§ 404-405; G. F. de Martens, Précis du droit des gens, § 94; Pradier-Fodéré, I, § 403; Pomeroy, Boston ed. (1886), by Woolsey, § 205; Baty, 1909 ed., 77 *et seq.*

writers did not make any clear distinction between a notoriously unjust decision and a flagrant denial of justice.¹

If the courts have maliciously misapplied their municipal law, or denied a foreigner the benefit of due process of law in any stage of the proceedings, the reclamation would be founded upon a denial of justice, as mentioned above. It is a fundamental principle of the conflict of laws that a foreign judgment is always impeachable for want of jurisdiction of the person of the defendant or of the subject-matter.² Apart from this ground (except where the judgment was obtained by fraud),³ courts have little power to impeach a foreign judgment.⁴ As already observed, however, the executive branch of the government has not hesitated to deny validity to the judgment of the highest court of a foreign state when the judgment appeared manifestly unjust. The question becomes exceedingly delicate when the judgment alleged to be unjust was reached by the observance of the regular forms of procedure. A diplomatic claim under these circumstances is in effect an impeachment of the sovereignty of a foreign state,⁵ and on this ground the countries of Latin-America have often protested against such claims. It may be said that before an international claim ought to be considered well-founded it should be shown that the decision was so palpably unjust that the good faith of the court is open to suspicion. The difficulty in actual practice, as remarked in the case of denial of justice, is that the claimant government assumes the right to determine for itself whether the judgment is sufficiently unjust to warrant diplomatic interposition.⁶

¹ Pradier-Fodéré, note to his edition of Vattel, II, ch. 18, § 351 and Vergé's note to De Martens Précis, II, § 257, p. 193.

² 23 Cyc. 1576. See also *Idler (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3491, 3511; *Flutie (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 38, 41.

³ *Abouloff v. Oppenheimer* (1882), 10 Q. B. Div. 295; *Vadala v. Lawes* (1890), 25 Q. B. Div. 310. See also 23 Cyc. 1589.

⁴ Piggott, *Foreign judgments*, I, 356 (1908 ed.); 32 *Canada Law Times* (1912), 968-970. The enforcement of a foreign judgment generally depends on treaty or comity.

⁵ Elihu Root in 3 A. J. I. L. (1909), 529-536.

⁶ See Señor Mariscal's able exposition in the Schooner *Rebecca* case, Sen. Doc. 328, 51st Cong., 1st sess., 43 *et seq.* A criticism of art. 11 of the Venezuelan law of 1903 and the Salvadorean law of May 10, 1910, to the effect that "notorious injustice," as expressed in those statutes, is not truly a valid ground of international reclamation.

The Department of State and arbitral tribunals have rejected the plea of *res adjudicata* advanced by defendant governments in support of the finality of the judgments of their courts. Thus Secretary of State Bayard in 1887 declared:

“This Department has contested and denied the doctrine that a government may set up the judgment of one of its own courts as a bar to an international claim, when such judgment is shown to have been unjust or in violation of the principles of international law.”¹

When a court presumes to pass upon questions of international law there is little doubt that foreign governments need not acquiesce in the judgments of such courts when they misapply or violate the principles of international law.² This rule has often been illustrated by the institution of international claims against the decisions of prize courts, which have either been diplomatically settled or submitted to arbitration.³ While the decisions of prize courts acting *in rem* bind the parties, so far as concerns the particular litigation, they may be contested by the government of the party which feels aggrieved.⁴ The

was published by A. de Busschère, the Belgian jurist, in 3 *Rev. de derecho y legislación* (Caracas, Oct., 1913), pp. 3-6. European governments have taken quite the opposite view.

¹ Mr. Bayard to the President, Feb. 26, 1887, Moore's Dig. VI, 667. See also Mr. Bayard to Mr. Hall, Nov. 29, 1886, For. Rel., 1887, p. 81, Moore's Dig. VI, 268. See also *ibid.* 691. The Department has never consented to the doctrine that a government could make the judgments of its courts internationally binding. See also *Howland (U. S.) v. Mexico*, Apr. 11, 1839, Moore's Arb. 3227; *Mather and Glover (U. S.) v. Mexico*, July 4, 1868, *ibid.* 3231.

² Martens, *Précis*, § 97.

³ *Dana's Wheaton*, §§ 392-397; 3 Wharton, § 329a; Oppenheim, II, § 557; *The Betsey, Furlong (U. S.) v. Great Britain*, Nov. 19, 1794, Moore's Arb. 3160-3209, especially Pinckney's opinion at 3180, and other cases under the Jay treaty. The British-American commission under treaty of May 8, 1871 reviewed numerous prize decisions of the U. S. Supreme Court, and reversed several of them by awarding indemnities to the claimants: *e. g.*, *The Hiawatha*, 2 Black, 635, Moore's Arb. 3902; *The Circassian*, 2 Wall. 135, Moore's Arb. 3911; *The Springbok*, 5 Wall. 1, Moore's Arb. 3928; *The Sir William Peel*, 5 Wall. 517, Moore's Arb. 3935; *The Volant*, 5 Wall. 179, Moore's Arb. 3950; *The Science*, 5 Wall. 178, Moore's Arb. 3950. See also *The Orient (U. S.) v. Mexico*, Apr. 11, 1839, Moore's Arb. 3229; *Felix (U. S.) v. Mexico*, Mar. 3, 1849, *ibid.* 2800-2815; Henry Wheaton in 20 *St. Pap.* 871-872; *Danish Indemnity*, Moore's Arb. 4550 and 4556-4557. See also Lapradelle and Politis, *Recueil*, I, 96-98 and 499.

⁴ 3 Wharton, 193.

international prize court planned by the Second Hague Conference was to hear appeals from national prize courts, and was intended to take out of the channels of diplomacy the complaints which are so frequently directed against the decisions of these courts.¹

It will be noted hereafter, that within the terms of the protocol establishing it, an international tribunal is superior to the local courts,² and that an arbitral court adjudicating claims between two nations will make its award independently of the previous decisions of the local courts,³ unless its jurisdiction is expressly limited.⁴

¹ In theory, the decision of the highest municipal court is not reversed by the international tribunal, but the whole question of the international responsibility of the state is resubmitted. This limitation upon the proposed jurisdiction of the International Prize Court was contained in an additional agreement of Sept. 9, 1910, between the U. S. and Great Britain and other powers.

² *Infra*, p. 806. See *Selwyn (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *Ralston*, 322 and citation of authorities, pp. 324-325.

³ *The Phare (France) v. Nicaragua*, *Moore's Arb.* 4871.

⁴ *Le More (France) v. U. S.*, Jan. 15, 1880, *ibid.* 3232.

CHAPTER V

FORFEITURE OF PROTECTION BY ACT OF CITIZEN—Continued

FAILURE OF PROPER RECOURSE TO JUDICIAL REMEDIES

FAILURE TO EXHAUST LOCAL REMEDIES

§ 381. Application of General Rule.

The principle of international law by virtue of which the alien is deemed to tacitly submit and to be subject to the local law of the state of residence implies as its corollary that the remedies for a violation of his rights must be sought in the local courts. Almost daily the Department of State has occasion to reiterate the rule that a claimant against a foreign government is not usually regarded as entitled to the diplomatic interposition of his own government until he has exhausted his legal remedies in the appropriate tribunals of the country against which he makes claim. There are several reasons for this limitation upon diplomatic protection: first, the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs; secondly, the right of sovereignty and independence warrants the local state in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice; thirdly, the home government of the complaining citizen must give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussion; fourthly, if the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain that the wrongful act or denial of justice is the deliberate act of the state; and fifthly, if it is a deliberate act of the state, that the state is willing to leave the wrong un-

righted. It is a logical principle that where there is a judicial remedy, it must be sought. Only if sought in vain and a denial of justice established, does diplomatic interposition become proper.¹ The Department of State has invoked the rule on innumerable occasions both in the case of claims of foreigners against the United States² and of American citizens against foreign countries.³ One of the best statements of the rule and its reason was made by Secretary of State McLane in 1834:

“Although a government is bound to protect its citizens, and see that their injuries are redressed, where justice is plainly refused them by a foreign nation, yet this obligation always presupposes a resort, in the first instance, to the ordinary means of defence, or reparation, which are afforded by the laws of the country in which their rights are infringed, to which laws they have voluntarily subjected themselves by entering within the sphere of their operation, and by which they must consent to abide. It would be an unreasonable and oppressive burden upon the intercourse between nations, that they should be compelled to investigate and determine, in the first instance, every personal offence, committed by the citizens of the one against those of the other.”⁴

¹ The principle is so thoroughly established that the detailed citation of authorities seems hardly necessary. See, however, Vattel, Bk. II, ch. VIII, § 103. Fiore, *Dr. int. cod.*, 4th ed., § 537; Pradier-Fodéré, *Cours de droit diplomatique*, Paris, 1899, I, 524 *et seq.*; Tchernoff, 265 *et seq.*; Calvo, II, § 674; Seijas, I, 77-80; Phillimore II, 4; Lomonaco, 218. See also an excellent discussion of C. C. Hyde before the Lake Mohonk Conference, 20th Report (1914), 125-131.

² Citations from opinions of Attorneys General and state papers in Moore's Dig. VI, § 987, Wharton, II, § 241, and quotations from Jefferson and Clay, Moore's Dig. VI, p. 652. See also Mr. Bayard, Sec'y of State, to Mr. West, June 1, 1885, *For. Rel.*, 1885, pp. 453, 456, 458; Earl Granville to Mr. Adams, Sept. 25, 1884, 75 *St. Pap.* 1042, 1047; *Practice of the Netherlands in Pradier-Fodéré, Cours de dr. dip.* I, 524, note.

³ Extracts printed in Moore's Dig. VI, § 987 and Wharton, II, § 241. See also Mr. Gresham, Sec'y of State, to Mr. Hevner, June 10, 1893, Moore's Dig. VI, 271, 282. When a government affords what appears to be an adequate judicial remedy against itself, the U. S. will usually require claimants to avail themselves of it. For example, Latin-American countries have frequently established domestic claims commissions to adjudicate upon the claims of foreigners arising out of revolutions. The Department of State, *e. g.*, advised American citizens to present their claims arising out of the revolutionary disturbances in Mexico, in 1911, to the Consultative Claims Commission established by the Mexican government. Foreign governments are not necessarily bound by the decisions of these domestic tribunals.

⁴ Mr. McLane, Sec'y of State, to Mr. Shain, May 28, 1834, Moore's Dig. VI, 259 and again at 658.

The application of the rule that local remedies must be exhausted before an international claim may properly be instituted has served to dismiss many cases brought before international tribunals.¹ However, a number of arbitral awards have expressly dispensed with the requirement of exhausting local remedies, not for the reason that the local remedy was illusory or unsatisfactory (different illustrations of which will be discussed presently) but on jurisdictional grounds, the arbitrators reasoning that by the submission of the case to arbitration the two governments must have intended to confer jurisdiction upon the tribunal and supersede the local remedy.² It was, therefore, expressly provided in the protocol of arbitration between France and Venezuela of Feb. 11, 1913 that claimants must prove a resort to Venezuelan courts and an undue delay of justice (fifteen months without a decision) or an objection to the municipal decision by the

¹ Baldwin (U. S.) v. Mexico, April 11, 1839, Moore's Arb. 3126; Turner, *ibid.* 3126; Wilson (U. S.) v. Mexico, March 3, 1849, *ibid.* 3021; Medina (U. S.) v. Costa Rica, July 2, 1860, *ibid.* 2317; Pacific Mail (U. S.) v. Colombia, Feb. 10, 1864, *ibid.* 1412; People of Cinecua (Mexico) v. U. S., July 4, 1868, *ibid.* 3127; Selkirk (U. S.) v. Mexico, *ibid.* 3130, Tehuantepec Ship Canal, *ibid.* 3132, Leichardt, *ibid.* 3133, Jennings *et al.*, *ibid.* 3135, Black *et al.*, *ibid.* 3138, Green, *ibid.* 3139, Burn, *ibid.* 3140, Slocum, *ibid.* 3140, Pratt, *ibid.* 3141, Clavel, *ibid.* 3141, Ada, *ibid.* 3143, Ana, *ibid.* 3144, Smith, *ibid.* 3146, Nolan, *ibid.* 3147, Cramer, *ibid.* 3250, McManus, *ibid.* 3411; Danford (U. S.) v. Spain, Feb. 12, 1871, *ibid.* 3148; Brig *Napier* (Gt. Brit.) v. U. S., May 8, 1871, *ibid.* 3152-3159 (prize case); Hubbell (U. S.) v. Great Britain, *ibid.* 3484; Driggs (U. S.) v. Venezuela, Dec. 5, 1885, *ibid.* 3160, Corwin, *ibid.* 3210; Oberlander and Messenger (U. S.) v. Mexico, March 2, 1897, For. Rel., 1897, 370 at 382 *et seq.*, Sen. Doc. 73, 55th Cong., 3rd sess., 85, 125; French spoliation cases, Gray v. U. S., 21 Ct. Cl. 340; Ship *Tom*, 29 Ct. Cl. 68; Brig *Freemason*, 45 Ct. Cl. 555; La Guaira L. and P. Co. (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 182; De Caro (Italy) v. Venezuela, Feb. 13, 1903, *ibid.* 810; Comp. General of the Orinoco (France) v. Venezuela, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 244.

² See opinion of Day, Arbitrator, in Metzger (U. S.) v. Haiti, Oct. 18, 1899, For. Rel., 1901, 262, 275; Young, Smith and Co. (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. 3148; Trumbull (Chile) v. U. S., Aug. 7, 1892, *ibid.* 3569; Davy (Gt. Brit.) v. Venezuela, Feb. 13, 1903, Ralston, 410; Aroa Mines (Gt. Brit.) v. Venezuela, Feb. 13, 1903, *ibid.* 359 (*dictum*); Hoffman (U. S.) v. Mexico, March 3, 1849, Opin. 359 (not in Moore). In Moses (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3127 and Manasse (U. S.) v. Mexico, *ibid.* 3463, two cases decided by Lieber, Umpire, the grounds of decision are not convincing. The British-American commission of 1871, assumed jurisdiction, notwithstanding failure to resort to local remedies in Crutchett (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3734, Braithwaite, *ibid.* 3737, and Knowles, *ibid.* 3748. See also the *Sally*, Hays (U. S.) v. Great Britain, Nov. 19, 1794, *ibid.* 3101-3119.

French government.¹ The construction placed by arbitral courts upon the so-called Calvo clause, by the terms of which a claimant undertakes by contract (usually with the government) to resort to the local courts to the exclusion of diplomatic intervention, has already been fully considered.² Article III of the Terms of Submission of the British-American Arbitration under the agreement of August 18, 1910 very justly provides:

“The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim, in whole or in part, any failure on the part of the claimant to obtain satisfaction through legal remedies which are open to him or placed at his disposal, but no claim shall be disallowed or rejected by application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity of the claim.”³

§ 382. Position of Latin-America.

The Latin-American states have contended vigorously for the adoption by European states of the principle that an exhaustion of local remedies and the establishment of a denial of justice are conditions precedent to the exercise of diplomatic interposition. The principle has been incorporated into their constitutions, statutes and Pan-American conventions, and has found expression in a number of treaties between the states of Europe and Latin-America.⁴ Mexico appears to have had little difficulty in negotiating such treaties. Neither the United States nor Great Britain appears to have consented to enter into such a treaty stipulation with a Latin-American state.⁵ The Latin-American countries have concluded many treaties of this kind among themselves.⁶

¹ Protocol between France and Venezuela, Feb. 11, 1913, art. II, 7 A. J. I. L. (Suppl.), 218.

² *Supra*, §§ 375-377.

³ Malloy's Treaties, III, 55.

⁴ *Infra*, § 390 *et seq.* See also art. 2 of the convention for the establishment of a Central American Court of Justice, Dec. 20, 1907. Malloy's Treaties, II, 2400. See *Diaz v. Guatemala*, 39 *Clunet* (1912), 274.

⁵ Except in so far as such a limitation is contained in art. 10 of the treaty of Aug. 1, 1911 between Great Britain and Bolivia, Treaty series, 1912, 223.

⁶ Pradier-Fodéré, § 1370.

While these states have invoked their sovereignty and independence as a legal justification for insisting on the duty of aliens to exhaust local remedies and to refrain from calling upon the diplomatic protection of their own governments until a denial of justice in the courts is shown, they have not succeeded in securing a definite acceptance of this principle by the states of Europe. The European countries and the United States, invoking the right to protect their subjects abroad, upon which right the municipal law of Latin-America, they assert, can place no limitation, pass upon each case as it arises and determine for themselves whether it appears probable that a resort to local courts will afford an adequate remedy. Their unwillingness to remit their citizens unreservedly to the local courts of the more backward states of Latin-America seems to arise out of a lack of confidence in the impartiality of those courts and in their disposition to accord justice to the foreigner.¹ This attitude of Europe is especially noticeable in cases where the Latin-American government is a party to the litigation. In a recent agreement between France and Venezuela for the settlement of certain claims of French citizens against Venezuela, it has been expressly provided, that after the adjudication of the Venezuelan courts upon a claim, France shall have the right to object to the decision and submit the claim to an arbitral commission.² It is quite probable that with the growth of the weaker Latin-American countries in political stability, and, incidental thereto, an increasing confidence on the part of foreign countries in the impartiality and independence of the judiciary, foreign countries will give evidence of a greater willingness to submit the rights of their citizens and subjects to the decisions of the local courts, and to decline diplomatic interposition until local remedies have been exhausted.

§ 383. Qualifications of the Rule. When Unnecessary to Exhaust Local Remedies.

The rule that local remedies must be exhausted before diplomatic interposition is proper is in its application subject to the important condition that the local remedy sought is obtainable and is effect-

¹ *Infra*, §§ 390 *et seq.*, 396.

² Protocol between France and Venezuela, Feb. 11, 1913, art. II, *Journal Officiel*, June 17, 1913, p. 5198, printed in 7 A. J. I. L. (supplement), 218.

tive in securing redress. If this condition is absent, it would be futile and an empty form to require the injured individual to resort to local remedies. As Secretary of State Fish tersely remarked: "A claimant in a foreign state is not required to exhaust justice in such state when there is no justice to exhaust."¹ So, where the local tribunals are of such a nature that no confidence may be placed in them and no hope may be entertained of obtaining justice from them,² or where there are no duly established courts to which resort is "open and practically available,"³ it is unnecessary to exhaust local remedies.

It is not easy to determine when a citizen injured abroad is to be remitted to his local remedies and when the government may make his case the subject of immediate diplomatic action. In a general way, this may be said to depend upon whether he has an effective remedy in the local courts, and upon whether the injury is of a nature sufficiently flagrant to warrant immediate diplomatic action without requiring a preliminary resort to or exhaustion of local remedies. The difficulty of stating any general rule arises from the fact that the claimant's government determines in its discretion which method of procedure is under the circumstances proper.⁴ In cases of wrongful arrest and false imprisonment by local authorities, the absence of any uniform rule is particularly apparent.⁵

¹ Mr. Fish, Sec'y of State, to Mr. Pile, May 29, 1873, Moore's Dig. VI, 677.

² Lord Palmerston on the Don Pacifico case *v. Greece*, Hansard, Parl. Deb. cxii, 381-383, 387; Mr. Everett, Sec'y of State, to Mr. Marsh, Feb. 5, 1853, in case of *Dr. King v. Greece*, Moore's Dig. VI, 262-264.

³ Mr. Bayard, Sec'y of State, to Mr. Buck, Min. to Peru, Nov. 1, 1886, Moore's Dig. VII, 267; Mr. Fish, Sec'y of State, to Mr. Foster, Aug. 15, 1873, *ibid.* 678; *Gray v. U. S.*, 21 Ct. Cl. 340.

⁴ Mr. Bayard, Sec'y of State, to Mr. Morgan, April 27, 1886, H. Ex. Doc. 328, 51st Cong., 1st sess., p. 47; Mr. Blaine, Sec'y of State, to Mr. Shannon, Apr. 6, 1892, For. Rel., 1892, p. 34 *et seq.*; Lord Salisbury to Mr. St. John, Aug. 21, 1885, 77 St. Pap. 1212. Cases of illegal capture of vessels often dispense with requirement of exhausting local remedies. *Cushing v. U. S.*, 22 Ct. Cl. 1, 44.

⁵ Resort to local remedies was apparently considered unnecessary in *Mevs case v. Haiti*, Moore's Dig. VI, 768; in case of *Angell, Thomas and Pardee v. Guatemala*; *Master of Russian bark Hans v. U. S.*; *Hale's case v. Argentina*; and *Lillywhite case v. Great Britain*, *ibid.* 768-769. It was insisted upon, however, in *Warren's case in Ireland* (*ibid.* 661) and in other cases in England, France and Honduras (*ibid.* 670-671).

The requirement of exhausting local remedies has been dispensed with as unnecessary by the Department of State when the action of the higher officials or authorities of the foreign government causing the injury has been arbitrary and unjust, and there appeared to be no adequate ground for believing that a sufficient remedy was afforded by judicial proceedings.¹ The same principle has been applied by international arbitral commissions.²

Where recourse to or the prosecution of an appeal before the local courts appears useless or impracticable in affording a claimant relief, he has been excused from appealing to or exhausting his local remedies. This has been held in cases where the local courts were prohibited from entertaining jurisdiction of suits against the state;³ where the judges were menaced and controlled by a hostile mob;⁴ where the payment of a possible judgment was entirely a matter of discretion with the defendant government;⁵ or where an appeal to the highest court from the circumstances of the case appeared impracticable.⁶ In these cases the resort to local courts would not have resulted in an effective remedy. In a few prize cases, it has been held that in face of a uniform course of decisions in the highest courts, a reversal

¹ Mr. Hay, Sec'y of State, Oct. 25, 1901 in Venezuela, *Asuntos Internacionales*, 1903, 177; Mr. Frelinghuysen, Sec'y of State, to Mr. Morgan, May 19, 1884, and Mr. Bayard, Sec'y of State, to Mr. Jackson, July 20, 1885, Moore's Dig. VI, 679; Same to same, Sept. 7, 1886, *ibid.* 680; Mr. Cadwalader to Mr. Foster, Sept. 22, 1874, *ibid.* 678. See also 77 St. Pap. 1212 and 1225 and Akerman, Atty. Gen., in 13 Op. Atty. Gen. 547, 550.

² *Moses (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3127; *Grannan (U. S.) v. Peru*, Dec. 4, 1868, *ibid.* 1652; *Johnson (U. S.) v. Peru*, *ibid.* 1656; *Davy (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 410.

³ *Ruden (U. S.) v. Peru*, Dec. 4, 1868, Moore's Arb. 1653, 1655; *Grannan (U. S.) v. Peru*, *ibid.* 1652; *Johnson (U. S.) v. Peru*, *ibid.* 1656; *dictum* in *Fretz (U. S.) v. Colombia*, Feb. 10, 1864, *ibid.* 2560; *North and South Amer. Construction Co. (U. S.) v. Chile*, Aug. 7, 1892, *ibid.* 2318 (arbitrary suppression of local remedy). See also *supra*, p. 339.

⁴ *Grannan (U. S.) v. Peru*, *ibid.* 1652, *Johnson*, *ibid.* 1656.

⁵ *The Neptune (U. S.) v. Great Britain*, Nov. 19, 1794, Moore's Arb. 3076-3100.

⁶ This ruling has been made on several occasions in prize cases. *Ship Governor Bowdoin v. U. S.* (French Spoliations Act of Jan. 20, 1885, 36 Ct. Cl. 338; appeal court 9,000 miles distant); *Ship Tom v. U. S.*, 29 Ct. Cl. 68; *Carmalt (Gt. Brit.) v. U. S.*, May 8, 1871, Hale's Rep. 90, Moore's Arb. 3157; *McLennan (Gt. Brit.) v. U. S.*, *ibid.* 3158. See also the *Peggy*, 1 Cranch, 103, 107.

of the condemnation being hopeless, an appeal was excused;¹ but this rule was most strictly construed, and if a substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief.² Where the question is presented as to whether the government of a country has discharged its duty in rendering local protection to the citizens of another nation, the United States has contended that that government cannot be the final judge of its own conduct.³

A palpable denial of justice in the lower courts has on several occasions been held by the Department of State⁴ and by arbitral tribunals⁵ to relieve a claimant from the necessity of exhausting his local remedies.

A claimant is not, however, relieved from exhausting his local remedies by alleging his inability, through poverty, to meet the expenses involved;⁶ his ignorance of his right of appeal;⁷ the fact that he acted on the advice of counsel;⁸ or a pretended impossibility or uselessness of action before the local courts.⁹

We have already adverted to the attempts of the states of Latin-American to restrict aliens to their recourse to the local courts. When foreign governments deem the conditions of such recourse too onerous,

¹ Kane's notes on commission of July 4, 1831 between U. S. and France, Moore's Arb. 4472; *Bark Jones (U. S.) v. Great Britain*, Feb. 8, 1853, *ibid.* 3046.

² *Schooner Peggy*, 1 Cranch, 103, 107; *Ship Tom*, 39 Ct. Cl. 290; *Brig Freemason*, 45 Ct. Cl. 555, 560.

³ Mr. Blaine, Sec'y of State, to Mr. Dougherty, Jan. 5, 1891, Moore's Dig. VI, 805.

⁴ Mr. Bayard, Sec'y of State, to the President, Feb. 26, 1887, Moore's Dig. VI, 667; Mr. Bayard, to Mr. Copeland, Feb. 23, 1886 (*dictum*), *ibid.* 699; Mr. Marcy, Sec'y of State, to Mr. Clay, May 24, 1855, *ibid.* 659; Mr. Fish, Sec'y of State, to Mr. Pratt, March 20, 1875, *ibid.* 661.

⁵ *Glenn (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3138 ("general unsympathetic attitude of the lower court"); *Prize cases (Gt. Brit.) v. U. S.*, May 8, 1871, *ibid.* 3152, 3159 (misfeasance or default of capturing government in preventing appeal, *dictum* by Frazer, commissioner); *Montano (Peru) v. U. S.*, Jan. 12, 1863, *ibid.* 1630, 1634.

⁶ Mr. Adee, Act'g Sec'y of State, to Signor Carignani, Oct. 10, 1901, For. Rel., 1901, 310; Mr. Olney, Sec'y of State, to Mr. Dessaw, Nov. 19, 1896, Moore's Dig. VI, 670; *Gravelly (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3158; *McLeod*, *ibid.* 3158; *Horton*, *ibid.* 3158; *Napier (U. S.) v. Great Britain*, *ibid.* 3152.

⁷ *Carson (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3157; *Creighton*, *ibid.* 3158.

⁸ *Heycock (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3157.

⁹ *Diaz v. Guatemala*, Central American Court of Justice, 39 *Clunet* (1912), 274.

e. g., as in the case of the Venezuelan law of Feb. 14, 1873, or consider the local remedy provided as insufficient to afford the necessary relief or redress, they will not regard their citizens as bound to resort to or exhaust their local remedies, but will in their discretion make the claim a subject of diplomatic negotiation.¹

When the two governments have by agreement made a pecuniary claim the subject of diplomatic negotiation the claimant is considered as relieved of the necessity of having recourse to the local courts, unless his own government so consents and directs.² It has already been observed that an agreement to arbitrate has been construed as having the same effect.³ The agreement is deemed to withdraw the case from the courts, the local remedy being superseded by the international remedy. Even apart from any agreement, when a citizen has appealed to his government for protection and the government has undertaken to support his claim diplomatically, recourse to the local courts is no longer necessary, unless required by his own government.⁴

LACHES, LIMITATION AND PRESCRIPTION

§ 384. Effect of Delay in Presenting Claim.

Closely related to the failure to exhaust local remedies is the unnecessary delay in resorting to a remedy. The claimant who permits too long a time to elapse before making known his claim, loses his remedy and therefore his legal right in all systems of jurisprudence. Domat well said: "The indolence of those who are dilatory in recovering their property and claiming what is due them, should be punished, and . . . those who are indolent shall impute to themselves the punishment."⁵ This principle has been denominated as a loss of right by prescription, a term which requires explanation for the lawyer of

¹ Wharton, II, § 242, Moore's Dig. VI, § 990.

² Moore's Dig. VI, § 989. See also *U. S. v. Diekelman*, 92 U. S. 520, 524, where the Court of Claims was designated as the appropriate forum with consent of Prussian government.

³ Day, Arbitrator, in *Metzger (U. S.) v. Haiti*, Oct. 18, 1899, For. Rel., 1901, 262 and *supra*, p. 819, note 2.

⁴ Mr. Hill, Act'g Sec'y of State, to Mr. Merry, Sept. 29, 1900, For. Rel., 1900, 809, Moore's Dig. VI, 685-686.

⁵ Domat, Civil and public law (Strahan's ed., 1732), Lib. 8, t. 7, § 4.

the common law, in that acquisitive prescription, or the acquisition of right or title by long-continued and uncontested possession must be distinguished from extinctive or negative prescription, by which is meant the limitation of action or loss of a remedy.¹

The principles of public policy—based upon such practical considerations as the destruction and loss of evidence, the inability to call witnesses, etc.,—which place a bar upon the prosecution of stale and aged claims, hardly require discussion. The necessity for peace from litigation after the lapse of a certain period of time is as applicable to public law as it is to private law. “Time itself is an unwritten statute of repose,” and while states, in the prosecution of international claims, are not bound by any specific statute of limitations, the principle underlying these statutes and the doctrine of laches are applied by them. We cannot do better here than to quote the able statement of Dr. Francis Wharton, formerly Solicitor of the Department of State:

“While international proceedings for redress are not bound by the letter of specific statutes of limitations, they are subject to the same presumptions, as to payment or abandonment, as those on which statutes of limitation are based. A government cannot any more rightfully press against a foreign government a stale claim which the party holding declined to press when the evidence was fresh than it can permit such claims to be the subject of perpetual litigation among its own citizens.

“It must be remembered that statutes of limitations are simply formal expressions of a great principle of peace which is at the foundation not only of our own common law, but of all other systems of civilized jurisprudence. It is good for society that there should come a period when litigation to assert alleged rights should cease; and this principle, which thus limits litigation when wrongs are old and evidence faded, is as essential to the administration of justice as is the principle that sustains litigation when wrongs are recent and evidence fresh. ‘Rules for the application of such limitations,’ said Mr. Justice Swayne in *Wood v. Carpenter*, 101 U. S. 139, ‘are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While

¹ Holland’s *Jurisprudence*, 11th ed., 1910, p. 213. See also Angell, J. K., *Limitations of actions at law and suits in equity and admiralty*, 6th ed., by John W. May, Boston, 1876, Ch. I; Hewitt, E. P., *Statutes of limitations*, London, 1893, pp. 1-3; Wood, H. G., *Limitations of actions at law and in equity*, 3rd ed., by J. M. Gould, Boston, 1901.

time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.' ”¹

§ 385. Laches.

The unreasonable delay or neglect in enforcing a claim at a proper time is in itself a ground for its rejection, quite apart from the matter of lapse of time, which merely raises certain (often conclusive) presumptions. The reason for the rule is that the delay in the presentation of the claim prevents the defendant government from adducing defenses and invoking remedies of which, had it had timely notice of the claim, it might have availed itself. Laches operates as a waiver of rights. What is unreasonable delay or neglect depends, of course, upon the particular facts and circumstances of each case. The period of delay may on occasion be very short.² The failure to present a claim either at all or in good time to a commission established for the purpose of hearing claims,³ or to enter an appeal from a municipal decision within the time allowed, provided the time and the circumstances are fair and reasonable,⁴ have been held to constitute justifications for dismissal of a claim on the ground of laches. When the time for municipal suit or appeal was too short, the claimant, if an alien, has been excused by his government for the failure to bring his action within the time allowed,⁵ and has been accorded diplomatic redress.

¹ Note in 3 Wharton, 972, § 239, Appendix.

² *Davis (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *Ralston*, 406 (failure for two years to notify Venezuela of the erroneous delivery of consigned goods by customs officials, *dictum*); *Underhill (U. S.) v. Venezuela*, Feb. 17, 1903, *Ralston*, 45, 46 (failure to bring action promptly against tort-feasor, *dictum* by Paul, Venezuelan Commissioner); *Turner (U. S.) v. Mexico*, Apr. 11, 1839, *Moore's Arb.* 3126.

³ Commission of July 4, 1831, between U. S. and France dismissed claims in which claimant failed to avail himself of the relief provided under the treaty of 1800. Kane's notes, p. 90. *Haggerty et al. (U. S.) v. Mexico*, Act of March 3, 1849, *Moore's Arb.* 2665 (failure to present claim to 1839 commission, a jurisdictional condition, without explaining omission). See also *Accessory Transit Co. (U. S.) v. Costa Rica*, July 2, 1860, *Moore's Arb.* 1563; *Mr. Bayard, Sec'y of State, to Mr. Muruaga*, Dec. 3, 1886, *For. Rel.*, 1887, 1015, 1022.

⁴ *The Fame (U. S.) v. Great Britain*, Nov. 19, 1794, *Moore's Arb.* 3100 (failure to enter appeal until 18 months after time allowed).

⁵ *Supra*, p. 823.

Governments frequently establish domestic tribunals to hear claims of individuals against the state. The Southern Claims Commission was such a tribunal, and the Court of Claims and Heads of Departments, under various general and special acts, have acted and act in that capacity. In practically all cases, a statute of limitations is provided for, by which citizens and aliens are bound.¹ Foreign governments, particularly those of Latin-America have often established such domestic commissions, particularly at the end of revolutionary disturbances, and have set a definite limitation of time for the presentation of claims. If this period has seemed unreasonably short, and foreign governments have regarded the local government as internationally responsible for the injury upon which the claim of their citizen is based, these governments have not considered themselves as deprived of the right of presenting a diplomatic claim by reason of the claimant's failure through inability to appear on time before the local tribunal.² Thus, Secretary Hay in 1899, said: "Even admitting that a government may fix a limitation of time for the presentation of international claims, this would afford no justification for fixing a time unreasonably brief, and the tacit consent of a claimant government to such a measure cannot be deduced from the fact that it did not expressly object to it."³

§ 386. Limitation.

Strictly speaking, the lapse of a long time without presenting a claim raises a presumption of laches. But in view of the fact that there is no specific statute of limitations in international law, a claimant may overcome the presumption of laches arising from long delay by showing a valid excuse or justification. Thus, international com-

¹ The application of the statute of limitations under the Bowman and other Acts, and the application of the doctrine of laches by the Court of Claims and in the Departments is discussed by C. F. Carusi in an article on Government contracts, 43 Amer. L. Rev. (1909), 161, 165-169.

² Mr. Clayton, Sec'y of State, to Mr. Van Alen, July 10, 1849, Moore's Dig. VI, 1002. This position might be justified on the ground that a proper international obligation cannot be avoided by municipal statute. See Spader (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 162; Morris' Report, 326, 327. Natives, of course, are bound by the municipal statute.

³ Mr. Hay to Mr. Dudley, March 28, 1899, as printed in Moore's Dig. VI, 1003.

missions have held that a claim is not barred by prescription when there was no laches on the part of the claimant or his government in the presentation of the claim,¹ or where the reasons for invoking prescription do not exist.

The Department of State has often declined to bring to the attention of a foreign government a claim presented after such a long time that the difficulty of a proper investigation of the facts or the disappearance of evidence may reasonably be assumed. In 1885, Secretary Bayard wrote: "In view of the long delay which occurred in instituting the present proceedings, the injury having been inflicted in 1863, and the difficulty of arriving at the true state of the facts . . . the Department has considered it futile to institute proceedings."² Similarly, claims which have been allowed by claimants to rest or which have not been heard of for a great many years have been allowed to drop by the Department. Failure to avail oneself of a remedy and enforce one's right for an unreasonably long time gives color to a suspicion of fraud or bad faith, which only the clearest evidence may overcome.

§ 387. Decisions of International Tribunals.

International commissions have had frequent occasion to pass upon the effect of a failure to present a claim for a prolonged period of time. While they have not allowed municipal statutes or rules of limitation to bar an international claim³ or considered any particular length of time as constituting a period of limitation, they have, nevertheless, recognized and applied the principle of prescription so as to bar numerous claims the presentation of which was inordinately delayed. They have acted on the doctrine that the "principle of peace" from litigation which lies at the basis of all statutes of limitation is as binding on an international court in its administration of justice as the statute

¹ *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 328.

² Mr. Bayard to Mr. O'Connor, Oct. 29, 1885, Sen. Doc. 287, 57th Cong., 1st sess., 10. See also Mr. Bayard to Messrs. Morris and Fillette, July 28, 1888, Moore's Dig. VI, 1005.

³ *Pious Fund Claim (U. S.) v. Mexico*, 1902, U. S. Agents' Rep., Sen. Doc. 28, 57th Cong., 2nd sess., 17, 858, cited in Ralston's International arbitral law, § 563; *Spader (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 162; *Gentini (Italy) v. Venezuela*, Feb. 13, 1903, *ibid.* 729. For other awards relating to limitation and prescription, see Ralston, *op. cit.*, §§ 564-578 and Moore's Arb. IV, ch. LXIX.

is on a municipal court. The reasons for the application of the rule of prescription were tersely expressed by Umpire Plumley of the British-Venezuelan commission of 1903 in the Stevenson case: ¹

“When a claim is internationally presented for the first time after a long lapse of time, there arises both a presumption and a fact. The presumption, more or less strong according to the attendant circumstances, is that there is some lack of honesty in the claim, either that there was never a basis for it or that it has been paid. The fact is that by the delay in making the claim the opposing party—in this case the government—is prevented from accumulating the evidence on its part which would oppose the claim, and on this fact arises another presumption that it could have been adduced. In such a case the delay of the claimant, if it did not establish the presumption just referred to, would work injustice and inequity in its relation to the respondent Government.”

International commissions have dismissed on one or other of these grounds claims in which no complaint had been made for fifteen or sixteen years after the date of the injuries complained of,² and in other cases have barred claims unasserted or not presented for periods of twenty-three,³ twenty-six,⁴ twenty-eight,⁵ thirty-one,⁶ thirty-nine,⁷ forty-three⁸ or more⁹ years. Many of these cases, as will have been observed, came before the United States-Venezuelan commission of 1885, and two of the ablest opinions ever written on the question of prescription are those by Commissioner Little in the Williams case and Commissioner Findlay in the Barberie case.

¹ Stevenson (Gt. Brit.) v. Venezuela, Feb. 13, 1903, Ralston, 327, 328 (*dictum*).

² Black and Stratton (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3138, 3139; Mossman (U. S.) v. Mexico, *ibid.* 4180, 4181 (*dictum*). See also the *Horatio* (U. S.) v. Venezuela, Dec. 5, 1885, *ibid.* 3027 (*dictum*).

³ Bettiker (U. S.) v. Venezuela, Dec. 5, 1885, Opinions, Washington, 1890, p. 92 (*dictum*, disallowed for lack of citizenship).

⁴ Williams (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 4181-4199, Opinion by Little, Commissioner.

⁵ Driggs (U. S.) v. Venezuela, Dec. 5, 1885, Opinions, 403; Forrest (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 2944, 2946.

⁶ Gentini (U. S.) v. Venezuela, Feb. 13, 1903, Ralston, 729.

⁷ Corwin (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 3210, 3220 (*dictum*, disallowed on other grounds).

⁸ Spader (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 162.

⁹ Barberie (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 4199-4203, Opinion by Findlay, Commissioner.

Prescription is a rule of inference and establishes a presumption. When actual facts disprove the inference and the presumption, which are founded in the highest equity—namely, the avoidance of possible injustice to the defendant¹ because of ignorance of the existence of the claim—the reason for the application of the rule ceases. In several cases, therefore, in which timely notice of the existence of the claim had been given to the defendant government, with full opportunity to examine witnesses and the evidence and to adduce contradictory proof, it was held that there was no danger of injustice to the defendant, and notwithstanding the fact that the claim had not, for one reason or another, been prosecuted for many years, the tribunals declined to apply the rule of prescription.² Similarly, where public records support the existence of the claim, the reason for the principle ceases.³ Again, where the impoverishment⁴ or the dilatoriness of the defendant government⁵ is responsible for the delay in prosecution or payment, the claim having been seasonably brought to its attention, the claim is not considered as barred by prescription.

The presentation of the claim at any time after its origin will interrupt the running of the prescriptive period, and if the circumstances themselves, particularly the absence of any presumption of waiver or abandonment, or the shortness of the time elapsed, do not operate to inflict injustice upon the defendant government, the defense of prescription will not be admitted.⁶ The existence of public records, as in the case of unpaid national bonds and claims for overcharged taxes and duties, which refutes any inference of injustice to the de-

¹ Umpire Ralston's statement in *Gentini (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 727; *Giacopini (Italy) v. Venezuela*, *ibid.* 767.

² *Gentini (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 720, 727; *Giacopini (Italy) v. Venezuela*, *ibid.* 765, 767; *Tagliaferro (Italy) v. Venezuela*, *ibid.* 764, 765; *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *ibid.* 327, 329.

³ *Dictum* in *Gentini (Italy) v. Venezuela*, *ibid.* 730; *Williams (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 4194 (*dictum*).

⁴ *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 329.

⁵ *Roberts (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 142 (30 years elapsed between presentation and adjudication; the defendant government, if the rule of prescription had been applied, would have been allowed to reap advantage from its own dilatoriness); *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *ibid.* 327, 329.

⁶ *Butterfield (U. S.) v. Denmark*, Dec. 6, 1888, Moore's Arb. 1185, 1205; For. Rel., 1889, p. 159; *Canada (U. S.) v. Brazil*, March 14, 1870, *ibid.* 1733, 1745.

fendant government by reason of a belated demand for payment, better justifies the favorable award of the commission of 1853 between Great Britain and the United States, on claims for the refund of excess duties, than the ground upon which the decisions were apparently supported, namely, "that no statutes of limitation can be pleaded in bar of claims arising under treaties."¹

Long delay in the presentation of a claim has on occasion been held to stop the running of interest during the period of delay.²

In the Daniel case before the French-Venezuelan commission of 1902, it was held that the defense of prescription had to be pleaded, the commission being unable to take it into consideration of its own accord.³

In the case of the *Macedonian* against Chile, the governments took the precaution of stipulating that the question of prescription should be excluded from the consideration of the arbitrator.⁴

¹ King and Gracie (U. S.) *v.* Great Britain, Feb. 8, 1853, Moore's Arb. 4179, 4180; Similar cases (Gt. Brit.) *v.* U. S. *ibid.* 4180.

² Donnell's Executor (U. S.) *v.* Venezuela, Dec. 5, 1885, Moore's Arb. 3545; Russia *v.* Turkey, July 22, 1910, Award of the Hague Court of Arbitration, Nov. 11, 1912, 7 A. J. I. L. (1913), 195, 199.

³ Piton (France) *v.* Venezuela, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 462; also reported as Daniel (France) *v.* Venezuela, Ralston, 507, 509.

⁴ *Macedonian* (U. S.) *v.* Chile, Nov. 10, 1858, Moore's Arb. 1449, 1461.

ANNEX 129

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTATE OF MICHAEL HEISER, *et al.*,
Plaintiffs-Judgment Creditors-
Garnishors,

- against -

ISLAMIC REPUBLIC OF IRAN, *et al.*,
Defendants-Judgment Debtors,

- and -

BANK OF AMERICA, N.A. and WELLS
FARGO BANK, N.A.,
Garnishees,

ESTATE OF MILLARD D. CAMPBELL, *et al.*,
Plaintiffs-Judgment Creditors-
Garnishors,

- against -

ISLAMIC REPUBLIC OF IRAN, *et al.*,
Defendants-Judgment Debtors,

- and -

BANK OF AMERICA, N.A. and WELLS
FARGO BANK, N.A.,
Garnishees,

BANK OF AMERICA, N.A. and WELLS
FARGO BANK, N.A.,

Garnishees and Third-Party
Petitioners,

- against -

AL-BAIT AL-AMER FOR FURNITURE &
COMMERCE, BANK MELLAT, BANK MELLI
PLC U.K., BANK SADERAT IRAN,
BAYERISCHE LANDESBANK, DEUTSCHE
BANK AG, DEUTSCHE BANK TRUST CO.
AMERICAS, GULF EXCHANGE CO., IRAN
AIR, IRAN MARINE INDUSTRIAL CO.,
IRANIAN NAVY, KHAZAR SHIPPING a/k/a
Darya-ye-Khazar Shipping Co., NATIONAL
IRANIAN OIL COMPANY, TOLKUN

x

Case No.: 00-CV-02329 (RCL)

Consolidated with

Case No.: 01-CV-02104 (RCL)

CLERK'S CERTIFICATE OF
DEFAULT AS TO
BANK MELLAT,
BANK MELLI PLC U.K.,
BANK SADERAT IRAN,
BAYERISCHE LANDESBANK,
GULF EXCHANGE CO.,
IRAN AIR,
IRAN MARINE INDUSTRIAL
COMPANY,
THE IRANIAN NAVY,
KHAZAR SHIPPING A/K/A
DARYA-YE-KHAZAR
SHIPPING CO.,
NATIONAL IRANIAN OIL
COMPANY,
TOLKUN DENIZCILIK VE
TAS DIS TICARET LTD. STI,
TRANSOCEAN LTD.,
VEDDER PRICE P.C., AND
YAPI VE KREDI BANKASI,
A.S.

DENIZCILIK VE TAS DIS TICARET LTD. :
 STI, TRANSOCEAN LTD., VEDDER PRICE :
 P.C., YAPI VE KREDI BANKASI, A.S., THE :
 ESTATE OF MICHAEL HEISER, ESTATE OF :
 BRENT MARTHALER, KATIE LEE :
 MARTHALER, HERMAN MARTHALER, :
 SHARON MARTHALER, MATTHEW :
 MARTHALER, KIRK MARTHALER, :
 RICHARD WOOD, KATHLEEN WOOD, :
 SHAWN WOOD, ESTATE OF MICHAEL :
 HEISER, FRAN HEISER, GARY HEISER, :
 DENISE EICHSTAEDT, ANTHONY :
 CARTRETTE, LEWIS CARTRETTE, ESTATE :
 OF PATRICK FENNIG, THADDEUS C. :
 FENNIG, CATHERINE FENNIG, PAUL :
 FENNIG, MARK FENNIG; ESTATE OF :
 CHRISTOPHER ADAMS, CATHERINE :
 ADAMS, MARY YOUNG, DANIEL ADAMS, :
 ELIZABETH WOLF, PATRICK ADAMS, :
 JOHN ADAMS, WILLIAM ADAMS, :
 MICHAEL ADAMS, ESTATE OF THANH :
 "GUS" NGUYEN, CHRISTOPHER NGUYEN, :
 SANDRA M. WETMORE, BRIDGET :
 BROOKS, JAMES RIMKUS, ANNE RIMKUS, :
 ESTATE OF KENDALL KITSON, JR., :
 KENDALL KITSON, SR., NANCY R. KITSON, :
 STEVE K. KITSON, NANCY A. KITSON, :
 LAWRENCE TAYLOR, VICKIE TAYLOR, :
 STARLINA TAYLOR, ESTATE OF JOSHUA :
 WOODY, DAWN WOODY, BERNADINE :
 BEEKMAN, TRACY SMITH, JONICA :
 WOODY, TIMOTHY WOODY, ESTATE OF :
 LELAND "TIM" HAUN, IBIS "JENNY" :
 HAUN, SENATOR HAUN, MILLY PEREZ- :
 DALLIS; ESTATE OF CHRISTOPHER :
 LESTER, CECIL LESTER, SR., JUDY :
 LESTER, CECIL LESTER, JR., JESSICA :
 LESTER, ESTATE OF KEVIN JOHNSON , :
 SR., SHYRL JOHNSON, KEVIN JOHNSON, :
 JR., NICHOLAS JOHNSON, ESTATE OF :
 PETER MORGERA, MICHAEL MORGERA, :
 THOMAS MORGERA, ESTATE OF MILLARD :
 "DEE" CAMPBELL, MARIE CAMPBELL, :
 BESSIE CAMPBELL, ESTATE OF JUSTIN :

WOOD, ESTATE OF EARL CARTRETTE, JR., :
 ESTATE OF BRIAN MCVEIGH, JAMES :
 WETMORE, GEORGE BEEKMAN, ESTATE :
 OF JOSEPH E. RIMKUS, ESTATE OF :
 JEREMY TAYLOR, CHE COLSON, LAURA :
 JOHNSON, and BRUCE JOHNSON :
 Adverse Claimants-Respondents. :
 _____ x

I, ANGELA D. CAESAR, Clerk of the United States District Court for the District of Columbia, do hereby certify that:

1. Adverse Claimants-Respondents Bank Mellat, Bank Melli PLC U.K., Bank Saderat Iran, Bayerische Landesbank, Iran Air, Iran Marine Industrial Company, the Iranian Navy, Khazar Shipping a/k/a Darya-ye-Khazar Shipping Co., National Iranian Oil Company, Tolkun Denizcilik Ve Tas Dis Ticaret Ltd. STI, Transocean Ltd., Vedder Price P.C., and Yapi Ve Kredi Bankasi, A.S. have failed to answer, plead or otherwise defend against the Third-Party Petition Alleging Claims in the Nature of Interpleader filed by Garnishees and Third-Party Petitioners Bank of America, N.A. and Wells Fargo Bank, N.A. (Dkt. No. 235) (the “Third-Party Petition”) within the times permitted by the Federal Rules of Civil Procedure or Section 1608(d) of the Foreign Sovereign Immunities Act of 1976, despite being properly served with an Interpleader Summons (Dkt. No. 240) and the Third-Party Petition, as described and documented in the Declaration of James L. Kerr Concerning the Service of Summons and Third-Party Petition on Adverse Claimants-Respondents, filed January 24, 2014 (Dkt. No. 256), the Declaration of Michael Hawkins Concerning Service of Process Pursuant to the Hague Convention, dated January 17, 2014, attached thereto as Exhibit L (Dkt. No. 256-12), and, solely with

respect to the Iranian Navy, in the Order on Service of Process, dated July 21, 2014 (Dkt. No. 259), the Letter from Richard M. Kremen to Angela D. Caesar, dated October 14, 2014 (Dkt. No. 265), the Certificate of Mailing, dated October 21, 2014 (Dkt. No. 267), and the Letter from Daniel Klimow to Angela D. Caesar, dated July 22, 2015 (Dkt. No. 270).

2. The DEFAULT of Bank Mellat, Bank Melli PLC U.K., Bank Saderat Iran, Bayerische Landesbank, Iran Air, Iran Marine Industrial Company, Iranian Navy, Khazar Shipping a/k/a Darya-ye-Khazar Shipping Co., National Iranian Oil Company, Tolkun Denizcilik Ve Tas Dis Ticaret Ltd. STI, Transocean Ltd., Vedder Price P.C., and Yapi Ve Kredi Bankasi, A.S. IS HEREBY NOTED.

Date: Washington, D.C.
August 20, 2015



By:

ANGELA D. CAESAR
Clerk of the Court

/s/ N. Wilkens

Deputy Clerk

ANNEX 130

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FILED JUN 9 - 2016

Clerk, U.S. District & Bankruptcy Courts for the District of Columbia

<p>ESTATE OF MICHAEL HEISER, <i>et al.</i> Plaintiffs</p> <p>v.</p> <p>ISLAMIC REPUBLIC OF IRAN, <i>et al.</i> Defendants</p>	<p>Case No.: 00-CV-02329 (RCL)</p> <p>Consolidated with</p>
<p>ESTATE OF MILLARD D. CAMPBELL, <i>et al.</i> Plaintiffs</p> <p>v.</p> <p>ISLAMIC REPUBLIC OF IRAN, <i>et al.</i> Defendants</p>	<p>Case No.: 01-CV-02104 (RCL)</p>

ORDER GRANTING UNOPPOSED MOTION FOR JUDGMENT AGAINST GARNISHEES BANK OF AMERICA, N.A. AND WELLS FARGO BANK, N.A. FOR TURNOVER OF FUNDS, AND FOR INTERPLEADER RELIEF FOR SUCH GARNISHEES

WHEREAS Plaintiffs/Judgment Creditors¹ (the "Plaintiffs") filed an Unopposed Motion for Judgment Against Garnishees Bank of America, N.A. and Wells Fargo Bank, N.A. for

¹ The Plaintiffs consist of: (1) the Estate of Michael Heiser, deceased; (2) Gary Heiser; (3) Francis Heiser; (4) the Estate of Leland Timothy Haun, deceased; (5) Ibis S. Haun; (6) Milagritos Perez-Dalis; (7) Senator Haun; (8) the Estate of Justin R. Wood, deceased; (9) Richard W. Wood; (10) Kathleen M. Wood; (11) Shawn M. Wood; (12) the Estate of Earl F. Cartrette, Jr., deceased; (13) Denise M. Eichstaedt; (14) Anthony W. Cartrette; (15) Lewis W. Cartrette; (16) the Estate of Brian McVeigh, deceased; (17) Sandra M. Wetmore; (18) James V. Wetmore; (19) the Estate of Millard D. Campbell, deceased; (20) Marie R. Campbell; (21) Bessie A. Campbell; (22) the Estate of Kevin J. Johnson, deceased; (23) Shyrl L. Johnson; (24) Che G. Colson; (25) Kevin Johnson, a minor, by his legal guardian Shyrl L. Johnson; (26) Nicholas A. Johnson, a minor, by his legal guardian Shyrl L. Johnson; (27) Laura E. Johnson; (28) Bruce Johnson; (29) the Estate of Joseph E. Rimkus, deceased; (30) Bridget Brooks; (31) James R. Rimkus; (32) Anne M. Rimkus; (33) the Estate of Brent E. Marthaler, deceased; (34) Katie L. Marthaler; (35) Sharon Marthaler; (36) Herman C. Marthaler III; (37) Matthew Marthaler; (38) Kirk Marthaler; (39) the Estate of Thanh Van Nguyen, deceased; (40) Christopher R. Nguyen; (41) the Estate of Joshua E. Woody, deceased; (42) Dawn Woody; (43) Bernadine R. Beekman; (44) George M. Beekman; (45) Tracy M. Smith; (46) Jonica L. Woody; (47) Timothy Woody; (48) the Estate of Peter J. Morgera, deceased; (49) Michael Morgera; (50) Thomas Morgera; (51) the Estate of Kendall Kitson, Jr., deceased; (52) Nancy R. Kitson; (53) Kendall K. Kitson; (54) Steve K. Kitson; (55) Nancy A. Kitson; (56) the Estate of Christopher Adams, deceased; (57) Catherine Adams; (58) John E. Adams; (59) Patrick D. Adams; (60) Michael T. Adams; (61) Daniel Adams; (62) Mary Young; (63) Elizabeth Wolf; (64) William Adams; (65) the Estate of Christopher Lester, deceased; (66) Cecil H. Lester; (67) Judy Lester; (68) Cecil H. Lester, Jr.; (69) Jessica F. Lester; (70) the Estate of Jeremy A. Taylor, deceased; (71) Lawrence E. Taylor; (72) Vickie L. Taylor; (73) Starlina D. Taylor; (74) the Estate of Patrick P. Fennig, deceased; (75) Thaddeus C. Fennig; (76) Catherine Fennig; (77) Paul D. Fennig; and (78) Mark Fennig (collectively, the "Plaintiffs").

Turnover of Funds, and for Interpleader Relief for Such Garnishees (the “Unopposed Motion for Turnover”);

WHEREAS Garnishee Bank of America, N.A. (“Bank of America”) and Wells Fargo Bank, N.A. (“Wells Fargo,” together with Bank of America, the “Garnishees”) do not oppose the relief sought by the Unopposed Motion for Turnover;

WHEREAS the Plaintiffs hold an unsatisfied judgment in the amount of \$591,089,966.00 against the Islamic Republic of Iran, the Iranian Ministry of Information and Security and the Iranian Islamic Republic Revolutionary Guard Corps. (collectively, “Iran”);

WHEREAS, Iran is a terrorist party within the meaning of Section 1610(g) of the FSIA and Section 201 of TRIA, and the Judgment was entered based on acts of terrorism for which Iran is not immune under Section 1605(a)(7) or Section 1605A of the FSIA;

WHEREAS the relief requested by the Plaintiffs is authorized under 28 U.S.C. § 1610(g) and § 201 of the Terrorism Risk Insurance Act of 2002 (“TRIA”);

WHEREAS the Garnishees filed a Third-Party Petition Alleging Claims in the Nature of Interpleader (the “Third-Party Petition”) on August 31, 2012, by which Iran Marine and Industrial, Sediran Drilling Company (now known as the National Iranian Oil Company), Iran Air, Bank Melli PLC U.K., and the Iranian Navy (the “Adverse Claimants-Respondents”), were interpleaded into this action;

WHEREAS this Court issued interpleader summonses for service on the Adverse Claimants-Respondents on December 10, 2012;

WHEREAS this Court finds that service of the summons, Third-Party Petition, and all other necessary documents and translations on the Adverse Claimants-Respondents, as set forth in the Unopposed Motion for Turnover, was good and effective service, and finds further that

supplemental service on the Iranian Navy through diplomatic channels constitutes good and effective service within the meaning of Section 1608 of the Foreign Sovereign Immunities Act (the “FSIA”);

WHEREAS the Iranian Adverse Claimants-Respondents Iran Marine and Industrial, Sediran Drilling Company (now known as the National Iranian Oil Company), Iran Air, Bank Melli PLC U.K., and the Iranian Navy failed to respond to the summons and Third-Party Petition and the Clerk of the Court noticed their default on August 20, 2015;

WHEREAS, no non-Iranian Adverse Claimant-Respondent, including Adverse Claimant-Respondent Vedder Price, which communicated to counsel for the Garnishees its intention not to contest turnover, appeared to contest the ownership by Iran of any of the Blocked Assets that were the subject of the Third-Party Interpleader Petition;

WHEREAS the Court finds that the Iranian Adverse Claimants-Respondents, consisting of Iran Marine and Industrial, Sediran Drilling Company (now known as the National Iranian Oil Company), Iran Air, Bank Melli PLC U.K., and the Iranian Navy, are agencies or instrumentalities of Iran that have a current possessory ownership interest in the blocked assets held by the Garnishees described in Exhibit A and Exhibit B hereto (the “Blocked Assets”);

WHEREAS, upon evidence that has been submitted to and found to be satisfactory to the Court, the defaulting Iranian Adverse-Claimants Respondents, including Iran Air, Bank Melli PLC U.K., Iran Marine Industrial Company, the Iranian Navy and the Iranian National Oil Company (as the successor to Sediran Drilling Company), are organs, agencies or instrumentalities of Judgment Debtor the Islamic Republic of Iran within the meaning of the FSIA and TRIA;

WHEREAS the Court finds that the Blocked Assets constitute “blocked assets of a terrorist party” within the meaning of TRIA;

WHEREAS, the Blocked Assets are subject to execution in accordance with the requirements of Section 1610(g) of the FSIA and Section 201 of TRIA;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Unopposed Motion for Turnover is hereby GRANTED;
2. Judgment is hereby entered in favor of the Plaintiffs and against Garnishee Bank of America solely in its capacity as garnishee and solely with respect to the Blocked Assets identified in Exhibit A hereto, plus any accrued interest thereon;
3. Judgment is hereby entered in favor of the Plaintiffs and against Garnishee Wells Fargo solely in its capacity as garnishee and solely with respect to the Blocked Assets identified in Exhibit B hereto, plus any accrued interest thereon;
4. Bank of America shall pay and turn over to the Plaintiffs the Blocked Assets identified on Exhibit A hereto, and any accrued interest thereon, within fifteen (15) business days of the date of this Order, and upon a turnover of the Blocked Assets by Bank of America, Bank of America shall receive a discharge from all further liability for such Blocked Assets as set forth in D.C. Code § 16-528; and
5. Wells Fargo shall pay and turnover to the Plaintiffs the Blocked Assets identified on Exhibit B hereto, and any accrued interest thereon, within fifteen (15) business days of the date of this Order, and upon a turnover of the Blocked Assets by Wells Fargo, Wells Fargo shall receive a discharge from all further liability for such Blocked Assets as set forth in D.C. Code § 16-528;

6. Garnishees are entitled to an award of their reasonable costs and attorneys' fees in connection with the Third-Party Petition (the "Garnishees' Attorneys' Fees"), to be paid solely out of the amount awarded herein, in an amount to be agreed upon with Plaintiffs or to be awarded by the Court upon application;

7. Within fifteen (15) business days of receipt of the funds from the Garnishees, if the Plaintiffs and the Garnishees agree on the amount of the Garnishee Attorneys' Fees, or within fifteen (15) business days from the date on which this Court enters any final, non-appealable order setting the amount of the Garnishees' Attorneys' Fees, Plaintiffs shall pay over to the Garnishees from the amounts referenced in paragraphs 2 and 3 of this Order the Garnishees' Attorneys' Fees;

8. In addition to the discharges set forth in paragraphs 4 and 5 of this Order, Garnishees Bank of America and Wells Fargo shall be fully discharged pursuant Sections 16-554 and 26-803 of the Code of the District of Columbia, and shall be fully discharged in interpleader pursuant to Rule 22 of the Rules of District of Columbia Superior Court Rules of Procedure and Rule 22 of the Federal Rules of Civil Procedure, as applicable, from any and all obligations or other liabilities to Iran, any agency or instrumentality of Iran (including, without limitation, defaulting Iranian Adverse Claimants-Respondent), or to any other party otherwise entitled to claim the funds contained in the Blocked Accounts (including, without limitation, Vedder Price and defaulting non-Iranian Adverse Claimants-Respondents), to the full extent of such amounts so held and paid to the Plaintiffs in accordance with this Order;

9. The Plaintiffs shall obtain the dismissal of any garnishment or similar proceeding that remains pending as against the Garnishees, if any, including the proceedings pending in the United States District Court for the District of Maryland (Case No. 1:11-cv-00137 (GLR)) and in

the United States District Court for the District of South Carolina (Case No. 11-MC-02114 (CMC)); and


10. Each and every party to this proceeding is hereby and shall be restrained and enjoined from instituting or prosecuting any claim or action against the Garnishees in any jurisdiction arising from or relating to any claim to the Blocked Assets that the Garnishees shall have turned over to the Plaintiffs in compliance with this Order, except that this Court retains jurisdiction to enforce this Order.

Washington, D.C.

~~November 11, 2015~~

June 7, 2016

So Ordered:



The Honorable Royce C. Lamberth
United States District Judge

EXHIBIT A

Blocked Assets Held by Bank of America

Account Number	Original Blocked Amount	Amount Blocked as of June 30, 2015	Iranian Entity(ies) with Ownership Interest in the Blocked Asset	Transaction Type
XXX9-002	\$37,453.88	\$37,543.59	Iran Marine and Industrial	Blocked Account
XXX9-0003	\$11,717.00	\$11,744.80	Sediran Drilling Company	Blocked Account
XXX8-0069	\$9,682.66	\$9,743.53	Iran Air, Bank Melli PLC U.K.	Check Proceeds

EXHIBIT B

Blocked Asset Held by Wells Fargo

Original Blocked Amount	Amount Blocked as of June 30, 2015	Iranian Entity with Ownership Interest in the Blocked Asset	Transaction Type
\$207,873.00	\$249,365.44	Iranian Navy	Blocked collateral for letter of credit

ANNEX 131

637 F.3d 783
United States Court of Appeals,
Seventh Circuit.

Jenny RUBIN, et al., Plaintiffs–Appellees,
and
Deborah D. Peterson, et al., Intervenors–Appellees,
v.
THE ISLAMIC REPUBLIC OF IRAN, Defendant–Appellant,
and
Field Museum of Natural History and University of Chicago, the Oriental Institute, Intervenors.

No. 08–2805.

Argued Oct. 26, 2009.

Decided March 29, 2011.

As Corrected April 1, 2011.

Rehearing and Rehearing En Banc Denied June 6, 2011.*

Synopsis

Background: Judgment creditors, who obtained judgment against Islamic Republic of Iran for injuries sustained in a suicide bombing in Israel carried out by terrorist organization with the assistance of Iranian material support and training, attempted to enforce their judgment by seeking to execute or attach various collections of Persian artifacts in the possession of a university, a museum, and an individual. The United States District Court for the Northern District of Illinois, [Blanche M. Manning, J.](#), [436 F.Supp.2d 938](#), and [2006 WL 2024247](#), denied Foreign Sovereign Immunities Act (FSIA) immunity in the absence of an appearance by the foreign state, and ordered general-asset discovery to proceed, and Iran appealed.

Holdings: The Court of Appeals, [Sykes](#), Circuit Judge, held that:

general-asset discovery order was incompatible with the FSIA, and

under FSIA, the property of Iran was presumed immune from attachment and execution, and the immunity inhered in the property and did not depend on an appearance and special pleading by Iran.

Reversed and remanded.

Attorneys and Law Firms

***784** [David J. Strachman](#) (argued), Attorney, McIntyre, Tate, Lynch & Holt, Providence, RI, for Plaintiffs–Appellees.

[Thomas G. Corcoran, Jr.](#) (argued), Attorney, Berliner, Corcoran & Rowe, Washington, DC, for Defendant–Appellant.

[David J. Cook](#) (argued), Attorney, Cook Collection Attorneys, San Francisco, CA, for Intervenor–Appellee.

[Susan M. Benton](#), Attorney, [William P. Ferranti](#) (argued), Attorney, Winston & Strawn LLP, [Matthew G. Allison](#), Attorney, Baker & McKenzie, Chicago, IL, for Intervenors–Appellants.

Sharon Swingle (argued), Attorney, Department of Justice, Civil Division, Appellate Staff, for Amicus Curiae.
*785 Before BAUER and SYKES, Circuit Judges, and SIMON, District Judge.**

Opinion

SYKES, Circuit Judge.

The Islamic Republic of Iran appeals two orders issued in connection with a long-running effort to collect on a large judgment entered against it for its role in a 1997 terrorist attack. The plaintiffs are American citizens who were injured in a brutal suicide bombing in Jerusalem, Israel, carried out by Hamas with the assistance of Iranian material support and training. The victims obtained a \$71 million default judgment against Iran in federal district court in Washington, D.C., and then registered that judgment in the Northern District of Illinois for the purpose of attaching two collections of Persian antiquities owned by Iran but on long-term academic loan to the University of Chicago’s Oriental Institute. They also sought to attach a third collection of Persian artifacts owned by Chicago’s Field Museum of Natural History. They contend that this collection, too, belongs to Iran but was stolen and smuggled out of the country in the 1920s or 1930s and later sold to the museum. Iran’s appeal requires us to consider the scope and operation of § 1609 of the Foreign Sovereign Immunities Act of 1976 (“FSIA”), 28 U.S.C. §§ 1330(a), 1602–1611, which provides that a foreign state’s property in the United States is immune from attachment unless a specific statutory exception to immunity applies.

The district court held that the immunity codified in § 1609 is an affirmative defense personal to the foreign sovereign and must be specially pleaded. Because Iran had not appeared in the attachment proceeding, this ruling had the effect of divesting the collections of their statutory immunity unless Iran appeared and affirmatively asserted it. So Iran appeared and made the immunity claim. In response the served Iran with requests for discovery regarding *all* Iranian-owned assets located anywhere in the United States. Not surprisingly, Iran resisted, maintaining that such far-flung and open-ended discovery about its American-based property was inconsistent with the FSIA. The district court disagreed and ordered general-asset discovery to proceed. Iran appealed.

The district court’s discovery order effectively rejected Iran’s claim of sovereign immunity and is therefore immediately appealable under the collateral-order doctrine. The court’s earlier order, which denied § 1609 immunity in the absence of an appearance by the foreign state, is also properly before this court. That order raises closely related questions about sovereign-property immunity and is revived for review by Iran’s interlocutory appeal of the general-asset discovery order.

Both orders are seriously flawed; we reverse. The district court’s approach to this case cannot be reconciled with the text, structure, and history of the FSIA. Section 1609 of the Act provides that “the property in the United States of a foreign state *shall* be immune from attachment” *unless* an enumerated exception applies. (Emphasis added.) This section codifies the longstanding common-law principle that a foreign state’s property in the United States is presumed immune from attachment. This presumptive immunity, when read with other provisions of the FSIA, requires the plaintiff to identify the specific property he seeks to attach; the court cannot compel a foreign state to submit to general discovery about all its assets in the United States. The presumption of immunity also requires the court to determine—*sua sponte* if necessary *786—whether an exception to immunity applies; the court must make this determination regardless of whether the foreign state appears.

I. Background

This appeal has its roots in a vicious terrorist attack. On September 4, 1997, Hamas carried out a triple suicide bombing in the crowded Ben Yehuda Street pedestrian mall in Jerusalem. *See Campuzano v. Islamic Republic of Iran*, 281 F.Supp.2d 258, 261 (D.D.C.2003). Five bystanders were killed and nearly 200 were injured. Hamas claimed responsibility for the bombing, and Israeli police arrested two Hamas operatives who participated in the attack. *Id.* at 261–62. They and other members of their Hamas cell gave Israeli authorities information about the planning, financing, and execution of this act of terrorism. The

two were later convicted of multiple counts of murder and attempted murder. *Id.*

The plaintiffs here—Jenny Rubin and her mother, Deborah Rubin; Stuart Hersh and his wife, Renay Frym; Noam Rozenman and his parents, Elena and Tzvi Rozenman; Daniel Miller; and Abraham Mendelson—are American citizens who were grievously wounded in the September 4, 1997 bombing or suffered severe emotional and loss-of-companionship injuries as a result of being closely related to those who were physically hurt. These victims filed suit against Iran in federal district court in Washington, D.C., alleging that Iran was responsible for the bombings as a result of the training and support it had provided to Hamas. *Id.* Jurisdiction was predicated on § 1605(a)(7) (1996) of the FSIA, and the district court consolidated the action with another suit filed by a separate group of victims of the bombing. *Id.* at 261. Iran was properly served but defaulted. Pursuant to the requirements of § 1608(e) of the FSIA, the district court held a three-day evidentiary hearing before issuing a default judgment against Iran for \$71.5 million in compensatory damages.¹ *Id.* at 272–77.

At this point the plaintiffs faced a problem familiar to Iran’s judgment creditors: They had won a significant judgment but enforcement options were limited. A nationwide search for attachable Iranian assets eventually led to Chicago and its rich collection of ancient artifacts housed in the city’s major museums. The plaintiffs registered their judgment with the United States District Court for the Northern District of Illinois and served the University of Chicago’s Oriental Institute and later the Field Museum of Natural History with a Citation to Discover Assets pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and chapter 735, section 5/2–1402 of the Illinois Compiled Statutes.² The plaintiffs identified three specific collections in the museums’ possession that they sought to attach and execute against: *787 the Persepolis and Chogha Mish Collections at the Oriental Institute, and the Herzfeld Collection at the Field Museum.³

The first two are collections of Persian antiquities recovered in excavations in the Iranian city of Persepolis in the 1930s and on the Chogha Mish plain in southwestern Iran in the 1960s. Archaeologists from the University of Chicago led these excavations, and Iran loaned the artifacts to the Oriental Institute for long-term study and to decipher the Elamite writing that appears on some of the tablets included among the discoveries. The terms of the academic loan require the Oriental Institute to return the collections to Iran when study is complete. The Institute says it has finished studying the Chogha Mish Collection and is ready to return it to Iran pending resolution of a claim before the Iran–United States Claims Tribunal in the Hague.⁴ Study of the Persepolis Collection is apparently ongoing, although the Institute says it has returned parts of this collection to Iran.

The third group of artifacts is known as the Herzfeld Collection, after the German archaeologist Ernst Herzfeld who worked on excavations in Persia for 30 years in the early twentieth century. *See* Wikipedia, Ernst Herzfeld, http://en.wikipedia.org/wiki/Ernst_Herzfeld (last visited Mar. 10, 2011). The Field Museum purchased a set of prehistoric pottery, metalworks, and ornaments from Herzfeld in 1945. The plaintiffs contest the Field Museum’s title; they claim that Iran owns this collection because Herzfeld stole the artifacts and smuggled them out of the country in the 1920s and 1930s. Iran, however, does not claim ownership of the Herzfeld Collection.

The plaintiffs alleged that these three collections are subject to attachment under two provisions in the FSIA: (1) the exception to § 1609 attachment immunity for “property in the United States of a foreign state ... used for a commercial activity” where the underlying judgment “relates to a claim for which the foreign state is not immune,” 28 U.S.C. § 1610(a)(7); and (2) the “blocked assets” provision of the Terrorism Risk Insurance Act of 2002 (“TRIA”), which provides that the blocked assets of a terrorist party or its agency or instrumentality are subject to execution to satisfy a judgment obtained under the FSIA’s terrorism exception, Pub.L. No. 107–297, Title II, § 201(a), 116 Stat. 2322, 2337 (2002) (codified at 28 U.S.C. § 1610 note). The museums responded that the collections are immune from attachment under § 1609 of the FSIA and that neither the commercial exception in § 1610(a)(7) nor the “blocked assets” provision of TRIA applies.

The plaintiffs moved for partial summary judgment, asking the court to hold that § 1609 immunity is an affirmative defense that only the foreign state itself can assert. This question first came before a magistrate judge, who issued a report and *788 recommendation agreeing with the plaintiffs that § 1609 immunity is personal to the foreign state and must be affirmatively pleaded. The museums objected. The United States entered the fray, filing a statement of interest on the side of the museums. The district judge was not impressed and entered an order agreeing with the magistrate judge that the foreign state itself must specially plead § 1609 immunity.

Instead of taking an immediate appeal, the museums asked the court to certify the order for appeal under 28 U.S.C. §

1292(b), but other events in the litigation soon overtook this request. Two days before the museums filed their § 1292(b) motion, Iran appeared in the district court and asserted § 1609 attachment immunity. This dramatically altered the course of the proceedings. The plaintiffs promptly shifted their attention to Iran, seeking discovery not just on the three museum collections but on *all* Iranian assets in the United States. Since then, the plaintiffs and Iran have been embroiled in litigation concerning the proper scope of these discovery requests. The dispute spawned numerous motions, multiple rulings by the magistrate judge and the district court, and now this appeal. We will not try to provide a complete account of what transpired below but instead offer the following summary.

After Iran made its appearance, the plaintiffs served it with a request for production of documents under Rule 34 and a notice of deposition under Rule 30(b)(6) of the Federal Rules of Civil Procedure. The document request had ten sections. The first nine sought materials relating to the Persepolis, Chogha Mish, and Herzfeld Collections. The tenth request was significantly more ambitious. In relevant part, it demanded that Iran turn over “[a]ll documents, including without limitation any communication or correspondence, concerning any and all tangible and intangible assets, of whatever nature and kind, in which Iran and/or any of Iran’s agencies and instrumentalities has any legal and/or equitable interest, that are located within the United States....” The Rule 30(b)(6) notice sought to depose an officer or agent designated by Iran to testify on its behalf regarding its assets in the United States.

Iran sought a protective order shielding it from these discovery requests and also moved for summary judgment seeking a declaration that the Persepolis, Chogha Mish, and Herzfeld Collections are immune from execution and attachment under the FSIA. The plaintiffs countered with a motion under Rule 56(f) of the Federal Rules of Civil Procedure requesting additional discovery before responding to Iran’s summary-judgment motion. This motion was completely separate from the plaintiffs’ earlier discovery requests under Rules 30(b)(6) and 34, but it led to significant confusion regarding which discovery requests were actually on the table. In addition to the Rule 56(f) motion, the plaintiffs also separately moved to compel Iran to comply with its previous document requests under Rule 34 and its deposition notice under Rule 30(b)(6).

The magistrate judge eventually granted the plaintiffs’ Rule 56(f) motion for additional discovery. The judge said the plaintiffs were entitled to the following discovery from Iran: (1) any documents relating to the three contested collections of Persian artifacts; (2) documents that might support the plaintiffs’ theory that the Oriental Institute was effectively Iran’s agent; and (3) a Rule 30(b)(6) deposition of an officer or agent authorized to testify on Iran’s behalf. The magistrate judge also granted the plaintiffs’ motion to compel, but only “[i]nasmuch” as the discovery was necessary for the plaintiffs to respond to Iran’s request for partial summary judgment. *789 Iran objected but was overruled by the district court.

The plaintiffs interpreted these rulings as compelling Iran to comply in full with all their discovery and deposition requests under Rules 30(b)(6) and 34. Iran read the orders much more narrowly and thought it was only required to produce discovery relating directly to its motion for summary judgment. In particular the parties disputed whether Iran was required to provide general-asset discovery. Iran sought clarification, or in the alternative, a protective order. The magistrate judge denied Iran’s motion for a protective order and explicitly ordered general-asset discovery to proceed. The district judge affirmed, dismissing Iran’s concerns about sovereign immunity as “overblown.” But the judge was laboring under a misapprehension; she said the plaintiffs were “not seeking general asset discovery about every conceivable asset of Iran’s in the United States.”

Of course, general-asset discovery was *precisely* what the plaintiffs were seeking and indeed what the magistrate judge had ordered. His order plainly stated that “Iran will comply with [the plaintiffs’] requests for general asset discovery[.]” and this holding was the focal point of Iran’s objection before the district court. In a motion to reconsider, the plaintiffs noted the district judge’s error. The judge then acknowledged the oversight and issued a one-page order compelling Iran to submit to the plaintiffs’ requests for general-asset discovery. Iran appealed under the collateral-order doctrine and also sought review of the district court’s earlier order declaring that § 1609 sovereign-property immunity must be asserted by the foreign state itself. We permitted the museums to intervene on appeal, and the United States appeared as an amicus in support of reversal.⁵

II. Discussion

A. Appellate Jurisdiction

Before we address the merits, there is a threshold question about appellate jurisdiction—two questions, actually, because two interlocutory orders have been appealed: (1) the district court’s general-asset discovery order; and (2) the court’s earlier order rejecting § 1609 sovereign-property immunity in the absence of an appearance by Iran. Jurisdiction over the general-asset discovery order is a relatively straightforward matter. The jurisdictional analysis regarding the court’s earlier order is slightly more complicated.

It is well-established that “as a general rule, an order authorizing discovery in aid of execution of judgment is not appealable until the end of the case.” *In re Joint E. & S. Dists. Asbestos Litig.*, 22 F.3d 755, 760 (7th Cir.1994). However, the order at issue here invades Iran’s sovereign immunity, and it is equally well-established that orders denying claims of immunity may be immediately appealed under the collateral-order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 742–43, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982); *Empress Casino v. Blagojevich*, 638 F.3d 519, 527–28 (7th Cir.2011). This includes interlocutory orders denying claims of sovereign immunity under the FSIA. *Rush–Presbyterian–St. Luke’s Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n. 2 (7th Cir.1989); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir.1987).

*790 It is true that *Segni* and *Rush–Presbyterian* concerned a foreign state’s jurisdictional immunity from suit under 28 U.S.C. § 1604, not attachment immunity under § 1609.⁶ But the Fifth Circuit has held that the denial of attachment immunity under § 1609 of the FSIA may be immediately appealed under the collateral-order doctrine, *FG Hemisphere Assocs. v. République du Congo*, 455 F.3d 575, 584 (5th Cir.2006), and we agree with this sensible conclusion. There is no reason the collateral-order doctrine should apply any differently in cases raising the attachment immunity of foreign-state property under § 1609 than in cases raising foreign-state jurisdictional immunity under § 1604. The FSIA protects foreign sovereigns from court intrusions on their immunity in its various aspects, and interlocutory appeal is appropriate regardless of which form of immunity is at stake. Because the district court’s general-asset discovery order effectively rejected Iran’s claim of attachment immunity under § 1609, we have jurisdiction to review it under the collateral-order doctrine.

The question of appellate jurisdiction over the court’s earlier order is trickier. That order, too, had the effect of denying a claim of attachment immunity under the FSIA. The district court held that § 1609 immunity is an affirmative defense that can be asserted only by the foreign sovereign itself. Up to that point in the litigation, the museums were advancing the claim of attachment immunity, and because Iran had not appeared, the court’s order effectively stripped the collections of their statutory immunity. The court’s earlier order thus falls within the scope of the collateral-order doctrine and was immediately appealable.

But orders immediately appealable under the collateral-order doctrine are “final decisions” under 28 U.S.C. § 1291, and subject to exceptions not applicable here, must be appealed within 30 days of entry. See FED. R.APP. P. 4(a)(1)(A); 28 U.S.C. § 2107(a); *Otis v. City of Chicago*, 29 F.3d 1159, 1166–67 (7th Cir.1994) (en banc). Rather than filing an immediate appeal, the museums asked the court to certify the order for interlocutory appeal under § 1292(b). This was unnecessary, for reasons we will explain in a moment. In the meantime Iran appeared, becoming the lead defendant, and the focus shifted to discovery disputes. The § 1292(b) motion apparently got lost in the shuffle. Although the motion was fully briefed, the district court didn’t address it until after this appeal was filed; at that point the court simply dismissed it as moot.

In *Weir v. Propst*, 915 F.2d 283, 285 (7th Cir.1990), we “clarif[ied] the relationship between the collateral-order doctrine and section 1292(b) certification in the recurrent setting of appeals from denial of immunity.” We explained that a § 1292(b) certification is unnecessary for an appeal under the collateral-order doctrine; orders denying immunity are “appealable—without any of the rigamarole involved in a 1292(b) appeal—under section 1291, by virtue of *Mitchell v. Forsyth*.” *Id.* We also said that a request for § 1292(b) certification “may not be used to circumvent the time limitations on filing an appeal under section 1291.” *Id.* The “deadlines in Rule 4(a) for appeals in civil cases apply to all appealable orders, including collateral orders, specifically orders denying immunity, ... [and] [i]f the deadline is missed, the order is not appealable.” *Id.* at 286. If *791 that occurs, “[t]he defendant must then wait until another appealable order (normally, the final judgment) is entered, upon appeal of which he can challenge any interlocutory order that has not become moot.” *Id.*

We reiterated this point in *Otis*, although in somewhat more sweeping terms: “[A] litigant entitled to appeal under the

collateral order doctrine must act within 30 days and if this time expires without appeal must wait until the final judgment to pursue the issue.” 29 F.3d at 1167. This passage in *Otis* relied on *Weir* and should be read with the earlier opinion. The failure to timely appeal an immunity order under the collateral-order doctrine does not necessarily postpone review until the end of the case; it postpones review until another appealable order is entered. This will usually be the final judgment, but not always. And here, there is “another appealable order,” *Weir*, 915 F.2d at 286, not the final judgment, that has provided the next opportunity for review. The district court’s general-asset discovery order rejected Iran’s claim of sovereign immunity, and Iran’s timely appeal of *that* order permits review of the earlier—and closely related—immunity decision.⁷

This conclusion finds support in decisions from the Third and Fifth Circuits. See *In re Montgomery County*, 215 F.3d 367, 372 (3d Cir.2000) (quoting *Weir*’s statement that when a collateral order is not timely appealed, “[t]he defendant must then wait until another appealable order (normally, the final judgment) is entered, upon appeal of which he can challenge any interlocutory order that has not become moot”); *Kenyatta v. Moore*, 744 F.2d 1179, 1186–87 (5th Cir.1984) (interlocutory appeal that is not timely pursued can be revived upon entry of final judgment or some other appealable order); but cf. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 48 F.3d 373, 375 (8th Cir.1995) (deciding not to review earlier orders of the district court—whether or not they fell within the collateral-order doctrine—on interlocutory review of a later injunction because the earlier orders were not timely appealed and were not inextricably linked to the injunction issue that was properly before the court).

Moreover, in the particular circumstances of this case, permitting review of the first immunity order as part of Iran’s appeal from the second reflects sound appellate management, not an unwarranted expansion of the scope of collateral-order review. Both orders raise important and closely related questions regarding the scope and operation of the FSIA. Questions of foreign-sovereign immunity are sensitive, and lower-court mistakes about the availability of immunity can have foreign-policy implications. More particularly here, the district court’s refusal to consider § 1609 attachment immunity without an appearance by the foreign state precipitated Iran’s appearance and led directly to the imposition of the general-asset discovery order against it. The latter order was timely appealed, and the two substantially overlap.⁸ Review of both orders now will *792 clarify the rest of the litigation. Iran’s timely appeal of the court’s general-asset discovery order brings up the court’s earlier order denying § 1609 attachment immunity unless Iran appeared.⁹

B. Attachment Immunity Under § 1609 of the FSIA

On the merits this appeal challenges the district court’s interpretation of the FSIA. Our review is de novo. *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir.2007).

The FSIA was enacted in 1976, but the doctrine of foreign-sovereign immunity developed at common law very early in our nation’s history. *Samantar v. Yousuf*, 560 U.S. 305, 130 S.Ct. 2278, 2284, 176 L.Ed.2d 1047 (2010); *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 865, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008); *Republic of Austria v. Altmann*, 541 U.S. 677, 688–89, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004). “For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country.” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). Chief Justice Marshall’s opinion in *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 3 L.Ed. 287 (1812), articulated the general principle, and “[a]lthough the narrow holding of *The Schooner Exchange* was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in our port, that opinion came to be regarded as extending virtual absolute immunity to foreign sovereigns.” *Verlinden*, 461 U.S. at 486, 103 S.Ct. 1962. The doctrine “is premised upon the ‘perfect equality and absolute independence of sovereigns, and th[e] common interest in impelling them to mutual intercourse.’ ” *Pimentel*, 553 U.S. at 865, 128 S.Ct. 2180 (quoting *Schooner Exchange*, 7 Cranch at 137); see also *Nat’l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362, 75 S.Ct. 423, 99 L.Ed. 389 (1955) (Foreign-sovereign immunity is based on “reciprocal self-interest [] and respect for the ‘power and dignity’ of the foreign sovereign.”).

Foreign-sovereign immunity “is a matter of grace and comity on the part of the United States,” not a constitutional doctrine. *Verlinden*, 461 U.S. at 486, 103 S.Ct. 1962. Accordingly, federal courts *793 “consistently ... deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.” *Id.* Eventually, a “two-step procedure developed for resolving a foreign state’s claim

of sovereign immunity, typically asserted on behalf of seized vessels.” *Samantar*, 130 S.Ct. at 2284. The diplomatic representative of the foreign state would request that the State Department issue a “suggestion of immunity.” *Id.* If the State Department did so, the court would surrender jurisdiction. *Id.* In the absence of a suggestion of immunity, however, the court would “decide for itself whether the requisites for such immunity existed.” *Id.* (quoting *Ex parte Republic of Peru*, 318 U.S. 578, 587, 63 S.Ct. 793, 87 L.Ed. 1014 (1943)). To make this decision, the court “inquired ‘whether the ground of immunity is one which it is the established policy of the [State Department] to recognize.’ ” *Id.* (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36, 65 S.Ct. 530, 89 L.Ed. 729 (1945)). The process thus entailed substantial judicial deference to the Executive Branch whether the State Department issued a suggestion of immunity or not.

In practice the State Department would usually request immunity in all actions against friendly foreign sovereigns. *Samantar*, 130 S.Ct. at 2285; *Verlinden*, 461 U.S. at 486, 103 S.Ct. 1962. That changed in 1952 when the State Department adopted a new “restrictive” theory of foreign-sovereign immunity. *Samantar*, 130 S.Ct. at 2285; *Verlinden*, 461 U.S. at 486, 103 S.Ct. 1962. The “Tate Letter” (Jack B. Tate, Acting Legal Advisor to the Department of State, writing to the Attorney General) announced that foreign-sovereign immunity would thenceforward be “confined to suits involving the foreign sovereign’s public acts, and [would] not extend to cases arising out of a foreign state’s strictly commercial acts.” *Verlinden*, 461 U.S. at 487, 103 S.Ct. 1962.

This policy shift was not codified into law, and its implementation gave rise to some practical and political difficulties as the State Department struggled to maintain a consistent standard for evaluating grants of immunity for foreign sovereigns. *Samantar*, 130 S.Ct. at 2285; *Altmann*, 541 U.S. at 690–91, 124 S.Ct. 2240; *Verlinden*, 461 U.S. at 487, 103 S.Ct. 1962. In 1976 Congress passed the FSIA for the purpose of providing a clear, uniform set of standards to govern foreign-sovereign immunity determinations. Under the FSIA, courts, not the State Department, decide claims of foreign-sovereign immunity according to the principles set forth in the statute. See 28 U.S.C. § 1602 (congressional findings and declaration of purpose); *Samantar*, 130 S.Ct. at 2285; *Altmann*, 541 U.S. at 691, 124 S.Ct. 2240; *Verlinden*, 461 U.S. at 487–88, 103 S.Ct. 1962.

For the most part, the FSIA codified the restrictive theory of sovereign immunity announced in the Tate Letter. *Samantar*, 130 S.Ct. at 2285; *Altmann*, 541 U.S. at 691, 124 S.Ct. 2240; *Verlinden*, 461 U.S. at 488, 103 S.Ct. 1962. The Act contains two primary forms of immunity. Section 1604 provides jurisdictional immunity from suit: “[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States” except as otherwise provided in the Act. 28 U.S.C. § 1604. Section § 1609, the provision at issue here, codifies the related common-law principle that a foreign state’s property in the United States is immune from attachment and execution:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act *the property in the United States of a foreign state shall be immune from *794 attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.*

Id. § 1609 (emphasis added). The term “foreign state” includes “a political subdivision of a foreign state or an agency or instrumentality of a foreign state.” *Id.* § 1603(a).

In keeping with the restrictive theory of foreign-sovereign immunity, the FSIA carves out certain exceptions to the jurisdictional immunity of foreign states described in § 1604 (see §§ 1605–1607) and the immunity of foreign-state property from attachment and execution described in § 1609 (see §§ 1610, 1611). Accordingly, under § 1604 foreign states and their agencies and instrumentalities are immune from suit unless statutory exception applies. Under § 1609 foreign-state property in the United States is likewise immune from attachment or execution unless an exception applies. Under the exceptions listed in §§ 1610 and 1611, property owned by a foreign state’s instrumentalities is generally more amenable to attachment than property owned by the foreign state itself. See *id.* § 1610(a) (exceptions applicable to foreign-state property), (b) (exceptions applicable to foreign-instrumentality property); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 460 cmt. b.

In their underlying suit against Iran, the plaintiffs established jurisdiction via § 1605(a)(7), an exception to jurisdictional sovereign immunity for actions “in which money damages are sought against a foreign state for personal injury or death that

was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act.” 28 U.S.C. § 1605(a)(7) (repealed and reenacted as § 1605A(a)(1), Pub.L. No. 110–181, Div. A, Title X, § 1083(a)(1), (b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 338, 341). In the execution proceeding, they relied on the following exception to § 1609 attachment immunity:

(a) The property in the United States of a foreign state ... used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State ... if—

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, regardless of whether the property is or was involved with the act upon which the claim is based.

Id. § 1610(a)(7). They also claimed that Iran’s assets are attachable under § 201 of the TRIA as “blocked assets” of a terrorist party. Pub.L. No. 107–297, Title II, § 201(a), 116 Stat. 2322, 2337 (2002).

The district court did not address the applicability of either of these exceptions. Instead, the court held that the attachment immunity conferred by § 1609 is personal to the foreign state, which must appear and affirmatively plead it. When Iran made its appearance and specifically raised § 1609, the court continued to sidestep the immunity question and instead ordered general-asset discovery regarding *all* of Iran’s assets in the United States, not just the three museum collections the plaintiffs identified in the attachment citations. Both of these orders are incompatible with the text, structure, and history of the FSIA, and also conflict with relevant precedent. We address the second order first.

1. The general-asset discovery order

Execution proceedings are governed by Rule 69(a) of the Federal Rules of Civil Procedure and “must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.” *795 FED.R.CIV.P. 69(a)(1). Discovery requests in aid of execution may be made pursuant to either the federal rules or the corresponding rules of the forum state, *id.* Rule 69(a)(2), but either way, the FSIA plainly applies and limits the discovery process.

As a general matter, it is widely recognized that the FSIA’s immunity provisions aim to protect foreign sovereigns from the burdens of litigation, including the cost and aggravation of discovery. *See Pimentel*, 553 U.S. at 865, 128 S.Ct. 2180; *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003); *Rush–Presbyterian*, 877 F.2d at 576 n. 2; *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir.2000); *Foremost–McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C.Cir.1990). This is consistent with the Supreme Court’s treatment of other immunities—for example, the qualified immunity of governmental officials. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1953, 173 L.Ed.2d 868 (2009) (“The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery.” (quotation marks omitted)). A potential difficulty arises, however, when an asserted exception to immunity turns on disputed facts. The FSIA does not directly address the extent to which a judgment creditor may pursue discovery to establish that the property he is seeking to attach fits within one of the statutory exceptions to the attachment immunity conferred by § 1609.¹⁰

In *Arriba Ltd. v. Petroleos Mexicanos*, the Fifth Circuit aptly took note of the “tension between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign’s or sovereign agency’s legitimate claim to immunity from discovery.” 962 F.2d 528, 534 (5th Cir.1992). *Arriba* involved § 1604 *jurisdictional* immunity, but the same tension is present when *attachment* immunity under § 1609 is at stake. The district court’s decision to order nationwide discovery of all Iranian assets fails to appreciate this basic point. That much is evident in the magistrate judge’s rationale for the discovery order:

By inquiring about Iran’s assets generally, the Plaintiffs, and ultimately the Court, will be able to determine which of those assets fall within the domain of assets that are amenable to attachment and execution under the FSIA and TRIA. The Court will not limit the Plaintiffs’ discovery requests to

those categories of assets that are reachable under the FSIA and TRIA, allowing Iran to be the judge of which assets are immune before providing any discovery. That determination goes to the merits of the case and will be made by the Court alone.

Rubin v. Islamic Republic of Iran, No. 03 C 9370, 2008 WL 192321, at *15 (N.D.Ill. Jan. 18, 2008). The district judge adopted this reasoning in toto.

This approach is inconsistent with the presumptive immunity of foreign-state property under § 1609. As a historical matter, “[p]rior to the enactment of the FSIA, the United States gave absolute immunity to foreign sovereigns from the execution of judgments. This rule required plaintiffs who successfully obtained a judgment against a foreign sovereign to rely on voluntary repayment by that State.” *Autotech*, 499 F.3d at 749. The FSIA “codified this practice by establishing *796 a general principle of immunity for foreign sovereigns from execution of judgments,” subject to certain limited exceptions. *Id.* The statutory scheme thus “modified the rule barring execution against a foreign state’s property by ‘partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity.’ ” *Id.* (second emphasis omitted) (quoting *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir.2002)).

Importantly here, the exceptions to attachment immunity are narrower than the exceptions to jurisdictional immunity: “Although there is some overlap between the exceptions to jurisdictional immunity and those for immunity from execution and attachment, there is no escaping the fact that the latter are more narrowly drawn.” *Id.* We noted in *Autotech* that “[t]he FSIA says that immunity from execution is waived only for specific ‘property.’ As a result, in order to determine whether immunity from execution or attachment has been waived, the plaintiff must identify specific property upon which it is trying to act.” *Id.* at 750. Under the FSIA “[t]he only way the court can decide whether it is proper to issue the writ [of attachment or execution] is if it knows which property is targeted.” *Id.* In other words, “[a] court cannot give a party a blank check when a foreign sovereign is involved.” *Id.*

As our discussion in *Autotech* makes clear, § 1609 of the FSIA codifies the common-law rule that property of a foreign state in the United States is *presumed* immune from attachment and execution. To overcome the presumption of immunity, the plaintiff must identify the particular foreign-state property he seeks to attach and then establish that it falls within a statutory exception. The district court’s general-asset discovery order turns this presumptive immunity on its head. Instead of confining the proceedings to the specific property the plaintiffs had identified as potentially subject to an exception under the FSIA, the court gave the plaintiffs a “blank check” entitlement to discovery regarding *all* Iranian assets in the United States. This inverts the statutory scheme.

Three other circuits have addressed the question of discovery in the context of attachment proceedings against foreign-state property in the United States under the FSIA, and all have agreed that the court must proceed narrowly, in a manner that respects the statutory presumption of immunity and focuses on the specific property alleged to be exempt. The Second, Fifth, and Ninth Circuits have repeated an identical message to the district courts: “[D]iscovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.” *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir.2007) (quoting *First City, Texas–Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir.1998)); *Conn. Bank of Commerce*, 309 F.3d at 260 n. 10 (quoting *Arriba*, 962 F.2d at 534); *Af–Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095–96 (9th Cir.2007) (emphasis omitted) (quoting *Conn. Bank of Commerce*, 309 F.3d at 260 n. 10).¹¹ We agree. Discovery orders that are broad in scope and thin in foundation unjustifiably subject foreign states to unwarranted litigation costs and intrusive inquiries about their American-based assets. One of the purposes of the immunity codified *797 in § 1609 is to shield foreign states from these burdens.

The plaintiffs note that these decisions from other circuits took language from *Arriba*, 962 F.2d at 534, the Fifth Circuit case dealing with exceptions to § 1604 *jurisdictional* immunity, and adapted it to the context of *attachment* immunity under § 1609. They claim that broader discovery should be available under § 1609 than § 1604. This argument is based on their reading of § 1606 of the FSIA, which provides that if an exception to § 1604 *jurisdictional* immunity applies, “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 1606. The plaintiffs contend that once a court has exercised jurisdiction over a foreign sovereign and entered a judgment against it, § 1606 entitles them to the same broad discovery as any other litigant seeking to execute on a judgment under Rule

69(a). The critical error in this argument is that it mixes the scope of *liability* with the scope of *execution*. Although Iran may be found liable in the same manner as any other private defendant, the options for executing a judgment remain limited. That is the point of § 1609. It is true that §§ 1604 and 1609 provide different kinds of immunity to foreign sovereigns, but there is no reason to read § 1609 to allow for more intrusive discovery than its § 1604 counterpart. To the contrary, as we observed in *Autotech*, the exceptions to § 1609 attachment immunity are drawn more narrowly than the exceptions to § 1604 jurisdictional immunity.

The plaintiffs cite two cases as support for the general-asset discovery order. The first is *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir.1992), which involved a contract dispute between an American company and Beijing Ever Bright Industrial Co., a company controlled by the People’s Republic of China. The American company won a default judgment against Ever Bright on a breach-of-contract claim and then sought general discovery in order to identify Ever Bright’s assets; the district court authorized the discovery. Ever Bright appealed and the Ninth Circuit affirmed. *Richmark* is distinguishable from this case. Ever Bright was an instrumentality of the People’s Republic of China, and the discovery order at issue in *Richmark* was limited to Ever Bright’s assets. As we have noted, the immunity exceptions in the FSIA for property owned by an *instrumentality* of a foreign state are much broader than the exceptions for property owned by the foreign state itself.¹² See 28 U.S.C. § 1610(a) (exceptions to immunity of foreign-state property), 1610(b) (exceptions to immunity for foreign-instrumentality property); see also *Autotech*, 499 F.3d at 749–50. Even so, we held in *Autotech* that a judgment creditor seeking to invoke an exception to § 1609 immunity must first identify the property on which it seeks to execute. *Id.*

*798 The plaintiffs also cite *First City, Texas–Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 177 (2d Cir.1998), which affirmed an order permitting a judgment creditor to conduct general discovery against Rafidain Bank, an instrumentality of Iraq. *Rafidain Bank* is also distinguishable; as in *Richmark* the order in question authorized general discovery against an *instrumentality* of a foreign sovereign, not the foreign sovereign itself. Equally important, the Second Circuit authorized broad discovery so that the judgment creditor would have an opportunity to substantiate its claim that the defendant instrumentality of Iraq was the alter ego of the Central Bank of Iraq—a claim that if proven would have allowed the judgment creditor to pursue the assets of the Central Bank. Neither *Richmark* nor *Rafidain Bank* provide support for the discovery order in this case.¹³

Finally, the plaintiffs lodge a policy objection to restricting discovery to the particular foreign-state property sought to be attached. They maintain that limiting discovery in this way would effectively deny judgment creditors the opportunity to locate potentially attachable assets of the foreign state. This contention merits several responses.

First, it is an exaggeration to suggest that limiting discovery to the specific property identified for attachment completely forecloses the opportunity of judgment creditors to discover *any* attachable assets of the foreign-state judgment debtor. Targeted discovery regarding specifically identified assets may prove fruitful, and the plaintiff may in the end be permitted to execute on the specified property. It is true that limiting discovery to the specific property identified for attachment restricts the plaintiff’s ability to use the coercive power of the court to identify *other* attachable foreign-state assets, but that is a consequence of the balance struck by the FSIA. Nothing in the statutory scheme prevents judgment creditors from using private means to identify potentially attachable assets of foreign states located in the United States. Moreover, the FSIA includes a provision for judgment creditors in certain cases to enlist the assistance of the Secretary of the Treasury and the Secretary of State in identifying and executing against the assets of a foreign sovereign. Section 1610(f)(2)(A) provides:

At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A [enacted Jan. 28, 2008]) or section 1605A, the Secretary of the Treasury and the Secretary of State *should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state* or any agency or instrumentality of such state.

(Emphasis added.) The plaintiffs secured their judgment against Iran under § 1605(a)(7) and thus are eligible for this assistance from the United States.

There is no question that the attachment immunity codified in § 1609 of the FSIA has a cost, and that cost is borne primarily by Americans who have been injured in tort or contract by foreign states or their agencies or instrumentalities. The FSIA § 799 embodies a judgment that our nation's foreign-policy interests justify this particular allocation of legal burdens and benefits. Accordingly, we conclude that under the FSIA a plaintiff seeking to attach the property of a foreign state in the United States must identify the specific property that is subject to attachment and plausibly allege that an exception to § 1609 attachment immunity applies. If the plaintiff does so, discovery in aid of execution is limited to the specific property the plaintiff has identified. The general-asset discovery order issued in this case is incompatible with the FSIA.¹⁴

2. The appearance order

The foregoing discussion also highlights the flaws in the district court's earlier order in which the court held that attachment immunity under § 1609 is an affirmative defense that can only be asserted by the foreign state itself. This ruling fails to give effect to the statutory text: "[T]he property in the United States of a foreign state *shall* be immune from attachment arrest and execution *except* as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. § 1609 (emphasis added). As we have explained, the statute cloaks the foreign sovereign's property with a presumption of immunity from attachment and execution unless an exception applies; under § 1609 the property is protected by immunity and may not be attached absent proof of an exception. It follows from this language that the immunity does not depend on the foreign state's appearance in the case. The immunity inheres in the property itself, and the court must address it regardless of whether the foreign state appears and asserts it.

Again, we can find helpful analogous principles in the operation of § 1604 jurisdictional immunity. The Supreme Court has confirmed that the FSIA's immunity from suit arises presumptively, and "even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act." *Verlinden*, 461 U.S. at 493–94 & n. 20, 103 S.Ct. 1962.¹⁵ This conclusion is unsurprising; the immunity conferred by § 1604 is jurisdictional. The Court in *Verlinden* read § 1604 together with a separate provision of the FSIA, codified at 28 U.S.C. § 1330(a), which provides:

The district courts shall have original jurisdiction ... of any ... action against a foreign state as defined in section 1603(a) of this title as to any claim for relief ... to which the foreign state is § 800 not entitled to immunity either under sections 1605–1607 of this title or any applicable international agreement.

28 U.S.C. § 1330(a); *Verlinden*, 461 U.S. at 493–94, 103 S.Ct. 1962.¹⁶

Though not jurisdictional, the immunity conferred by § 1609 is similarly a default presumption, one that inheres in the property of the foreign state. When a judgment creditor seeks to attach property to satisfy a judgment obtained under the FSIA, the district court is immediately on notice that the immunity protections of § 1609 are in play. In particular, where the plaintiff seeks to attach property of the foreign state *itself*, immunity is presumed and the court must find an exception—with or without an appearance by the foreign state—not as a jurisdictional matter but to give effect to the statutory scheme. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 460 cmt. b (explaining the distinction in the FSIA between the property of foreign states and the property of foreign-state instrumentalities).

This reading of § 1609 is confirmed by several provisions in § 1610 governing exceptions to attachment immunity. For example, § 1610(a)(1) states that § 1609 immunity does not apply where "the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication." This strongly suggests that immunity from execution is presumed and waiver of immunity is the exception.¹⁷ Section 1610(c) is even more telling. That provision governs the issuance of an attachment order under either § 1610(a) or (b) when the foreign state is in default:

No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter [governing service, time to answer, and default].

28 U.S.C. § 1610(c). The waiting period required by § 1610(c) ensures that a defaulting foreign state is provided adequate notice before an attachment order issued under either § 1610(a) or (b)—the “commercial” exceptions to § 1609 immunity—will take effect. This provision makes it clear that even when the foreign state fails to appear in the execution proceeding, the court must determine that the property sought to be attached is excepted from immunity under § 1610(a) or (b) before it can order attachment or execution.

Our conclusion that the court must address § 1609 immunity even in the absence of an appearance by the foreign state is also consistent with the common-law practice that the FSIA codified. As we have explained, the attachment immunity of foreign-state *801 property, like the jurisdictional immunity of foreign states, was historically determined without regard to the foreign state’s appearance in the case. The court either deferred to the State Department’s suggestion of immunity or made the immunity determination itself, by reference to the State Department’s established policy regarding foreign-sovereign immunity. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35–36, 65 S.Ct. 530, 89 L.Ed. 729 (1945) (common-law doctrine of foreign-sovereign immunity required judicial deference to executive determinations of immunity because “[t]he judicial seizure” of the property of a foreign state may be regarded as “an affront to its dignity and may ... affect our relations with it”). This practice continued after the issuance of the Tate Letter and the State Department’s shift to the restrictive theory of foreign-sovereign immunity.

To date, two circuits have addressed whether the foreign state must appear and assert § 1609 attachment immunity, and both have concluded that the answer is “no.” In the most recent case, the Peterson plaintiffs (who have intervened here) sought to execute their judgment against certain Iranian receivables; the Ninth Circuit concluded that the district court must independently raise and decide whether the property is immune from attachment under § 1609. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1126–28 (9th Cir.2010). Similarly, the Fifth Circuit has held that “the [foreign state’s] presence is irrelevant” to the question whether the property the plaintiff seeks to attach is excepted from § 1609’s presumptive immunity. *Walker Int’l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir.2004). A district court in Massachusetts also agrees. See *Rubin v. Islamic Republic of Iran*, 456 F.Supp.2d 228, 231–32 (D.Mass.2006) (execution proceeding brought by the Rubin plaintiffs to attach property in the possession of a museum at Harvard University but alleged to belong to Iran).

We now join these courts in concluding that under § 1609 of the FSIA, the property of a foreign state in the United States is presumed immune from attachment and execution. The immunity inheres in the property and does not depend on an appearance and special pleading by the foreign state itself. The party in possession of the property may raise the immunity or the court may address it sua sponte. Either way, the court must independently satisfy itself that an exception to § 1609 immunity applies before ordering attachment or other execution on foreign-state property in the United States.

For the foregoing reasons, we REVERSE the district court’s general-asset discovery order and its earlier order requiring Iran to appear and affirmatively plead § 1609 immunity, and REMAND for further proceedings consistent with this opinion.

All Citations

637 F.3d 783

Footnotes

* The Honorable Frank H. Easterbrook, Chief Judge, and the Honorable Richard A. Posner, Joel M. Flaum, Ilana Diamond Rovner, and Diane P. Wood, Circuit Judges, took no part in the consideration of this case.

** The Honorable Philip P. Simon, Chief Judge of the United States District Court for the Northern District of Indiana, sitting by designation.

¹ The victims also received an award of punitive damages against other defendants—senior Iranian officials—but this attachment proceeding involves only Iran itself. Liability against Iran and its officials was premised on § 1605(a)(7), read in conjunction with the “Flatow Amendment,” 28 U.S.C. § 1605 note, to create a private cause of action against foreign sovereigns for acts of terrorism, including extrajudicial killings. In a separate case, the D.C. Circuit later held that no such private cause of action against foreign sovereigns (as opposed to individuals) exists. See *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C.Cir.2004). Congress responded by supplying a cause of action through the National Defense Authorization Act of 2008, Pub.L. No. 110–181, 122 Stat. 3, which amended this section of the FSIA. This history has no effect on the merits of this appeal.

- 2 The Field Museum and the Oriental Institute have jointly briefed this appeal. We refer to them collectively as “the museums” unless the context requires otherwise.
- 3 The Rubin plaintiffs are pursuing similar litigation against Boston-area museums that possess artwork alleged to be owned by Iran. See *Rubin v. Islamic Republic of Iran*, 456 F.Supp.2d 228 (D.Mass.2006).
- 4 The Iran–United States Claims Tribunal was established in January 1981 under the terms of the Algiers Accords, which resolved the crisis precipitated by Iran’s seizure of American hostages at the United States Embassy during the Iranian Revolution in 1979. *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 129 S.Ct. 1732, 1736, 173 L.Ed.2d 511 (2009). After the hostages were taken, President Carter blocked Iranian assets within the United States. In connection with the release of the hostages, the Algiers Accords restored the financial position of Iran to that which existed before the crisis. *Id.* The Tribunal adjudicates property claims between the two states and their nationals in accordance with the terms of the Algiers Accords. *Id.*
- 5 After Iran filed this appeal, another group of judgment creditors against Iran was granted leave to intervene in the district court. The lead plaintiff in this group is Deborah Peterson. After intervening, the Peterson plaintiffs participated in this appeal. Their presence, however, has no bearing on the merits of the appeal.
- 6 In full, 28 U.S.C. § 1604 provides:
Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.
- 7 The museums cite *United States v. Michelle’s Lounge*, 39 F.3d 684 (7th Cir.1994), as support for the proposition that the court’s earlier order may be reviewed with Iran’s timely interlocutory appeal of the later collateral order. But *Michelle’s Lounge* simply held that an unappealed collateral order can be reviewed following the entry of final judgment, *id.* at 692, an uncontroversial proposition not at issue in this case. *Michelle’s Lounge* does not address the precise question presented here: Whether a collateral order that is not timely appealed is revived for review when a timely appeal is taken from a later collateral order.
- 8 Iran’s appearance did not moot the earlier order. Iran entered the case only because the district court refused to consider the question of § 1609 immunity unless Iran appeared and raised it. Iran’s appearance, in turn, exposed it to the general-asset discovery requests and the court’s order that it comply. Iran would like to withdraw from this case but is inhibited from doing so by the district court’s holding that § 1609 attachment immunity must be asserted by the foreign sovereign. This is a sufficient continuing interest to support an ongoing live controversy about the court’s earlier order.
- 9 The Supreme Court’s recent decision in *Ortiz v. Jordan*, —U.S. —, 131 S.Ct. 884, 178 L.Ed.2d 703 (2011), does not affect our conclusion. The issue in *Ortiz* was whether the denial of a motion for summary judgment based on qualified immunity could be appealed following a full trial on the merits. *Id.* at 888–89. The Supreme Court said “no.” *Id.* at 893. The denial of a motion for summary judgment based on qualified immunity may be immediately appealed under *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), subject to the limitations of *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995); alternatively, the defense may be renewed and litigated at trial. The Court held in *Ortiz* that the failure to take an immediate appeal of the denial of immunity on summary judgment precludes review of that order following a trial on the merits; to obtain review of an immunity claim in that situation, the defendant must preserve it at trial in a motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure. *Ortiz*, 131 S.Ct. at 892–93.
- 10 The only section in the FSIA that directly addresses discovery is 28 U.S.C. § 1605(g). That provision allows the Attorney General, under certain circumstances, to stay any request for discovery against the United States in any action brought against a foreign state on the basis of the “terrorism” exception to § 1604, as defined in § 1605(a)(7).
- 11 In *Af-Cap* the district court had limited discovery on grounds unrelated to the FSIA. The Ninth Circuit affirmed and also concluded that the discovery limitations were consistent with the requirements of the FSIA. *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir.2007).
- 12 The commercial-activity exception in § 1610(b) allows a judgment creditor to execute against any property of an agency or instrumentality of a foreign state in the United States so long as the agency or instrumentality has been found to have engaged in commercial activity. On the other hand, § 1610(a), the FSIA exception invoked in this case, allows execution against the property of a foreign state in the United States only if *that property* has been used for commercial activity. See *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 749–50 (7th Cir.2007); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 460 cmt. b (“For purposes of post-judgment attachment and execution, the [FSIA] draws a sharp distinction between the property of states and the property of state instrumentalities....”).

- ¹³ The Restatement of Foreign Relations explains that the FSIA provides weaker immunity protection for the property of foreign-state instrumentalities because “instrumentalities engaged in commercial activities are akin to commercial enterprises.” RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE U.S. § 460 cmt. b. But because “the primary function of [foreign] states is government ..., their amenability to post-judgment attachment should be limited to particular property.” *Id.*
- ¹⁴ In light of this holding, we need not consider Iran’s alternative argument that the general-asset discovery order violates the Algiers Accords, 20 I.L.M. 224 (1981).
- ¹⁵ The district court justified its appearance ruling almost entirely on an out-of-context reading of a sliver of FSIA legislative history that appears in this footnote in the Court’s opinion in *Verlinden*. Just before the sentence we have quoted above, the Court notes that “[t]he House Report on the [FSIA] states that ‘sovereign immunity is an affirmative defense that must be specially pleaded.’ ” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 n. 20, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983) (quoting H.R.Rep. No. 94–1487, at 17 (1976)). But immediately after this reference, the Court says quite clearly that the House Report got this point wrong: “Under the Act, however, subject matter jurisdiction turns on the existence of an exception to foreign sovereign immunity, 28 U.S.C. § 1330(a). Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act.” *Id.* This footnote, read as a whole, does not support the district court’s order. In a bit of charitable understatement, we have previously characterized this passage of FSIA legislative history as “not entirely accurate.” *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir.1985).
- ¹⁶ A complication arises when a foreign-state instrumentality has a questionable claim to jurisdictional immunity. *See, e.g., Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*, 32 F.2d 195 (2d Cir.1929) (The plaintiff, apparently a private corporation, was served with a counterclaim and then attempted to invoke foreign-sovereign immunity by claiming it was an instrumentality of Sweden.). In this situation, we have held that before a foreign instrumentality may be entitled to the presumption of immunity under § 1604, it must establish a prima facie case that it fits the FSIA’s definition of a foreign state. *See, e.g., Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir.2005). However, when the plaintiff sues the foreign sovereign itself, the immunity issue is uncomplicated; immunity is presumed, and the court must find an exception with or without an appearance by the foreign state.
- ¹⁷ We have previously rejected the notion that a foreign state’s failure to make an appearance before the court could itself constitute an implicit waiver of sovereign immunity. *See Frolova*, 761 F.2d at 378.

ANNEX 132

133 S.Ct. 23
Supreme Court of the United States

Jenny RUBIN, et al., petitioners,
v.
ISLAMIC REPUBLIC OF IRAN, et al.

No. 11–431.
|
June 25, 2012.

Synopsis

Case below, [637 F.3d 783](#).

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Justice [SCALIA](#) and Justice [KAGAN](#) took no part in the consideration or decision of this petition.

All Citations

567 U.S. 944, 133 S.Ct. 23 (Mem), 183 L.Ed.2d 692, 80 USLW 3240, 80 USLW 3704, 80 USLW 3708

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ANNEX 133

Department of State

F020004-029817

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SENT TO: Amembassy, TEHRAN *1561*

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Your 1716 Article II-2 Proposed addition repetitive. Right to enforce internal safety regulations amply covered by II-3. Security interests also provided for in XX-1-D. Additional phrase adds nothing and would create misunderstanding as to intent in II-2 and II-3. You may give written statement for negotiation records, if necessary, that enforcement internal security regulations connection travel and residence covered II-3. Treaty fully recognizes paramount right state take measures to protect itself and public safety.

Article XII Comma required before and after QUOTE who UNQUOTE.

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ANNEX 134

High-risk and other monitored jurisdictions

High-risk and other monitored jurisdictions

On the basis of the results of the review by the International Co-operation Review Group (ICRG), the FATF identifies jurisdictions with strategic AML/CFT deficiencies in the following public documents that are issued three times a year: [FATF Public Statement](#) (call for action) and [Improving Global AML/CFT Compliance: On-going Process](#) (other monitored jurisdictions).

[Related publications](#) >

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	Call for action	Other monitored jurisdictions
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Botswana		●
Cambodia		●
Democratic People's Republic of Korea (DPRK)	●	
Ethiopia		●
Ghana		●
Iran	●	
Pakistan		●
Panama		●
Sri Lanka		●
Syria		●
Trinidad and Tobago		●
Tunisia		●
Yemen		●

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ANNEX 135

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Department of State

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Origin

Info:

Treaty Article III - one. Iranian comment appears reflect misunderstanding. Paragraph confers no rights corporations engage in business. It merely provides their recognition as corporate entities principally in order they may prosecute or defend their rights in court as corporate entities. In this sense, paragraph one related paragraph two. Under treaty no U.S. corporation may engage in business in Iran except as permitted by Iran. Corporate status should be recognized assure right foreign corporate entities--those that sell goods or furnish other services to Iran as well as those permitted operate in Iran-- free access courts collect debts, protect patent rights, enforce contracts, etc. If this explanation fails remove difficulty, request more detailed statement problem.

Article III - three. Embassy's explanation good. Refer in addition to long history private arbitration in commercial communities, expedites settlement disputes without crowding public courts, purely voluntary as between parties to contract. Iran not required enforce awards if substantive objections but merely not discriminate account alien arbitrators or foreign situs. Comparable provisions in U.S. treaties with Japan, Germany, etc.

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V. G. Setser

Clearances:

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ANNEX 136



DEPARTMENT OF STATE INSTRUCTION

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Netherlands
FCN 1968

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NO.: A-165 December 21, 1953

SUBJECT: FCN treaty.



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TO: The American Embassy, THE HAGUE.

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Reference is made to the Department's A-114 of November 27 wherein, in commenting on Article XXII(3), the Department undertook to supply additional instruction regarding the Dutch proposal for adding a "seat" test in connection with the rule governing the nationality of companies. Although the information communicated in Embassy's telegram 494 of December 4 indicates that the need for such instruction is not immediate, the Department nevertheless will now forward its views on the subject of the "seat" test, for purposes of future reference and to complete the file of replies to questions raised in recent despatches concerning the FCN treaty draft. These views may be summarized as follows:

(1) The Dutch have not advanced reasons why it would be desirable or necessary to add the "seat" test; and the single test of place-of-incorporation proposed by the Department, which is that adopted in all FCN treaties signed by the U. S. with various countries since World War II, should be presumed a sound and adequate test unless and until the contrary can be shown.

(2) The single, place-of-incorporation test has the virtue of simplicity and easy determination. It pays full deference to the laws of the country to which the corporation owes its existence and from which it derives its nationality; and it renders the determination of a corporation's nationality analogous to the determination of an individual's nationality, in conformity with the treaty scheme of equating the corporation to the individual, insofar as feasible and prudent, for treaty purposes. Theoretically it is not apparent why the location of the "seat" of a corporation should govern its nationality, per se, any more than the place of domicile or residence of an individual should decide his nationality. The simple, single, logical test of place-of-incorporation is, in the Department's opinion, a contribution to good order in the realm of the international juridical status of corporations.

(3) It

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(3) It may be emphasized that the definition of corporate nationality is just that -- a definition, and no more. Of itself the definition only requires each Party to concede and acknowledge that a corporation is actually existent and endowed with legal being when the law of the other Party has created it and given it existence. The operative rights of a corporation must be sought in the operative provisions of the body of the treaty.

(4) The Department is mindful that a Party will wish to reserve a measure of protection against possible abuse that may arise through use of the corporate device; and it has accordingly framed the provision carried as Art. XXI(1-e), whereunder it is permissible to "pierce the corporate veil" where it is desired to deny third-country interests access, indirectly but no less effectively, to valuable rights under this bilateral treaty. (See comment in A-144 regarding this reservation). But this reservation has been carefully phrased so that it cannot in any event be used to deny the juridical existence of a corporation or deny it its day in court; and Protocol para. 2 has been included to assure, *inter alia*, that the invocation of XXI(1-e) cannot result in spoliation of acquired property rights of nationals of the other Party. The addition of the "seat" test to the XXII(3) definition would cut sweepingly and indiscriminately. Would the Dutch want every vestige of treaty right barred to a corporation that could not meet the "seat" test? A real kind of example would be the so-called "China Trade Act" corporation, many of which were chartered under the laws of the District of Columbia but maintained their business and their management offices (their "seat", that is) in China. It would be unfortunate if such a corporation were not entitled to sue in Dutch courts for breach of contract or patent infringement; and the Department cannot conceive that, notwithstanding the unqualified nature of their "seat" proposal, the Dutch would actually wish to bring about such a result.

(5) A secondary consideration is that the term "seat" is not familiar in American jurisprudence, and to introduce it into the treaty would tend to contribute an element of uncertainty in cases arising before U.S. courts. Even among European countries, there appears to be lack of uniformity of approach. A "seat" can be the legal headquarters, or the center of administration ("siege sociale"), or the center of exploitation, each of which may be in a different location (and it may not always be obvious just where that location is in a complicated business organization). There is a celebrated French case holding that the "siege sociale", in effect, was the center of exploitation, notwithstanding the usual rule that it is the center of administration.

(6) The Dutch have already agreed to the single place-of-incorporation test in two instruments concluded with the U.S.: namely, the Agreement relating to Conflicting Claims to German Enemy Assets, signed Brussels on 5 December 1947 (Annex, Arts. 11 and 21), and the Convention on Avoidance of Double Taxation, signed Washington on 29 April 1948 (Art. II(1)(c) and (d)). Both countries, therefore, have excellent precedent for the rule, and have in effect apparently settled the matter between themselves. (It would be anomalous to have a "seat" test for tax treatment under the FCN treaty, but no such test for tax treatment under the double-tax convention).

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ANNEX 137



DEPARTMENT OF STATE INSTRUCTION

2426

2426

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NO.: A-201 March 25, 1957

SUBJECT: Belgian Counterdraft of Treaty of Friendship, Commerce and Navigation - Fourth Version (Articles I-V).

TO: The American Embassy, BRUSSELS.

611,554/2-157

Reference Embassy's despatch No. 942, February 1, 1957.

The following is a provision-by-provision review of Articles I through V of the fourth version of the Belgian counterdraft, mainly to indicate the Department's understanding of the status of those provisions which have not been commented upon in recent instructions.

Preamble: The preamble is acceptable as it appears in the fourth version of the counterdraft.

Article I: Acceptable.

Article II: Acceptable. The marginal note to paragraph 1 suggests that the Belgians wish confirmation that the United States immigration laws allow the automatic entry of treaty traders and treaty investors. If the Belgians bring this matter up again, the Embassy may reply along the following lines: To say that entry of treaty traders or investors is allowed automatically tends to be rather misleading, for it implies that these two categories of nonimmigrants are relieved of compliance with the general requirements and procedures which aliens seeking entry into the United States must observe. Such, of course, is not the case. Treaty traders and investors, in common with all other prospective entrants, must meet the requirements as to entry documents and to that end must establish that they are not excludable on any of the grounds specified in Section 212 of the Immigration and Nationality Act. In addition, such traders and investors, in common with all other prospective entrants in nonimmigrant categories, must establish that they are entitled to classification in the particular category in which they seek entry. Such classification depends upon a showing of ability to meet the special qualifications stipulated by the Act and the administrative regulations for the nonimmigrant category in question.

As a

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APPROVED BY: *[Signature]*
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As a consequence, the treaty provision should not be looked upon as a guarantee that any one who applies for a nonimmigrant visa in the treaty trader or treaty investor category will be admitted to the United States. On the other hand, imposition on prospective traders and investors of the same general requirements as other nonimmigrants represents nothing more than the exercise of normal controls in order to prevent abuse of the entry privilege. The requirements are such that an applicant, otherwise admissible, who shows that he is a bona fide trader or investor should experience no difficulty in obtaining entry into the United States. This conclusion may be borne out by the long history of liberal application and interpretation of the treaty trader provision. That provision received specific statutory authorization in 1924 and since that time the entry of treaty traders has been subject to administrative controls. Through the years both the courts and the regulatory authorities may fairly be said to have followed a quite consistent pattern of liberality. The treaty trader concept has been construed broadly so as to embrace within the meaning of that term a number of activities such as insurance and banking which are involved only indirectly in the international exchange of goods. Similarly, in administering the provision the tendency has been to act in a spirit of liberality consistent with the treaty objective of promoting international trade and to view the system of administrative controls solely as a safeguard against evasion of the immigration laws and not as a device for arbitrary restriction of or interference with trade.

Article III (1): Revision of the first sentence is proposed in the Department's A-171, February 11, 1957. In the second sentence the phrase "à tous les degrés de juridiction" may possibly be misplaced. (See Embassy's despatch No. 642, November 27, 1956).

Article III (2): The first sentence is acceptable. Revision of the second sentence is proposed in the Department's A-171.

Article III (3): The first sentence is the subject of the Department's A-145, January 16, 1957. In light of Embassy's despatch No. 942, agreement appears to have been reached on the second sentence.

Article III (4): Acceptable. However, it appears that the first word of the second line on page 8 should be "et".

Article III (5): Accepted (Department's A-49, August 21, 1956).

Article IV (1): Accepted (Department's A-134, December 27, 1956).

Article IV (2): The first two sentences accepted. (Embassy's despatches No. 622, November 21, 1956; No. 942, February 1, 1957). The third sentence is dealt with in the Department's A-153, January 24, 1957.

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Article IV (3) (as renumbered): Accepted (Embassy's despatch No. 622). However, through an inadvertence the proposal was made that the order of the original paragraphs 3 and 4 be reversed. This would fail to carry out the Department's intention in making the proposal, for the result would be to split the provisions on expropriation by inserting between them a broad rule of nondiscriminatory treatment for property generally. The Department's object was to group the general rules at the head of this Article and follow them with the more specific rules. Otherwise, a general rule such as that embodied in this paragraph might be construed as applying only to the specific subject matter of the paragraph immediately preceding and not to the corpus of rights in property, as is the intent. Accordingly, at some convenient time the Embassy should propose that this paragraph be inserted immediately after paragraph 1. Present paragraph 2 would be renumbered 3, but the remaining paragraphs would remain as they now are numbered.

Article IV (4) and (5): Accepted (Department's A-96, October 29, 1956).

Article IV (6): Further review of this paragraph indicates that the substitution of "s'engagent" for "exprimment leur accord sur le fait qu'il est hautement souhaitable" tends to produce a construction quite difficult to render meaningfully in English, and apparently to some extent in French as well. The remedy appears to be either to find an acceptable substitute for "par voie de coopération et par tous autres moyens" or to retain "exprimment leur accord sur le fait qu'il est hautement souhaitable", which is seemingly intended as a literal translation of the English wording of Article X(2) of the Dutch treaty. Of the two remedies, the Department is inclined to prefer the latter.

Article V (1): Acceptable. With respect to the right of companies of either country to form subsidiaries under the general incorporation laws of the other country (Embassy's despatch No. 622), it may be observed that the prevailing rule in the United States, as in Belgium, is that only natural persons may take out charters of incorporation, although in a number of States corporations are in fact permitted in some circumstances to act as incorporators. As a practical matter, however, the proper object of the treaty is not to extend such a right to a foreign corporation but rather to assure that such a corporation will be able to act through natural persons as agents or intermediaries to obtain the desired charter for its subsidiary. In the Department's view the inclusion of "filiales" in the second sentence amount to such an assurance, but it may be desirable, because of the variation in the legal systems of the two countries, to have a brief indication of the common understanding to this effect appear in the negotiating record.

Article V (2): The first sentence is acceptable. By and large the Belgian contention that this paragraph as now worded accords the right to

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engage in gainful activities "directly or by agent or through the medium of any form of lawful juridical entity" is correct. The reference to the medium through which activity is to be conducted is intended mainly to be illustrative of the scope of the national treatment rule. As such, it testifies to the general absence in each country of restrictions on the choice of means for engaging in business activities such as limitations on the use of agents or requirements that participation in a given activity be only through the medium of a domestic corporation.

While the additional wording admittedly is of secondary importance, there may be a measure of value in retaining it in some appropriate form, in order to: (a) amplify and strengthen the general treaty assurance of the existence of conditions favorable to investment; (b) provide a useful clarification of the scope of the provision in question, as an aid in its interpretation and application; (c) strengthen by force of example the definition of desirable international standards of practice in this regard; and (d) emphasize that from the standpoint of the United States there is no intent to modify the policy embodied in recent treaties of broad and detailed coverage of this subject matter. The wording in question, however, actually is protocolary in character, and the best course seemingly would be to rephrase it in a manner suitable for insertion in the protocol. Accordingly, the Embassy should, if feasible, propose the inclusion in the protocol of a provision to the following effect:

"It is understood that the activities referred to in Article V, paragraph 2, may be carried on directly or by agent or through the medium of any form of lawful juridical entity"

The second sentence has been accepted (Department's A-134, A-171).

Article V (3): In the Department's view there are strong objections to the Belgian proposal that simple recognition of the juridical status of corporations be conditioned upon: (1) a reservation for "l'ordre public", and (2) the so-called "seat" test.

(a) The object of this provision is to afford a definition that will permit a simple, easy and clear-cut determination of the nationality of corporations and similar juridical persons. Such a definition is necessary to the proper interpretation and application of the treaty.

(b) By reason of its character as a definition, this provision does nothing more than require each country to acknowledge that a corporation is actually existent and endowed with legal being when the law of the other country has created it and given it existence.

(c) Mere

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(c) Mere recognition of the juridical personality of a corporation, when accorded by either country under this provision, does not vest the corporation with power or authority to engage, within the other country, in the activities which its charter specifies as its corporate purposes. The operative rights of a corporation must be sought rather in the operative provisions elsewhere in the treaty.

(d) Since the object is to determine nationality, not to confer the right to engage in activities, the single test of place-of-incorporation proposed by the Department is regarded as sound and adequate. It has the virtue of simplicity and easy determination. It pays full deference to the laws of the country to which the corporation owes its existence and from which it derives its nationality. Determination of a corporation's nationality thus is made analogous to determination of an individual's nationality, in accord with the general treaty scheme of equating the corporation to the individual, so far as may be feasible, for treaty purposes.

(e) Again, in view of the object of the provision, it is not apparent why the termination of a corporation's nationality should be made dependent upon considerations that are in fact extraneous. The location of the "seat" of a corporation should no more govern its nationality than the place of domicile or residence of an individual should decide his nationality. In the case of the public order test the situation is even more extreme, for recognition of the nationality of a corporation is conditioned upon whether its charter and corporate purposes are in concordance with the laws of a foreign state.

(f) The imposition of these tests is unnecessary for the purposes for which the definition is included in the treaty. Since recognition of its juridical status does not empower a corporation to engage in activities, it is immaterial whether the corporation's charter or purposes are fully in accord with the laws of the country extending recognition. The only way in which such recognition could have harmful effects would be if it actually empowered the corporation thus recognized to carry on an activity contrary to the law. The treaty, however, does not condone illegal activities, and it precludes the possibility of an improper extension of authority to an alien corporation by granting operating rights only through the medium of specific and detailed provisions for that purpose. The enjoyment of any operating rights not thus specifically granted, of course, would depend entirely on the local laws.

(g) The Department is mindful, however, that each treaty partner may wish to reserve a further measure of protection against possible abuse that may arise through use of the corporate device, and it accordingly has framed the provision appearing in the counterdraft as Article XXII (1) (f), under which it is permissible to "pierce the corporate veil" where it is desired to deny third-country interests access, indirectly but no less effectively,

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to valuable rights under a bilateral treaty of this kind. But this reservation has been carefully phrased so that it can not be used in any event to deny the juridical existence of a corporation or to deny it its day in court.

(h) Access to the courts of justice is the key right which under the treaty is made dependent upon recognition of corporate nationality. To add the public order test and the "seat" test to the definition would have such indiscriminate and sweeping effects that it would seem impossible to avoid episodes in which justice in effect was denied on highly technical grounds. Would the Belgians want every vestige of a treaty right barred to a corporation which could not meet either or both of these tests? Recognition of juridical status is necessary to maintain court action to test the validity of charges of illegality. A corporation apparently would be denied its day in court when its very purpose in seeking to come into court is to obtain a judicial determination of its status. In view of the serious elements of uncertainty inherent in both tests, the only likelihood of a satisfactory solution in many cases would be through judicial action, but this course is ruled out by the Belgian proposal. Even if a corporation failed to meet either of the tests, moreover, it is entitled at the very least to access to the courts. It would be unfortunate if a corporation were not entitled to sue in Belgian courts for breach of contract, for example, or patent infringement, merely because there was something in its charter inconsistent with the laws of Belgium, a country in which it carried on no activities and none of whose laws it had actually broken. It would be even more unfortunate if this result were reached merely because the corporation followed the fairly common practice of maintaining its business and management offices in some third country (e.g., the so-called "China Trade Act" corporations). The Department can not conceive that, notwithstanding the unqualified nature of their proposal, the Belgians actually would wish to bring about such results.

(i) A collateral consideration is the effect of the public order test on Belgian corporations in the United States. With the multiplicity of jurisdictions which regulate the activities of corporations (i.e., the Federal Government, the 48 States, the District of Columbia, the Territories and island possessions), there is necessarily no concurrence of opinion on what comports with and what is contrary to public order. This diversity greatly increases the likelihood that the charter or purposes of a Belgian corporation will be unable to meet the public order test in some, perhaps many, jurisdictions. In all probability, the corporation would be faced with a confusing pattern in which it would be recognized in some States and denied recognition in others on grounds that might differ widely from State to State. On the other hand, the situation in the United States illustrates strikingly the lack of necessity for a public order test. Activities which are legal in some States are illegal

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in others (e.g., liquor traffic, gambling), yet these activities have not been spread from States where they are legal to States where they are not, merely because the latter recognized the juridical personality of corporations of the former engaged in such activities and gave them access to its courts.

(j) Another collateral consideration involves the "seat" test. That term is not familiar in American jurisprudence, and to introduce it in the treaty would tend to contribute an element of uncertainty in cases arising before United States courts. Even among European countries there appears to be lack of uniformity of approach. A "seat" can be the legal headquarters, or the center of administration (siège sociale), or the center of exploitation, each of which may be in a different location, and it may not always be obvious just where that location is in a complicated business organization.

(k) In the Department's view, the only sound and adequate test for determining the nationality of a corporation is the simple, single, logical test of place-of-incorporation. It is safe; it avoids confusion and inequity, and consequently stands to contribute materially to greater uniformity of practice in this field. The Belgians have not advanced any reasons why it is desirable or necessary to add the public order test or the "seat" test. In the single discussion of this subject to date (Embassy's despatch No. 456, October 11, 1956) they alluded to the need for clarification of the status of United States corporations which are not registered in Belgium and mentioned that their proposed provision appears in their treaties with all other European countries. However, the Belgians have already agreed to the single place-of-incorporation test in two instruments concluded with the United States: (1) the Agreement relating to Conflicting Claims to German Enemy Assets, signed at Brussels December 5, 1947 (Annex, Article 11, 21); and (2) the Convention for the Avoidance of Double Taxation with respect to Taxes on Income, signed at Washington, October 28, 1948 (Article II (1) (c) and (d)). Both countries therefore have excellent precedent for the rule and apparently have in effect settled the matter between themselves. It would be anomalous, of course, to require a public order or "seat" test for tax treatment under the FCN treaty but no such test for tax treatment under the double taxation convention.

The matter of the most appropriate location for this provision may be left open for the time being. If it is to be retained in Article V, however, the best place for it would be immediately after paragraph 1.

Article V (4): Accepted (Department's A-134).

Article V (5) (6) and (7): Accepted (Department's A-97, October 30, 1956). The cross-reference in paragraph 6, however, should be to paragraphs 2 and 4.

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Article V (8): Accepted (Department's A-134, A-171).

The Department's comments on the remaining articles of the counter-draft fourth version will be forwarded in a separate communication.

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ANNEX 138

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Article
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BARCELONA TRACTION IN THE 21ST CENTURY: REVISITING ITS CUSTOMARY AND POLICY UNDERPINNINGS 35 YEARS LATER

Introduction

In the 1970 Barcelona Traction¹ case, the International Court of Justice (ICJ) articulated a rule, ostensibly based on custom, that a corporation is a national of the state in which it is incorporated for the purpose of diplomatic protection.² The Court held that Belgium lacked standing to bring a claim on behalf of Belgian shareholders who owned most of the Barcelona Traction, Power and Light Company, which had been expropriated by Spain, because it was incorporated in Canada. Even when the case was decided, critics lambasted the Barcelona Traction rule of incorporation for being out of touch with economic reality--that is, for failing to adequately protect foreign direct investment.

Over the last ten years, the International Law Commission (ILC) has revisited Barcelona Traction as part of its work to codify a set of draft articles on diplomatic protection.³ The Barcelona Traction rule was formulated during the Cold War and in the context of the now-defunct New International Economic Order. The question for the ILC now is whether the rule is *238 supported by custom and policy in the post-Cold War era, in which developing countries willingly enter bilateral investment treaties (BITs) that protect the investment of developed country investors. While much has changed in the thirty-five years since Barcelona Traction was decided, two important factors have remained the same. First, the rule of incorporation was not a rule of customary law then, and it is not one now. Second, the policy considerations that inform the competing views of corporate nationality still focus primarily on the effects such rules have on the economic relations between developed and developing states.

What has changed since Barcelona Traction is the nature of economic relations between developed and developing states. In the last thirty-five years, flows of foreign direct investment from developed states to developing states have increased dramatically, rising over fifty-fold. At the same time, an increasing number of developing states have signed BITs with developed states in order to attract such investment. The terms of these BITs strongly favor developed countries often at the expense of developing state interests.

This Article revisits Barcelona Traction, analyzing both its foundation in customary international law and the policy considerations underpinning the rule it articulated. Based on an independent examination of state practice, perhaps the first in recent literature on Barcelona Traction, I argue that while most states have accepted the rule of incorporation, most have also required something more--some sort of "genuine link" between the espousing state and the injured corporation.

I also assess the policy arguments for and against the Barcelona Traction rule, and argue that the balance of policy considerations supports a genuine link requirement. While certain members of the ICJ believed the incorporation rule best

protected the interests of developing countries, I posit that given the current legal and economic environment and the relatively recent proliferation of BITs, developing states should and to some extent have shown that they already do, prefer a genuine link requirement. Actually, a test of corporate nationality based on a genuine link between a corporation and the claimant state is one that both developed and developing states should prefer on the whole. I base this assertion on an examination of two dimensions of policy considerations. First, a genuine link requirement would reduce the general likelihood of abuse of the doctrine of diplomatic protection, whether the respondent state is a developed or developing country. Specifically, a genuine link test of corporate nationality will encourage claimant states to base their decisions to pursue or waive diplomatic protection claims on the merits of the claims themselves rather than on the extent to which such claims can be used as political bargaining chips to gain concessions in unrelated areas. Second, a genuine link test of nationality may better protect the interests of developing states than the incorporation test of nationality, contrary to the reasoning of the ICJ in *Barcelona Traction*. This is largely because the current legal and economic environment now favors investors and capital-exporting developed states. Developing countries, competing amongst themselves for foreign direct investment, have ratified BITs to attract investment from developed states. But these treaties contain liberal rules of nationality. The existence of this large network of BITs now allows many corporations to seek the overlapping protection of multiple states, exactly the phenomenon *239 *Barcelona Traction* sought to prevent. The genuine link requirement--a rule that may have seemed pro-investor thirty-five years ago-- would serve to limit the number of states from which a corporation could seek diplomatic protection against a developing state. It would also tend to ensure that the developed state with the most interest in protecting a particular, injured corporation could do so.

Part I of this Article provides a short overview of the doctrine of diplomatic protection, of *Barcelona Traction*, and the ILC draft articles on diplomatic protection pertaining to the rule of corporate nationality. Part II presents a survey of state practice. Part III analyzes the policy arguments in light of the preceding evidence, including an assessment of the change in the economic and legal environment since *Barcelona Traction*.

I. Overview of Diplomatic Protection and *Barcelona Traction*

In Part I.A, I describe the doctrine of diplomatic protection as it applies to corporations. In Part I.B, I provide a summary and overview of the *Barcelona Traction* case. In Part I.C, I review the ILC's approach to the issue of corporate nationality in diplomatic protection claims.

A. Diplomatic Protection of Corporations

Diplomatic protection is the right of a state to espouse a claim on behalf of nationals injured by the wrongful conduct of another state.⁴ Traditionally, individuals are not the subjects of international law and have no standing to bring claims against states for their injuries. States, then, exercise diplomatic protection to offer their nationals abroad protection from injury by foreign states. In the corporate context, a typical diplomatic protection claim involves a state's espousal of a claim on behalf of a corporation with operations in a foreign country, which has expropriated or nationalized the corporation's property.

The doctrine of diplomatic protection is based on a legal fiction: that an injury to a national of a state is an injury to the state itself.⁵ The bond of nationality gives a state standing to exercise diplomatic protection on behalf of an injured national. This, of course, begs the question of when a legal or natural person is a national of a state for the purposes of diplomatic protection.⁶ Determining the nationality of a natural person is usually straightforward, though it can occasionally be complicated by naturalization, dual nationality, *240 marriage, or forces beyond the control of the person (e.g., state succession). Determining the nationality of a legal person, created under the law of a particular state, may seem simple at first glance but turns out to be complex. For example, a company, such as *Barcelona Traction*, can be incorporated in one state (Canada), owned by persons from another state (Belgium), and maintain all of its operations in yet a third state (Spain). Further, the owners of the Canadian corporation may also constitute a separate legal person, to wit, a Belgian corporation, headquartered in Japan, with Russian, South African, and Brazilian natural persons as its only shareholders. When a corporation has different essential components in various countries, different tests of corporate nationality are possible. A rule of incorporation would mean simply that a corporation has the nationality of the state in which it was legally registered.⁷ A rule based on the seat or *siège social* would mean that a corporation has the nationality of the state where its headquarters or center of control is located.⁸ A rule based on shareholdings would make a corporation a national of the state of nationality of its shareholders,⁹ or, if all shares are not held by the nationals of one country, then a national of the state of nationality of a

preponderance of its shareholders.¹⁰ One could also employ a rule based on any combination of the other tests: incorporation and shareholdings,¹¹ incorporation or shareholdings,¹² or by a genuine link test (which could be satisfied by the presence of shareholders or seat in a country, but not by mere incorporation).¹³

Given this array of choices, it is important to ask: what are the stakes of different rules of nationality? The debates on the merits of the different permutations of this apparently minor procedural rule mirror substantive debates because, like many procedural rules, the corporate nationality rule is a gatekeeper to substantive claims. The conventional wisdom seems to be that a wider rule (e.g., “a company is a national of any state with which it has a connection”) favors developed states by making it more likely that a state will have standing to espouse a claim on its behalf if it is injured. A narrower rule (e.g., “a company is a national of a state only if it is incorporated and headquartered in that state and all its shareholders live in that state”) ostensibly protects developing states from the vexatious claims brought against corporations by powerful, capital-exporting states. Thus, the debate over the rule of nationality reflects the debate over the proper scope of diplomatic protection itself—a debate that has long been a point of friction between developed and developing states. This is the backdrop for the Barcelona Traction decision.

*241 B. The Barcelona Traction Case

The Barcelona Traction, Power & Light Company operated in Spain,¹⁴ was incorporated in Canada and, at the time Belgium filed a claim with the ICJ, was eighty-eight percent owned by Belgians.¹⁵ Belgium claimed that, just after World War II, the Spanish government had expropriated the company.¹⁶ Canada made formal representations to Spain on behalf of the company but stopped after Canadian creditors were satisfied (Barcelona Traction had practically no Canadian shareholders).¹⁷ Belgium made informal diplomatic overtures, along with the United Kingdom and United States,¹⁸ but Spain rejected repeated efforts by Belgium to resolve diplomatically its interests in the case, driving Belgium to bring a claim against Spain at the ICJ.

In deciding Barcelona Traction, the ICJ faced two tasks: First, the court had to clarify the customary rule on corporate nationality and, therefore, provide a rule of standing for claim espousal;¹⁹ second, in order to resolve the specific case, it had to decide how to apply this rule of standing to a state that represented a supermajority of shareholders but was not the state of incorporation.²⁰

Some observers had expected that the ICJ’s *Nottebohm*²¹ decision would influence the outcome in Barcelona Traction.²² *Nottebohm*, decided nearly ten years before the first phase of Barcelona Traction but before the second phase, involved a diplomatic protection claim by a natural person and articulated a “genuine link” requirement. That is, *Nottebohm* held that a state might espouse a claim on behalf of a natural person only if the person has a genuine link with the state.²³ The ICJ did not purport to deal with the criteria of *242 corporate nationality in *Nottebohm*,²⁴ but Belgium thought that the genuine link requirement would apply to corporate diplomatic protection claims as well and that it would have standing to bring a claim on behalf of its shareholders in the Barcelona Traction company.²⁵

Instead, the ICJ held that Belgium had no standing. The Court tersely distinguished *Nottebohm*, without providing an adequate explanation for doing so,²⁶ and decided that customary law established no single genuine link test for corporate nationality,²⁷ even though Belgium and Spain agreed that a genuine link of some sort was required between the injured corporation and the espousing state.²⁸ The ICJ did note that some states used *siege social* as a test of genuine link, while others used economic control,²⁹ but concluded that “no absolute test of the ‘genuine connection’ has found general acceptance”³⁰ and did not say whether a genuine link was required for corporate claims at all. The Court did say that Canada had “manifold” links with Barcelona Traction, establishing a “close and permanent connection.”³¹

Instead of analyzing customary law,³² the ICJ resolved Barcelona Traction by analyzing general principles of law. It applied the corporation-shareholder distinction from municipal law to conclude that states have no standing to espouse claims on behalf of shareholders in an injured corporation. They reasoned thus: (1) The concept of the corporation as an entity with legal personality exists as a matter of widespread practice;³³ (2) municipal law created the corporation expressly to have a legal personality distinct from that of its shareholders, in order to shield them from liability beyond their shareholdings, but also to prevent these shareholders from having access to the assets of the corporation;³⁴ (3) a corporation’s creditors may not generally pierce the corporate veil, except under special circumstances (e.g., malfeasance, fraud);³⁵ (4) therefore, shareholders may not pierce the corporate *243 veil to recover for damages to the corporation in international claims, except under special circumstances,³⁶ which were not applicable in the Barcelona Traction case.³⁷ The ICJ thus concluded that the “traditional rule

attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office.”³⁸

The clearest holding one can discern from the case is that incorporation (and the registered office requirement), is a necessary, but not sufficient, condition for standing to espouse a claim on behalf of a corporation.

If the legal analysis in the case was less than clear, the ICJ’s articulation of the policy reasons in support of the rule was even more opaque. The Court’s main concern seemed to be that if any state with shareholders of an injured corporation had standing, a mass of states would bring claims on behalf of shareholders, thus “creat[ing] an atmosphere of confusion and insecurity in international economic relations.”³⁹ The ICJ identified three situations in which shareholders might want their states to make claims: (1) When the state of incorporation refused to bring a claim, (2) when the state of incorporation initiated a claim but stopped short of obtaining compensation, or (3) when the state of incorporation pursued a claim but obtained insufficient compensation.⁴⁰ The Court’s discussion of policy stopped there.

However, differing concerns, divided along the line between developed and undeveloped countries, motivated judges to write a variety of concurring opinions. Three judges from developed states believed that Belgium should have been precluded from making the claim based on the specific facts of the case but felt, as a general principle, states should be permitted to espouse claims on behalf of shareholders.⁴¹ Judges from developing countries agreed with the incorporation rule but were attracted to it for reasons not set out in the main opinion. Judges Nervo⁴² and Ammoun⁴³ *244 worried that the rules of international law were established by, and therefore generally favor, developed states and their investors at the expense of developing states. Judge Morelli, without directly referring to developing states, seemed to be of the same mind and disavowed a rule that would allow states to espouse claims on behalf of shareholders because such a rule would imply that the right to compensation for investors was on par with fundamental human rights.⁴⁴

Criticisms followed almost immediately after the court announced its decision. Scholars argued that states did not use the incorporation test of nationality in practice,⁴⁵ but instead used a wide variety of tests,⁴⁶ that the ICJ had not conducted a proper analysis of state practice,⁴⁷ and, furthermore, that even after Barcelona Traction, states continued to use tests other than incorporation to determine corporate nationality.⁴⁸ Some maintained that certain states, many years after the decision, deviate from the rule articulated in the case, acting as if incorporation was not even a necessary⁴⁹ condition for the exercise of diplomatic protection.⁵⁰

C. ILC Draft Articles on Diplomatic Protection

In 1996, the ILC first identified diplomatic protection as a topic in international law ripe for codification or progressive development.⁵¹

After three reports largely covering the rules for diplomatic protection of natural persons, in 2003, the Special Rapporteur on Diplomatic Protection, Professor John Dugard, published his Fourth Report on diplomatic protection, which contained draft articles on nationality for corporate claims. The report was ambivalent towards Barcelona Traction, observing that it was “a significant judicial decision, albeit one whose significance is not matched by the persuasiveness of its reasoning or by its concern for the protection of foreign investment.”⁵² Noting that the ILC might wish to depart from the incorporation rule, seven different rules of nationality were presented and *245 assessed for the ILC.⁵³ The report noted that, despite its flaws, Barcelona Traction remains “widely viewed not only as an accurate statement of the law on diplomatic protection of corporations but a true reflection of customary international law.”⁵⁴ The report cites the responses of states (delegates to the Sixth Committee of the General Assembly) to a questionnaire distributed by the Special Rapporteur asking whether the Barcelona Traction rule should be reconsidered. Out of fifteen states that responded, only one suggested reconsidering the incorporation rule.⁵⁵

The report concluded that “the wisest course seems to be to formulate articles that give effect to the principles expounded in Barcelona Traction,”⁵⁶ endorsing both the primary rule (nationality derived from the state of incorporation) and the exceptions announced by the ICJ.⁵⁷ The Special Rapporteur formulated the primary rule thus: “For the purposes of diplomatic protection, the State of nationality of a corporation is the State in which the corporation is incorporated [and in whose territory it has its registered office].”⁵⁸

In 2004, the International Law Commission considered the Special Rapporteur's report and adopted a slightly different rule on its first reading of the draft articles on diplomatic protection: "For purposes of diplomatic protection of corporations, the State of nationality means the State under whose law the corporation was formed and whose territory it has its registered office or the seat of its management or some similar connection."⁵⁹ The Commission intended to give effect to the rule of incorporation but used the phrase "formed" instead of "incorporated" because the latter "is a technical *246 term that is not known to all legal systems."⁶⁰ Also, by accepting the "registered office" requirement (i.e., by taking them out of brackets), the ILC purported to "give effect to the insistence of the [ICJ] in Barcelona Traction that there be some connecting factor between the State in which the company is formed and the company."⁶¹

The key difference between the rule adopted by the ILC and the rule proposed by the Special Rapporteur is the phrase "or seat of management or some similar connection." The ILC added these alternatives to the "registered office" requirement because "some legal systems do not require registered offices, but some other connection."⁶² The ILC's proposed draft article on corporate nationality "requires a relationship between the corporation and the States, which goes beyond mere formation or incorporation and is characterized by some additional connecting factor."⁶³ But the Commission cautioned that this "connecting factor"--whether registered office, seat of management, or something else--"should not . . . be seen as forms of a genuine link," at least to the extent that such a link "is understood to require majority shareholdings as a connecting factor."⁶⁴

Thus, unlike the Special Rapporteur's proposed rule, the ILC did not really adopt the holding of Barcelona Traction, which indicated that a "genuine link"--specifically majority shareholdings or seat of management--was not required to establish standing for a corporate diplomatic protection claim.⁶⁵ The ILC draft article, on the other hand, requires a "connecting factor" above and beyond incorporation or formation. The ILC did not intend for this "connecting factor" to require an extensive showing of links between a state and a corporation.⁶⁶ But under the rule adopted by the ILC, seat of management (siege social) may be used as required "connecting factor," even though Barcelona Traction identified seat of management as a genuine link requirement that set too high a threshold to show standing.⁶⁷ The only genuine link the ILC rejected as a proxy for a "connecting factor" is the test of majority shareholding.⁶⁸

This is not the ILC's last word on the subject. The draft articles have been submitted to states in the U.N. General Assembly, through the Secretary-General, for comments and observations due at the beginning of 2006.⁶⁹

*247 II. State Practice

In Barcelona Traction, the ICJ made little direct reference to state practice in its analysis of customary international law,⁷⁰ and what it did cite was entirely secondary.⁷¹ Some works immediately after Barcelona Traction surveyed state practice on corporate nationality by way of analyzing investment agreements⁷² and lump sum agreements as evidence of state practice.⁷³ No work since Barcelona Traction has attempted to track what states have said and done about corporate nationality in diplomatic protection claims.

This section analyzes a survey of state practice and *opinio juris*, contained in Appendix I of this Article, based on available public statements by states on their rules of corporate nationality, as well as indirect evidence suggesting state practice. This survey is incomplete since it is based on a review of the published records of developed states. But even this limited survey suggests that although the incorporation test from Barcelona Traction is widely used, it has not crystallized into a full-fledged rule of customary international law. Most states use the incorporation test, but a significant minority of states does not. Some states espouse claims on behalf of companies not incorporated in their territory. Second, at least one state asserts the right to refuse claims if no genuine link is present. Third, almost all states that use the incorporation test also require some sort of genuine link before espousing claims. All of this suggests that the incorporation rule is not the exclusive test for corporation nationality under customary international law.

Thus, in Part II.A, I describe the data that is included and excluded from the review of state practice. In Part II.B, I summarize the state practice data collected in Appendix I.

A. Data Selection

One initial hurdle in analyzing customary law with regard to diplomatic protection is the dearth of written evidence of state

practice, i.e., actual diplomatic protection claims. States rarely espouse claims formally, usually resolving disputes through a wide variety of informal, non-legal, *248 diplomatic measures.⁷⁴ States may resolve disputes under the shadow of international law without explicit resort to it.⁷⁵ As a result, there is simply little published evidence on state practice in diplomatic protection claims.⁷⁶ This is a problem because the state practice that is available is almost entirely reported by developed states. Yet to make reference solely to the practice of developed states, simply because that is all that is available, necessarily distorts an analysis of custom.⁷⁷ This is especially true because the primary faultline for diplomatic protection more generally has been one that splits developed and developing states.⁷⁸ For instance, it may be that, even if developed states uniformly oppose the Barcelona Traction rule, developing states might uniformly accept it. More generally, developing states often object to custom because it was created by the practice of powerful and wealthy developed states,⁷⁹ leaving them no say in the development of international law.⁸⁰ But, as a first step towards analyzing custom rule, this article considers state practice as reported by states themselves.⁸¹

Since little published material exists on the practice of developing states, it would be unjust simply to proceed to analyze custom as if only developed states existed. On the other hand, what supplementary evidence could be adduced to otherwise uncover a customary rule? Of the universe of claims that could (at least theoretically) give rise to diplomatic protection, *249 states actually settle most claims by one of three other means: lump-sum agreements,⁸² resort to some sort of ongoing claims tribunal, such as Iran-US Claims Tribunal⁸³ or the United Nations Compensation Commission,⁸⁴ and dispute settlement provisions according to the rules pursuant to an investment protection treaty (such as bilateral investment treaties⁸⁵ and ICSID or NAFTA).

Critics, including the ICJ, have dismissed all of these potential sources of state practice as *lex specialis* and, thus, irrelevant to an analysis of custom. The basis for dismissing all of these sources is the fact that they are formed by treaty. The dismissal of all of these sources, however, is not justified.

Lump-sum agreements are perhaps the most controversial potential alternate source of state practice. In Barcelona Traction the ICJ explicitly rejected lump-sum agreements as a relevant form of state practice.⁸⁶ Some scholars have agreed, and dismissed lump-sum agreements as mere political agreements that do not inform state practice.⁸⁷ However, supporters argue that since almost all would-be diplomatic protection claims are resolved by lump-sum agreement,⁸⁸ it would be “untenable” to dismiss them out of hand as evidence of state practice.⁸⁹

Lump-sum agreements should be accepted as evidence of state practice for the purposes of determining a rule of nationality. While their widespread use in academic works analyzing corporate nationality suggests that they deserve some consideration, such use alone is not enough. More critical is the fact that the rules of nationality for lump-sum agreements are almost entirely in accord with the rules of nationality used by states that have publicly articulated their rules of nationality. Other aspects of lump-sum agreement, such as amount of compensation, are determined more by political compromise, not *250 principles of international law.⁹⁰ But available research suggests no difference, for any given country, between the rules of nationality for lump-sum agreements and rules employed in formal diplomatic protection claims.⁹¹ Further, some states have explicitly recognized lump-sum agreements as relevant state practice for determining a customary rule of corporate nationality.⁹² The state practice analysis here, therefore, assumes that when information on a state’s diplomatic protection practice is not available, lump-sum agreements represent an acceptable proxy.

The jurisprudence of tribunals is, for the most part, not relevant in itself for determining a rule of corporate nationality. In theory, the decisions of tribunals could be quite relevant indirectly to the extent that they analyze state practice. But cases cannot be evidence of state practice themselves. Unfortunately, the analysis of corporate nationality in international tribunals, like many rules of custom, has a recursive quality-- mirrors held up to other distorting mirrors. Tribunals refer to the decisions of other tribunals, which in turn refer to yet other tribunal decisions instead of directly analyzing state practice.⁹³

Indeed, some tribunals, such as United Nations Compensation Commission (UNCC), disavow any link to custom or state practice. Some argue that because the UNCC is a quasi-judicial body, its decisions should not be considered a valid source of international law.⁹⁴ The Security Council, in drafting the rules for the UNCC, apparently did not wish to affect customary law or make reference to it at all. The UNCC seems to employ the pure incorporation test,⁹⁵ and yet the UNCC guidelines never mention diplomatic protection, Barcelona Traction, customary law, or public international law.⁹⁶ Similarly, some argue that the voluminous jurisprudence of the Iran-U.S. *251 Claims Tribunal has contributed to an understanding of customary law in the area of diplomatic protection claims.⁹⁷ However, with regard to corporate nationality, that tribunal did not need to look at

to custom because the Algiers Declaration defined corporate nationality for it.⁹⁸ A future claims tribunal may revisit the rule of corporate nationality and try to analyze customary international law if nationality is not defined in the settlement agreement.⁹⁹

Investment protection treaties, such as BITs and ICSID, also should be written off as *lex specialis*--they provide, by specific agreement, more protection to investors than customary law. Some argue that treaties are not mere contracts but are themselves sovereign acts that constitute state practice,¹⁰⁰ and thus may be used as a vehicle to change outmoded customary law.¹⁰¹ This seemed to be the intention of the United States in starting its bilateral investment treaty program.¹⁰² It is also notable that in its *Nottebohm* decision, the ICJ's only analysis of state practice involved examining a series of bilateral nationality treaties; based on this, the ICJ divined a genuine link requirement for determining the nationality of natural persons.¹⁰³ According to *252 this reasoning, the rules of nationality in bilateral investment treaties are relevant state practice.

But even proponents of the "treaty-as-state-practice" view note that not every treaty, and not every provision in a treaty, can give rise to custom but, rather only those that contain "generalizable rules" may do so.¹⁰⁴ Anthony D'Amato provides examples of treaty provisions that do not have this character,¹⁰⁵ and concedes that "[s]ometimes . . . opposing views are possible upon whether on the basis of general concepts of international law a particular provision in a treaty could become a rule of custom."¹⁰⁶

The problem with using BITs as evidence of custom is that, up to now, most developed states signing BITs have evinced an intention to escape customary law, not to change it. That is, they are not interested in merely avoiding the Barcelona Traction rule, but to get greater substantive investment protection than customary law currently affords.¹⁰⁷ Even if BITs represent an attempt to change custom, because they are not yet ubiquitous it is difficult to say that they have formed a new rule of custom. They are, as I will explain below, useful in illustrating the preferences of states, including developing states.

B. Analysis of State Practice

The discussion in this section is a summary, based on the research discussed in Appendix I, which contains much more detailed discussions of the practice of different states.

Incorporation. Of twelve countries surveyed, seven states¹⁰⁸ required incorporation before espousing diplomatic protection claims. Four more countries¹⁰⁹ used the incorporation in some way, though not exclusively (i.e., these states espouse claims on behalf of companies incorporated in other states). In this small sample, the incorporation requirement is widely accepted and, as the Special Rapporteur's survey indicated, few states seem interested in changing this.¹¹⁰ And, to some extent, Barcelona Traction changed the claim espousal practice of states. At least five states¹¹¹ changed their practice and *253 used the incorporation test after Barcelona Traction was decided. There is thus little reason to believe that incorporation was a rule of customary law before the ICJ decided Barcelona Traction. Even the ICJ did not seem to think that incorporation was a rule of customary law when it applied general rules of law--specifically, when it analogized to corporate law in municipal law.

Genuine Link. While most states use the rule of incorporation, it also seems that most states require some sort of genuine link (seat of management or economic control) before espousing a claim on behalf of a corporation. Only two countries seem willing to espouse claims on behalf of companies solely based on incorporation.¹¹² Three states require both incorporation and seat before espousing claims for a company.¹¹³ One state requires both incorporation and economic control,¹¹⁴ while yet another requires incorporation but considers whether the company has a genuine link generally.¹¹⁵ Three states use incorporation non-exclusively and will espouse claims on behalf of a company incorporated in a third country if that company possesses a genuine link.¹¹⁶ Two states seem to repudiate not using the incorporation test at all but, instead, require some sort of genuine link.¹¹⁷ Ultimately, nine states seem to require some sort of genuine link before espousing a claim. However, this evidence does not suffice to show that the genuine link requirement is customary law. Since diplomatic protection is a discretionary doctrine, states are free not to espouse claims on behalf of companies, for any reason. Arguably, the genuine link required by nine states has nothing to do with what is required by international law, but simply constitutes the discretionary rule adopted by states as to when they will make diplomatic protection claims.

Repudiation of Incorporation Test. While it is not inconsistent with Barcelona Traction for states to require a genuine link of companies for which it espouses claims, there are at least two pieces of evidence that call into question whether the holding of Barcelona Traction is a customary rule of international law. First, several states flout Barcelona Traction by espousing

claims on behalf of companies that would not be nationals under the incorporation test. Switzerland will espouse claims of companies that are controlled by Swiss nationals even if the company is not incorporated in Switzerland.¹¹⁸ Indeed, the Swiss foreign ministry does not think of Switzerland as a persistent objector but seems to believe that international law *254 requires the control test.¹¹⁹ Austria looks exclusively to seat as the exclusive test of nationality.¹²⁰ And both Belgium and Italy, which primarily use the incorporation test, will exercise diplomatic protection on behalf of companies that have their seat in the state's territory, whether or not they are incorporated there.¹²¹ The practice of these states calls into question Barcelona Traction because only the state of incorporation should be able to exercise diplomatic protection on behalf of a company.

A corollary to this is that a respondent state can only challenge the standing of a claimant state if it is not the state of incorporation. While Barcelona Traction seemed ambivalent as to whether companies must have a genuine link, the ICJ did (briefly) distinguish *Nottebohm* and implied that no genuine link was necessary.¹²² The practice of the United States, then, contradicts Barcelona Traction in that as a respondent state, the United States reserves the right to reject claims if there is no genuine link between an injured corporation and the claimant state.¹²³

Assessment. This survey of the practice of developed states suggests that there is ample ammunition for both supporters and detractors of the rule articulated in Barcelona Traction. Most surveyed states seem to recognize, in some way, the rule of incorporation. However, most surveyed states also seem to require a genuine link--either seat of management or majority shareholdings. Finally, some states seem to openly repudiate the incorporation requirement (Austria, Switzerland, Belgium, and Italy). Those who support the incorporation test might view the five outlier states as violators of international law, whereas those who support a genuine link test may argue that these "violations" of customary law may contain the seed for a new rule.¹²⁴ Given the difficulty of discerning a clear rule based on state practice, it is understandable, though perhaps not excusable, that the ICJ did not fully analyze custom and instead resolved Barcelona Traction by resort to general principles of law. It is not easy to justify one rule or another solely based on classical principles of interpreting customary law.

This analysis of state practice suggests that by adopting at least the incorporation requirement of Barcelona Traction, the ILC's proposed rule for corporate nationality does not codify a customary rule of international law so *255 much as it represents the progressive development of the law.¹²⁵ But because there appears to be no well-settled default customary rule, the ILC will engage in progressive development no matter what rule it chooses. Certainly, the ILC does not purport to be merely codifying customary international law with regard to corporate nationality.¹²⁶ Under these circumstances it is useful--perhaps even necessary--to consider the policy implications of the various particular rules of nationality.

III. Policy Considerations

The conventional wisdom on policy seems to be that Barcelona Traction favors developing states and disfavors the protection of investments. There seems to be agreement on this, even between supporters of the incorporation rule¹²⁷ and its critics.¹²⁸ In this Section, I analyze several policy considerations. In Part III.A, I review the policy implications of rules of corporation nationality on the relations between investors and states espousing claims. In particular, I critique the policy assumptions made by the ICJ in Barcelona Traction. In Part III.B, I review the contours of the academic debate on the effect of Barcelona Traction on economic relations between developed and developing states. In Part III.C, I discuss how the legal and economic environment has changed since Barcelona Traction was decided. In Part III.D, I briefly consider how these changes may have undermined the ICJ's assumptions and may have affected both relations between investors and espousing states, and the relations between investors and developing states. My analysis of these policy considerations leads to the conclusion that the default rule of corporate nationality should include a genuine link requirement.

A. Criticism of Policy Considerations in Barcelona Traction

The ICJ in Barcelona Traction noted the "profound transformations which have taken place in the economic life of nations."¹²⁹ It concluded, based on its concern with the world economy, that it would be dangerous to accept the idea that the state of nationality of shareholders should be able to bring a diplomatic protection claim for the corporation:

*256 The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in

international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands.¹³⁰

The Court cited no authority in support of this proposition, and did not explain with any precision why “confusion and insecurity” would result from allowing a multiplicity of shareholder claims. While being concerned with “international economic relations” in general, it appeared that the ICJ had no specific understanding of how the rule of nationality it formulated might affect the world economy.

One early criticism of Barcelona Traction was that, as a matter of policy, the incorporation rule disregards economic and political reality, making states likely to ignore it.¹³¹ The state practice analysis in Part II seems to confirm that some states do indeed ignore the incorporation rule.

More importantly, while making reference to policy considerations in Barcelona Traction, the ICJ did not seem to pay much attention to how, in political reality, diplomatic protection works. The abuses of diplomatic protection have to do with the fact that it is a discretionary right: A state whose national has been injured has the right, vis-à-vis the injuring state, to bring a claim. But the injured national has no right, vis-à-vis the claimant state, to demand protection, as diplomatic protection is never obligatory.¹³² Because claim espousal involves the expenditure of political and financial capital, states will not simply pursue any and every diplomatic protection claim. They must decide on a simple cost-benefit basis whether to bring a claim, calculating the gain from pursuing the claim (not necessarily a strictly economic calculation) offset by the expenditure of limited state resources (financial and political capital and the limited time of diplomatic and foreign ministry officials) to espouse a claim.¹³³

This dynamic creates two distinct problems for diplomatic protection in general: inaction by the claimant state, and pretextual claims by the claimant state, as I will explain. The incorporation rule exacerbates both problems. Further, the analysis of inaction and pretextual claims shows that the concerns raised by the ICJ are an imaginary bugaboo--the cost-benefit calculus states go through before espousing claims makes it highly unlikely that states that receive investment will be flooded by an unmanageable multiplicity of claims on behalf of shareholders, as the ICJ feared.

***257** Inaction. A state may decline to espouse the claim of an injured corporation because it is of no interest to the state, because the claim does not justify the effort needed to espouse it, or because the claim may conflict with another, unrelated and weightier political concern. This is precisely what happened in Barcelona Traction: Canada (the state of incorporation) started and later withdrew a claim on behalf of Barcelona Traction largely because it had no state interest in a company merely registered in Canada.¹³⁴

This will always be a problem when the exercise of diplomatic protection is a discretionary right of the claimant state, even when a corporation has every possible genuine link with the claimant state. For instance, Company X is incorporated and headquartered in the United States, is 100% owned by U.S. nationals, but operates in Russia. Russia expropriates the company, worth \$100 million dollars, and Company X begs the State Department to make a claim. Conceivably, the U.S. might still refuse to espouse a claim on behalf of Company X if the U.S. and Russia were negotiating an investment treaty worth over \$500 million to the U.S. in the future. Just as possible, however, is the denial of protection when relations between states are delicate--perhaps the U.S. and Russia are not negotiating a lucrative treaty but, instead, were repairing their relations after the end of the second Gulf War.

Allowing only the state of incorporation to bring claims will exacerbate this tendency, for any mildly weighty political concern will outweigh the diplomatic protection claim. If Company X were incorporated in the U.S. but 100% owned by, say, Mongolians, it is even less likely that the U.S. would jeopardize either an investment treaty or friendlier relations with Russia to protect the company. In these cases where the state of incorporation has only tenuous links to a company, Barcelona Traction offers little comfort to investors.¹³⁵

Pretextual Claims. The mirror-image of inaction is the pretextual claim: A state may espouse claims for corporations in which it has little economic interest in order to exert pressure on the respondent state for reasons unrelated to the claim.¹³⁶ For instance, suppose Company X, owned 100% by Russians and incorporated in the US, operates in and is expropriated by France. The U.S. would normally have no interest in espousing the claim but wishes to push France to contribute to Iraqi

reconstruction. Russia, if it had standing to espouse the claim and had no interest in reconstructing Iraq, simply would have asked for compensation. The US, instead, uses the claim as a threat: Contribute \$50 million to the Iraqi reconstruction fund, or we will ask for \$100 million in compensation.

The pretextual claim is a problem both for the host state responding to the claim and for the company. If Russia had brought the claim, it would *258 simply argue with France over the claim itself. The lack of a genuine link creates the possibility for linking unrelated issues: The diplomatic protection claim is now a source of leverage for the U.S. over France.

For corporations, the use of the diplomatic protection claim as political leverage is a problem because the claimant state will abandon a perfectly meritorious claim as a quid pro quo when it receives the concessions, unrelated to the claim, from the respondent state. If the respondent state complies with the request (France contributes \$50 million to the Iraqi reconstruction fund), the claimant state then drops the diplomatic protection claim, returning the corporation back to the land of inaction. This concern is not purely hypothetical. The U.S. has both used diplomatic protection as a pretext for other actions¹³⁷ and attempted to prevent this sort of abuse.¹³⁸ Again, as with inaction, pretextual claims seem more likely when no genuine link is required in order to espouse a claim.¹³⁹

Multiple claims. The ICJ's primary policy concern in Barcelona Traction was that if all states of all shareholders had standing, there would be a dizzying multiplicity of claims that would discourage host states from allowing foreign investment. Or, at least, an injured corporation could go protection shopping amongst its various shareholder states, finding some state to bring a claim on its behalf.¹⁴⁰ The ostensible benefit of the rule of incorporation is that since corporations have only one state of incorporation, no such Pandora's Box of claims could be opened. But the ICJ never showed that the Pandora's Box scenario was likely or realistic. Given the economic and political costs *259 involved in exercising diplomatic protection, it is unlikely that every shareholder state in a particular corporation that would wish to bring a claim would espouse a diplomatic protection claim.

Further, a genuine link requirement is likely to discourage protection shopping. In ILC debates over the continuity of nationality rule, certain members felt that protection shopping by natural persons was an academic problem-few people actually become naturalized citizens of a state solely to have it exercise diplomatic protection on their behalf.¹⁴¹ Although Mr. Nottebohm did, in essence, engage in protection shopping,¹⁴² little evidence exists of this occurring recently, and in most countries naturalization is a process lengthy and difficult enough to discourage protection shopping.¹⁴³

B. Distribution: Developing States and Diplomatic Protection

Analysis of the discretionary nature of diplomatic protection shows how a rule of nationality might expand or limit abuse. But this analysis also suggests that meritorious claims are more likely to be espoused, or not, depending on how the rule of nationality is formulated.¹⁴⁴ There is another policy debate, involving the conflict of those who support the expansion of the espousal of claims and those who support limiting claim espousal. I take, as representative of the opposing positions, the work of two scholars. Francisco Orrego Vicuña argues that human rights, by analogy and directly, support the maximization of the espousal of shareholder claims. Georges Abi-Saab makes the contrary argument, supporting minimization of claim espousal on behalf of shareholders because, according to him, foreign investment is a sort of economic imperialism, by which developed states exploit developing states.

Investment Protection & Human Rights. The ILC has already considered draft articles on the admissibility of diplomatic protection claims for natural persons. The rules, to a great extent, reflect the philosophy that diplomatic protection should be used to protect human rights when possible and appropriate. For instance, in the First Report on Diplomatic Protection, the Special Rapporteur proposed making the exercise of diplomatic protection obligatory in the case of jus cogens violations of a national's rights (Article *260 4),¹⁴⁵ protecting stateless persons when possible (Article 8),¹⁴⁶ significantly abrogating the continuity of nationality rule (Article 9),¹⁴⁷ and--at least for claims that do not involve dual nationals-- eliminating the Nottebohm genuine or effective link requirement (Article 5).¹⁴⁸ All of these proposals reflect the Special Rapporteur's conviction that diplomatic protection is still a useful and effective tool to protect human rights, largely because extant international human rights regimes have not been wholly effective.¹⁴⁹

Many members of the ILC and the Sixth Committee argued that the draft articles, with respect to natural persons, represented an unjustified, progressive development and actually conflicted with customary law,¹⁵⁰ and that the articles reflected a human

rightist worldview that confused diplomatic protection with other human rights mechanisms.¹⁵¹ But few members were critical of the idea that--so long as they did not contradict state practice--the draft articles should maximize the chances that states will bring claims on behalf of natural persons.

Orrego Vicuña suggests that a rule that promotes the protection of corporations, such as a more liberal rule of admissibility of claims on behalf of corporations, directly and indirectly supports human rights. He advocates replacing the Barcelona Traction rule with a shareholder control test for determining the admissibility of corporate claims.¹⁵² First, Orrego Vicuña argues that the growth of institutions and regimes protecting natural persons, on the one hand, and those protecting investments and corporations, on the other hand, are mutually reinforcing.¹⁵³

Second, he asserts that a rule resulting in more effective protection for shareholders would aid human rights: “[E]conomic rights are also considered today to be a part of human rights, thus also justifying liberal mechanisms of protection”; and though “different areas of the law might follow different rules and requirements as to their protection,” nevertheless the “underlying premise is always the same; that is, the assertion of the rights of the individual in their *261 own merit.”¹⁵⁴ This argument implies both a direct and indirect relationship between human rights and investment protection: direct because the economic interests of shareholders, according to this reasoning, are human rights¹⁵⁵ and indirect because any international regime that encourages the treatment of individuals, or any non-state actors, as subjects of international law necessarily supports human rights.¹⁵⁶

This line of argument also has certain distributional consequences. Most natural persons, as shareholders in corporations, are citizens of developed countries. International human rights treaties do protect the right to property,¹⁵⁷ but in context, this right has more to do with ensuring subsistence or right to basic livelihood of the impoverished¹⁵⁸ than with guaranteeing investors something akin to “just compensation” under the U.S. Constitution.¹⁵⁹ It seems unlikely that, for instance, the ICESCR was intended to protect those with enough disposable income to invest in equity securities. Perhaps the opposite--the ICESCR guarantees developing states to determine what level of protection to afford non-national investors.¹⁶⁰ It is hard to say, then, that human rights regimes, directly or indirectly, can be read to support a rule that maximizes the chances of a legal person to seek diplomatic protection.¹⁶¹ Some judges in the Barcelona Traction case were repulsed by the notion that shareholders’ interests should be protected as if they were the subject of fundamental human rights.¹⁶²

***262** Exploitation of Developing States. Orrego Vicuña’s position is subject to an even more withering attack. Abi-Saab, who has long written in support of the interests of developing countries in the international legal system, suggests that, if anything, protecting foreign investment would lead to a degradation of human rights in developing countries.

He first challenges the assumptions made by supporters of the shareholder rule of nationality. They assume that the rules maximizing the investment protection are good because to do so encourages investment in developing countries and, therefore, has a welfare-maximizing effect for both the investing states and recipients of investment. According to Abi-Saab, this line of reasoning does not consider fully the actual distributional consequences of a rule that maximizes protection of shareholder interests. If wealth and power were distributed equally among states, a rule expanding the admissibility of claims that benefited corporations would not be as controversial as it is. But wealth is distributed unevenly, and this gap between rich and poor states is widening.¹⁶³ In addition, most developing states are net capital importers and will always be the host state to foreign investment and, therefore, respondent state to any diplomatic protection claim. Ostensibly neutral rules regarding diplomatic protection reflect a purely “hypothetical reciprocity,”¹⁶⁴ likely to prejudice the interests of developing states. Abi-Saab thus supports the rule of incorporation on normative grounds because a shareholder rule would more likely give rise to diplomatic protection claims by developed states at the expense of developing states.¹⁶⁵ Specifically, the control rule represents an unwelcome and self-serving progressive development of international law advocated by and benefiting capital-exporting countries, especially the United States.¹⁶⁶

Since World War II, multinational corporations have increasingly treated the world as one market.¹⁶⁷ Proponents of “economic internationalism” contend that multinational corporations are becoming more international in outlook, scope, planning, management, and shareholdings. As a result, they help to erode the inefficient and artificial economic boundaries between nation-states. Therefore, proponents view multinational corporations as agents of international efficiency and welfare maximization.¹⁶⁸

***263** Abi-Saab, however, argues that the internationalist view of economic globalization is wrong. First, because

multinational corporations are often large, oligopolistic concerns, they “cannot be agents of maximization of welfare on the international plane” since in these situations “private and social maximization are situated at different levels.”¹⁶⁹ Second, despite their greater international outlook, e.g., operations in many countries, foreign employees, foreign managers, and shareholders from many countries, multinational corporations do not lose their national allegiances.¹⁷⁰ As a result, the relative strength of such corporations vis-à-vis developing states leads to two objectionable practices in international law: agreements between developing governments and alien corporations that may illegitimately restrict the sovereignty of the host state;¹⁷¹ and the exercise of diplomatic protection by developed states to protect their interests in multinational corporations, which are extensions of national wealth.¹⁷²

Thus, Abi-Saab criticizes the control test precisely because he believes it is aligned with political reality.¹⁷³ Historically, he argues, the great powers “played a primordial role in developing new institutions of international law,” but that as international law has become more universal, in practice the great powers no longer have the power to dictate the formulation of laws.¹⁷⁴ He applauds the ICJ for its decision in *Barcelona Traction* because the ICJ refused to change international law to benefit developed states at the expense of developing states.¹⁷⁵

While Abi-Saab’s concerns merit attention, his support for *Barcelona Traction* is problematic for several reasons.

First, he provides little evidence that a control test would lead to a multiplicity of claims by developed states. No evidence suggests that overturning *Barcelona Traction* would lead to a significant and burdensome increase in the aggregate number of claims.¹⁷⁶

Second, his analysis of exploitation by multinational corporations is too simplistic and overlooks the more ambivalent relationship that developing states have with multinationals and foreign investment. Other scholars have also expressed concern with the seemingly inevitable conflicts that arise when developed states invest in developing states.¹⁷⁷ Abi-Saab may be correct about *264 the unfair distribution of wealth and past exploitation by corporations, but he may too quickly dismiss the extent to which developing states need foreign investment as much as they need to avoid exploitation. Without a fair and balanced rule of investment protection, one that both protects investors from expropriation and protects developing countries from exploitation, developing states may not be able to attract foreign capital and inequalities may widen.¹⁷⁸ Some go further, arguing that sustainable development and human rights are linked.¹⁷⁹ The withdrawal of foreign direct investment, which contributes significantly to the GDPs of many developing states, may hurt developing states, even if investment flows currently do little to help them. As a result, it seems unlikely that a more restrictive rule of nationality alone will do much either to remedy inequalities between developed and developing states, or to prevent the exploitation of developing countries.¹⁸⁰

Finally, Abi-Saab essentially advocates procedural confusion to correct a substantive inadequacy.¹⁸¹ He lauds the *Barcelona Traction* rule precisely because he believes it will lead to fewer claims on behalf of corporations, which he considers proxies for dominant states in an unjust international order.¹⁸² But it may be inimical to the general interests of developing states to advocate a rule that flouts political reality. In general, developing states have an interest in challenging the ideological opacity of laws that usually reflect a political reality benefiting developed states; it would be inconsistent to stray from this approach in the few circumstances where it benefits developing states to do so.¹⁸³ And developed states have an advantage, *265 i.e., greater resources and experience in dealing with international law, when it comes to evading or manipulating unfavorable laws.¹⁸⁴

C. The Post-*Barcelona Traction* Legal and Economic Environment

The arguments made by supporters and detractors of the *Barcelona Traction* rule have been repeated over the last thirty years as if nothing has changed. But certain circumstances have changed. Developing states now depend upon foreign direct investment from developed states in a way that they did not in 1970. This shift has created an environment in which developing states compete with each other to attract foreign investment by granting developed states concessions through bilateral investment treaties. In this new context, developing states should prefer a genuine link test, particularly an economic control test, of nationality in diplomatic protection claims. Some evidence already indicates that developing countries have this preference.

When *Barcelona Traction* was decided, nationalizations were much more common than they are now, and developing

countries, especially oil rich countries, seemed to wield great influence over developed states. After World War II, newly socialist countries and former colonial territories nationalized many of their industries, which affected both domestic and foreign corporations. Some developed countries also nationalized their industries, e.g., France and the UK.¹⁸⁵ By the 1970s, these nationalizations had reached their peak.¹⁸⁶ By the 1970s, developing countries were able to set the agendas on international economic matters, even if they could not control the eventual outcomes.¹⁸⁷ The energy crises of the 1970s made developed countries fearful about their access to natural resources, held by an apparently solid bloc of developing states, which made them more willing to consider the views of developing countries on foreign investment.¹⁸⁸ In the U.N. General Assembly, developing states managed to pass two resolutions arguing for a radical change *266 in the world's trading and financial systems:¹⁸⁹ the Declaration of the Establishment of a New International Economic Order (NIEO)¹⁹⁰ and the Charter of Economic Rights and Duties of States. Both were adopted in 1974.¹⁹¹ The latter gave developing states the power to "exercise authority over foreign investment within its national jurisdiction"¹⁹² and to resolve disputes over compensation for expropriations within their own courts.¹⁹³ These resolutions have been described as "the Calvo Doctrine reborn again,"¹⁹⁴ and most developed states voted against them.¹⁹⁵ One critic described the NIEO as a "manifestly one-sided approach"¹⁹⁶ but nevertheless appreciated that they reflected an understandable conviction that before the NIEO international law systematically discriminated against poor states, and that the only remedy was a radical reversal of the rules.¹⁹⁷

By the 1990s, however, the NIEO largely collapsed. Starting in the early 1980s, the ability of developing states to set the agenda on international economic affairs weakened, partly because developed states had recovered from the energy crises and became more self-assured, and partly because the debt crises of the 1970s made foreign investment more attractive to developing states, which needed more capital without more debt.¹⁹⁸ The number of nationalizations tapered off in the 1980s and 1990s to practically none.¹⁹⁹ Further, the end of the Cold War and the opening of Eastern and Central European economies helped "strengthen market-oriented attitudes and forces and deprived developing countries of a bargaining tool."²⁰⁰ All of this reflects a paradigm shift by developing countries and a rejection of the NIEO.²⁰¹

*267 What has not changed over time is the fact that most foreign direct investment (FDI) still occurs between developed states.²⁰² Nonetheless, quantities of investment flows into developing states are of greater importance relative to their economies,²⁰³ and since 1996, FDI has accounted for the majority of resources flowing into developing countries, including foreign aid, bank loans, and "portfolio flows," which do not count as foreign direct investment.²⁰⁴

Flows of foreign direct investment to developing countries have risen over 50-fold from 1970 to 2004.²⁰⁵ Developing countries remain net capital importers, with inflows exceeding outflows by two times in 2000 and by nearly three times in 2004.²⁰⁶ Since the quantity of most international claims closely tracks the volume of investment flows,²⁰⁷ a developed state will almost always be the claimant state vis-à-vis a developing state in an investment dispute.

Despite the current openness of developing states towards foreign investment, there is no guarantee that developing states have fully accepted, much less internalized, developed states' conception of investment protection. The pendulum may swing back, and developing states may again repudiate neoliberalism and return to policies of nationalization and redistribution.²⁰⁸

*268 Some studies suggest that developing states go through stages of "attraction-aversion" to foreign direct investment, meaning that various domestic and international factors pressure a developing state into having regulations open to investment at one point in time and closed to investment later.²⁰⁹ Even if states eventually settle into an open acceptance of foreign investment, this oscillation may take place over decades.²¹⁰

All of these factors suggest that since 1970 developed and developing states have become even more mutually vulnerable in the area of foreign investments. Developed states have risked more capital on developing states and are more vulnerable to expropriation or nationalization than before. Developing states are now more dependent on developed states for investment and are still at great risk of exploitation or abandonment if this critical source of external funding disappears overnight.²¹¹

Despite potential frictions, developed and developing states have sent and received, respectively, increasing flows of foreign investment. Legal changes favoring developed states are one explanation for the expanding flow of investment. These changes have a dynamic relationship with the changes in economic relations. They are, in part, explained by the debt crises faced by many developing countries. Before the mid-1990s, foreign direct investment was, more or less, a secondary means of obtaining capital for developing countries.²¹² But as their debts expanded, they needed a source of capital that did not require them to service massive interest payments.²¹³ Perhaps the only way for developing countries to attract investment was to give credible assurances of investment protection. They gave these assurances by signing investment treaties.

Developed states began to engage in investment liberalization, largely with other developed states, in the early 1960s.²¹⁴ Also, partly to insure the security of their investments, developed states began to sign multilateral and bilateral agreements on investment protection. In 1965, the World Bank *269 sponsored the Convention on the Settlement of Investment Disputes²¹⁵ (ICSID) although at the time, primarily developed states ratified the convention.²¹⁶ More specifically, in response to the NIEO and the uncertain status of their investments in developing countries, developed states began to sign bilateral investment treaties (BITs) with developing states. BITs are agreements for reciprocal protection of foreign investments, usually including provisions on investment security, investment neutrality (i.e., non-discrimination or most-favored nation treatment), and market facilitation.²¹⁷ It is said that Germany signed the first BIT in 1959 with Pakistan.²¹⁸

From the perspective of the developing state, the advantage of signing a BIT or ICSID is that it signals to investors a favorable attitude towards FDI.²¹⁹ Initially, developing states--especially in Latin America--refused to sign ICSID or BITs.²²⁰ Through 1969, only seventy-two BITs were signed, and by 1970, sixty-four states had signed ICSID. The initial ICSID signatories were developed countries and developing states in Asia and Africa; the Latin American and communist bloc states were conspicuously absent.²²¹ But beginning in 1981, with Costa Rica, Latin American states began to sign ICSID, and by 2003, sixteen had signed.²²² In 1986, Hungary became the first Eastern bloc country to sign ICSID, and after the end of the Cold War, twenty- *270 two other former communist states followed suit.²²³ The number of BITs grew exponentially after the Cold War. During the 1970s, a cumulative total of 166 states had signed BITs; in the 1980s, 386.²²⁴ After the Cold War, from 1990 to 1998, an additional 1,340 BITs were signed.²²⁵ Over 160 states had signed at least one BIT by 1998.²²⁶

What is the effect of signing ICSID or a BIT? First, both BITs and ICSID (which BITs often incorporate by reference) preclude recourse to diplomatic protection except to enforce arbitral awards.²²⁷ They contain dispute settlement provisions, which refer disputes to third party arbitration or an arbitral tribunal of ICSID. They also usually allow a direct claim by injured investors against host states, taking away from the investor's state of nationality the discretion to decide whether or not to espouse a claim.

Secondly, ICSID and BITs, for the most part, contain definitions of corporate nationality.²²⁸ These nationality provisions, at first glance, seem to follow Barcelona Traction in defining eligible corporate claimants of a Contracting Party by reference to the state of incorporation.²²⁹ However, in practice, BITs and ICSID grant standing more liberally than does Barcelona Traction, for two reasons. ICSID, and most BITs, define "investments" in such a way that allows both natural persons and corporations to recover shares in a corporation, whether locally incorporated or incorporated in a third state.²³⁰ Shareholders need not wait for the corporation itself to make a claim against a host state. As a result, "virtually any dispute between host and investor [becomes]. . . a matter of international law."²³¹ Therefore, under a typical BIT or ICSID, Belgium's claim on behalf of Sidro (the holding company and majority shareholder in Barcelona Traction), or its natural person shareholders, would have been valid. And multiple claims--the policy bugaboo raised by Barcelona Traction--are possible under ICSID: Corporations, their shareholders (natural or legal persons), and their respective states of nationality all may bring claims against the host state.

Not only does this system give investors a right to investment protection, not subject to the discretion of their states of nationality, but it also seems to allow an injured corporation more than one bite at the apple. This happened recently in arbitrations, pursuant to bilateral investment treaties, between the Central European Media Enterprises (CME) and the Czech *271 Republic. CME alleged that the Czech government engaged in activities that, among other violations of the BIT, were tantamount to expropriation of CME's Czech operations.²³² In a London tribunal organized under the US-Czech BIT, with the main shareholder as the named claimant, CME was not awarded any compensation, and the tribunal found no expropriation.²³³ However CME had also instituted a parallel proceeding under the Netherlands-Czech BIT (CME was incorporated in the Netherlands). That tribunal, sitting in Stockholm, decided, on the same day as the London Tribunal's decision, that the Czech government expropriated CME's Czech operations.²³⁴ Later, the Stockholm tribunal awarded CME almost \$270 million in damages.²³⁵

One might ask why developing states would subject themselves to this, since most BITs and ICSID seem to give developed states and corporations everything they could want. One explanation is a "strategic analysis" of developing country behavior. While it is in the collective interests of developing states to resist strict investment protection standards under customary law, individual states have an interest in defecting from the "capital importing cartel" to sign a BIT.²³⁶ Developing states, after their debt crises, competed for foreign direct investment. Given the uncertain environment created by the NIEO years for

capital-exporting states, one advantage vis-à-vis other developing states in signing a BIT was that it offered heightened investment protection.²³⁷

But now that most developing states are trying to attract foreign investment, more of them are also ratifying BITs. Merely ratifying a BIT now provides a developing state no advantage at all vis-à-vis all the other developing states that have signed them as well. As a result, a bidding war is developing in which developing states offer more and more concessions through BITs and other domestic regulations (i.e., tax breaks, etc.) but--because every developing state is doing this--are not attracting much more *272 investment. Corporations and capital exporting states benefit from watching developing states scramble;²³⁸ thus, “the BIT regime may actually reduce the overall welfare of developing countries and therefore should not be uncritically embraced by those who seek the interests of [developing states].”²³⁹ This analysis also suggests that BIT practice should not be viewed as evidence of a customary rule of international law, precisely because BITs came about as a result of the NIEO years, when developing countries successfully challenged the orthodox customary law of investment protection.²⁴⁰

A glance at the nationality provisions of BITs between developing and developed states seems to confirm Andrew Guzman’s identification of a “bidding war.”²⁴¹ Out of 20 Western Hemisphere agreements between developed states (the Canada or US) and developing states, only two require some sort of genuine link between the contracting party and the injured corporation.²⁴² All of the agreements define “investment” broadly enough to include shareholdings in another corporation held by a company incorporated in one of the contracting parties.²⁴³ Two agreements even give the developed state more latitude with nationality than the developing state.²⁴⁴

An interesting contrast to this is the reciprocity of terms in BITs between developing states. An analysis of BITs between developing states suggests that, when they are not competing for capital, they prefer a genuine link requirement for nationality in investment claims. Out of forty BITs between developing states in the Americas, only five define nationality in such a way that incorporation alone will suffice as a connection with a contracting party in order to make an investor-state or state-to-state claim.²⁴⁵ The thirty-five other agreements all require some sort of genuine link with the would-be claimant state. Fifteen BITs require that the injured corporation be incorporated in and have its seat of management in the claimant state.²⁴⁶ Nine *273 agreements require incorporation, seat, and “effective economic activities” (a sort of “seat plus” test).²⁴⁷ Ten agreements permit claims upon showings of incorporation and seat (or “seat plus”), or alternately economic control.²⁴⁸ Only one requires incorporation and control.²⁴⁹

All of this points to the kind of rule developing states might prefer for corporate nationality in the absence of a bidding war for capital from developed countries. Based on the agreements they sign with other developing states, developing states prefer a “genuine link” requirement of some sort, contrary to the arguments of Abi-Saab and Judge Nervo.

D. Implications of Current Environment on Policy Considerations

Abuses of Diplomatic Protection. The ICJ in *Barcelona Traction* feared that by allowing diplomatic protection on behalf of shareholders, a Pandora’s Box of claims would be opened. Ironically, as an unintended consequence, *Barcelona Traction* may have helped create the atmosphere of “confusion and insecurity” in international economic relations that it tried to prevent.²⁵⁰ On the margins, it may have encouraged the signing of investment protection treaties that expose states that host investment to claims from multiple states.²⁵¹ The primary policy justification for *Barcelona Traction*, therefore, is undermined by an understanding of the current legal environment in which developing states sign BITs. The understanding of the ICJ was that multiple claims would discourage developing states from hosting investment.²⁵² Yet the potential exposure to multiple claims has not dampened the apparent enthusiasm of developing states for signing BITs. According to the policy concerns of the ICJ, a rule setting aside incorporation, which may allow more than one state to exercise a diplomatic protection claim, is not likely to be worse than the status quo.

The current legal environment also seems, to a great extent, to have mitigated the twin problems of inaction and pretextual claims.²⁵³ These problems seem less important to the extent that BITs take discretion away from states to make diplomatic protection claims, eliminating the problems of inaction and pretext. Investors will make claims when they are injured, and states cannot use the threat of a diplomatic protection claim as leverage to gain concessions on unrelated matters. The widespread ratification of BITs,²⁵⁴ by narrowing the situations in which diplomatic protection can be exercised, necessarily also reduces the frequency with which pretextual claims can be *274 made. While these twin problems seem to suggest that states should favor a genuine link test,²⁵⁵ BIT ratifications seem to render the problems largely moot.

Human Rights and Investment Protection. An analysis of the dynamics of BITs gives no indication that investor protection has developed in tandem with human rights, as Orrego Vicuña argued, as a rule of customary law to give shareholders a right to property in their claims. The configuration of the BIT game is not conducive to the promotion of human rights, even if it is true that economic development and human rights are positively correlated.²⁵⁶ For, if anything, the bidding war created by the BIT game has been detrimental to the economies of developing states.²⁵⁷ Thus, while investment protection and human rights are not mutually exclusive, they do not walk in lockstep as Orrego Vicuña suggests.

Exploitation of Developing Countries. Guzman’s analysis seems to have validated Abi-Saab’s concerns that investment liberalization may lead to the exploitation of developing states.²⁵⁸ But Abi-Saab was mistaken about the particular rule of nationality that would most benefit developing states in the current economic and legal environment. The fear of developed states—that the rule of incorporation articulated in Barcelona Traction inadequately protects investments—may have contributed to the “bidding war” that developing states have fallen into, which in turn subjects them to rigorous investment protection standards with very little increase in investment flows to those who sign BITs. The rule of incorporation may have the unintended effect of subjecting developing states to the very exploitation that Abi-Saab hoped the Barcelona Traction rule would avert.

Conclusion

As a result of the new legal and economic environment years after Barcelona Traction—in the age of BITs and ICSID—there is the question of whether diplomatic protection is relevant at all.²⁵⁹ Juliane Kokott, for instance, suggests that it is futile to try to reform the doctrine of diplomatic protection. Instead, she recommends accepting that “the traditional law of [diplomatic protection] has been largely replaced by a number of treaty-based dispute settlement procedures.”²⁶⁰

*275 In some ways, Kokott is right. There is little reason to believe that the states, developing states especially, will be less inclined in the immediate future to enter BITs or other dispute settlement procedures with developed states. But this is not inevitable. Developing states may later regret that they gave away so much in return for so little. Any ensuing aversion to foreign direct investment may have undesirable consequences for both developed and developing states.²⁶¹

In any case, the decision of a given state to enter into BITs will be influenced, in part, by the available alternatives. In this way, the decisions the ILC ultimately reaches regarding diplomatic protection and Barcelona Traction—after it hears from states in the Sixth Committee—will still be relevant in years to come. The analysis of the current legal and policy environment in this article suggests that developed states have not fully accepted the rule of incorporation as customary law, and that developing states should and do prefer a genuine link requirement. This convergence of interests might be a firmer common ground on which the ILC could establish a rule for corporate nationality in diplomatic protection claims than the venerable but obsolete Barcelona Traction case.

***276 Appendix I: State Practice**

A. State Practice Summary Chart

Country	Test of Corporate Nationality	Changed After Barcelona Traction	Genuine Link?
Australia	Unclear, likely incorporation. May use economic control test (“control”), i.e., majority shareholdings by Australians.	not available (“--”)	Maybe (control)
Austria	Seat of management (“Seat”). No incorporation.	No	Yes (seat)

Belgium	Seat or incorporation; sometimes control.	Yes (formerly control or seat).	Yes (seat)
Canada	Incorporation and “substantial Canadian interest.”	Yes (formerly control without incorporation).	Yes (control)
France	Seat or incorporation.	Yes (formerly seat only).	Yes (seat)
Germany	Incorporation and seat	Yes.	Yes (seat)
Italy	Incorporation or seat	Yes (formerly accepted incorporation, siege social, control or hybrids)	Yes (seat)
Netherlands	Incorporation and seat	No	Yes (seat)
Switzerland	Control. Sometimes incorporation or seat.	No	Yes (control)
Taiwan (ROC)	Unclear, likely incorporation.	--	No
United Kingdom	Incorporation. May consider genuine link with company.	No	Maybe (control)
United States	Incorporation and control		
(>50% shareholding)	Maybe (formerly brought claims on behalf of all shareholders, majority or not)	Yes (control)	

B. Discussion of Category Headings

Test of Nationality. Indicates the test of nationality a state uses for corporate diplomatic protection claims: incorporation, seat of management/siege social (“seat”), or economic control (control) as measured by a majority of shareholders. Some states combine these tests by requiring *277 two, e.g., incorporation and seat, or allowing one of several to satisfy the test, e.g., incorporation or seat.

Change After Barcelona Traction. Indicates whether a state has changed its test of nationality as a result of the Barcelona Traction decision.

Genuine Link: Indicates whether a state, either in its practice as claimant or respondent, requires a genuine link with a corporation, i.e., requires economic control or seat.

C. Discussion of State Practice.

1. Australia. There is no direct evidence of Australia’s rule of nationality for corporate diplomatic protection claims, at least in summaries of state practice in its yearbook of international law. Two conflicting pieces of evidence hint at Australia’s likely test of nationality. In 1989, it adopted the Foreign Corporations (Application of Laws) Act 1989, which defined a “foreign corporation” for the purposes of clarifying their rights in Australian courts. Simply, a foreign corporation is “a body or person incorporated in a place outside Australia.”²⁶²

However, about ten years earlier Australia passed a bill to encourage the “naturalization” of foreign-owned companies. Before 1978, companies majority-owned by foreigners were precluded from starting new mining projects. In 1978 the Australian government announced a policy that allowed foreign-owned companies, wherever incorporated, to start new mining projects if they were at least 25% owned by Australians, had a majority of Australians on the Board of Directors, and made a public commitment to increase equity held by Australians to 51%.²⁶³ Neither of these acts, however, involves claim espousal but only the treatment of foreign companies in Australia.

2. Austria. In lump-sum practice, Austria refers exclusively to the corporation’s seat as the test of nationality.²⁶⁴ No evidence suggests that Austria views itself as a persistent objector and nothing suggests that any states have resisted Austria’s claims on behalf of corporations with their seat in Austria. It seems that Austria, in lump-sum practice, employed the seat test before Barcelona Traction.²⁶⁵

*278 3. Belgium. Belgium employs the seat test. It announced that when a corporation voluntarily moves its seat outside of Belgium, it loses Belgian nationality.²⁶⁶ Before Barcelona Traction, Belgium used the seat test in lump sum agreements, but also showed a willingness to espouse claims on behalf of majority shareholders.²⁶⁷

In investment protection treaties Belgium has announced a willingness to depart somewhat from the rules and exceptions listed in Barcelona Traction. Discussing a reciprocal investment protection treaty with Malaysia, the Belgian government announced that it would protect both majority and minority shareholders from Belgium and Luxembourg who own stock in companies incorporated in Malaysia.²⁶⁸

4. Canada. Before Barcelona Traction, Canada’s Department of External Affairs Legal Bureau indicated that its general policy was to espouse claims made by Canadian shareholders in foreign corporations that are nationalized,²⁶⁹ without requiring that the corporation be “legally defunct.”²⁷⁰ After Barcelona Traction the Department’s official position changed. First, it required a corporation be linked to Canada by incorporation and a “substantial Canadian interest,” as measured by a number of factors, including such as “whether or not the corporation carries on business and active trading interests in Canada and the extent to which the company is beneficially owned in Canada and whether it is operating to the benefit of the Canadian economy.”²⁷¹ When a company is incorporated in Canada and wholly owned by Canadians, Canada may be “obligated to intervene”; i.e., the corporation has a right vis-à-vis the state to diplomatic protection.²⁷² Second, the Department generally would not espouse claims on behalf of Canadian-incorporated but foreign- *279 owned corporations, though it might use good offices (i.e. measures short of a formal diplomatic claim) if “some degree” of Canadian beneficial interest exists.²⁷³ Third, the Department noted that it was “barred by international law” from making formal claims on behalf of substantially Canadian-owned but foreign-incorporated companies, though it “may and usually does use its good office in an attempt to obtain compensation.”²⁷⁴

The Canadian model text for its BITs defines investment as an asset owned or controlled by either a natural or juridical investor of a Contracting Party.²⁷⁵ The Legal Bureau suggested that to prove ownership, an investor must demonstrate “control to cause, by legal means, the affairs of the enterprise to be conducted in accordance with the wishes of that person.”²⁷⁶ While noting that an exhaustive listing of the ways to show control might not be possible, the Legal Bureau lists examples, e.g., majority of voting shares, “sufficient voting shares to cause . . . the enterprise” to act as the investor wishes, powers conferred by incorporation document, and powers conferred by contract among the enterprise’s shareholders.²⁷⁷ Before Barcelona Traction, Canada seemed to regard lump-sum settlements as relevant state practice for customary rules of claim espousal.²⁷⁸

5. France. Before and after Barcelona Traction, France generally espoused claims on behalf of corporations with their seats of management (siegé social) in France.²⁷⁹ French judicial decisions and other state practice after Barcelona Traction have confirmed the seat rule, explicitly rejecting the control test.²⁸⁰ After Barcelona Traction was decided, France made “adjustments for companies whose central administrations are not located *280 within the ‘incorporating state,’” as Barcelona Traction would require.²⁸¹ The rules of nationality adopted in French lump-sum agreements explicitly reflect the seat test.²⁸²

6. Germany. The German Yearbook of International Law did not seem to contain any directly relevant state practice. However one German commentator from the Federal Ministry of Economics indicated that the test of nationality in Germany’s BITs is incorporation and seat of management, and the commentator implied that the rule applied equally to

German BITs and Germany's diplomatic protection practice.²⁸³ Germany explicitly repudiates the control test, at least in BITs.²⁸⁴ There are few exceptions to the incorporation and seat rule.²⁸⁵ Germany seems to be considering amending its model BIT to protect German majority shareholdings in companies incorporated in other states.²⁸⁶

7. Italy. The Italian civil code and domestic court decisions indicate that Italy may espouse claims on behalf of companies incorporated in Italy or those with their seat of management in Italy, even if the company is incorporated abroad.²⁸⁷ In claims practice preceding Barcelona Traction Italy required both incorporation and seat in Italy.²⁸⁸ Some agreements also required Italian majority shareholdings.²⁸⁹

In agreements to pay for World War II-related damages, all settled before Barcelona Traction, claimants employed different tests of nationality against Italy. U.S. corporations needed merely to be incorporated in the US.²⁹⁰ An agreement with Greece required that companies in the Dodecanese but incorporated in Italy had to have their place of business in the Dodecanese to *281 make claims against Italy.²⁹¹ Finally, an agreement with Germany required that a company either be incorporated and have its head office in Germany or, if headquartered in Italy, then more than 50% of it must have been held by German nationals.²⁹² In lump-sum agreements after Barcelona Traction, Italy used seat as the only test of nationality.²⁹³

8. The Netherlands. For purposes of corporate diplomatic protection the Dutch test of nationality seems to require both incorporation and seat in Holland.²⁹⁴ The rule of nationality seems to have remained the same before and after Barcelona Traction, though this is not entirely clear.²⁹⁵ It is not possible to tell if Dutch claim espousal practice differs from lump sum practice, as the Netherlands seems to settle all corporation claims by way of lump-sum agreements.²⁹⁶

Dutch BITs protect shareholders only if “the authorities of the relevant third country do not have the right or waive the right to require compensation after expropriation.”²⁹⁷

9. Switzerland. Switzerland generally uses the control test alone to determine the nationality of corporations for diplomatic protection claims.²⁹⁸ Before World War II, Switzerland used the rule of incorporation but changed to the control test after the war, concerned that diplomatic protection would be misused.²⁹⁹ After Barcelona Traction, Switzerland became even more willing *282 to espouse claims on behalf of Swiss-incorporated companies in addition to Swiss-controlled corporations.³⁰⁰

10. Taiwan (Republic of China). Taiwan seems to adopt the incorporation rule for defining “foreign investors” for the purposes of regulating foreign investment. The statute regulating investment by foreign nationals, however, is somewhat unclear. “The nationality of a foreign juridical person shall be determined by the law under which the foreign juridical person is incorporated.”³⁰¹

11. United Kingdom. The UK seems to have closely followed Barcelona Traction both before and after the decision. An official revision of claim espousal rules, released in 1983, reiterates the UK's commitment to the rule of incorporation³⁰² and includes the exceptions listed in Barcelona Traction.³⁰³ However, whether a company has a genuine link with the UK may be a consideration.³⁰⁴ The UK will espouse claims on behalf of UK shareholders of foreign-incorporated companies “only in concert” with the state of incorporation,³⁰⁵ which seems consistent with Barcelona Traction. But in amicus curiae briefs submitted to United States federal courts, the UK has asserted that “regardless of its ownership, a corporation is a national of the country under the laws of which it is organized.”³⁰⁶

The UK seems to accept the Barcelona Traction when acting as respondent, even though it requires a genuine link before acting as claimant, i.e., they seem to accept that other states may espouse claims even if *283 incorporation is the only link between the claimant state and the respondent. Before Barcelona Traction the UK espoused claims based solely on the state of incorporation without any reference to the nationality of its shareholders.³⁰⁷

12. United States. The U.S. purports to recognize the Barcelona Traction rule, accepting that for the purposes of international law a corporation has the nationality of the state where it is incorporated.³⁰⁸ However, in lump-sum agreements the U.S. has sought compensation only for US-incorporated companies majority-held by U.S. nationals, i.e., natural persons.³⁰⁹

Contradicting the Barcelona Traction rule, the U.S. reserves the right to oppose claims made by states without a genuine link to the injured corporation.³¹⁰ In the years before Barcelona Traction the United States limited claim espousal to US-incorporated companies majority-owned by U.S. natural persons.³¹¹ There is some evidence that before Barcelona

Traction the U.S. had made claims on behalf of foreign-incorporated but US-controlled companies.³¹² However, it is unclear whether Barcelona Traction changed U.S. practice or whether the U.S. simply stopped making claims on behalf of shareholders sometime before the case was decided. The U.S. accepts lump-sum agreements as evidence of state practice.³¹³

***284 Appendix II: Foreign Investment Flows³¹⁴**

Table 1. Investment flows in millions of U.S. dollars, 1970-2001

		1970	1980	1990	2000	2004
Developed Countries	FDI inflows	9,496	46,629	172,067	1,134,293	380,022
	FDI outflows	14,101	50,407	225,965	1,092,747	637,360
Developing Countries	FDI inflows	3,937	8,455	35,736	253,179	233,227
	FDI outflows	49	3,336	12,701	143,226	83,190
Eastern Europe	FDI inflows	--	24	75	9,067	34,897
	FDI outflows	--	--	15	3,176	9,707
World	FDI inflows	13,434	55,108	207,878	1,396,539	648,146
	FDI outflows	14,150	53,743	238,681	1,239,149	730,257

Table 2. Investment Flows for Developing Countries in millions of U.S. dollars (By Region, including Eastern Europe)

		1970	1980	1990	2000	2004
Africa	FDI inflows	1,266	400	2,840	9,627	18,090
	FDI outflows	19	1,089	689	1,573	2,824
Americas	FDI inflows	1,681	7,494	9,586	97,523	67,526
	FDI outflows	31	1,174	1,062	60,581	10,943
Asia	FDI inflows	854	442	22,614	145,725	147,545
	FDI outflows	-1	1,056	10,945	81,071	69,422
Eastern Europe	FDI inflows	--	24	75	9,067	34,897
	FDI outflows	--	--	15	3,176	9,707

***285 Appendix III: Summary of Western Hemisphere Bilateral Investment Treaties³¹⁵**

Table 1. Nationality Provisions in Developed State-Developing State BITs (20 Agreements)³¹⁶

	National defined as. ..	Reciprocal?	“Investment” includes shares in another company
*Canada-Argentina	Canada: Incorporation		
Argentina: incorporation and seat	No	Yes	
Canada-Barbados	Incorporation	Yes	Yes

Canada-Costa Rica	Incorporation or “branch of any such entity”	Yes	Yes
*Canada-Ecuador	Canada: incorporation		
Ecuador: incorporation and domicile with no citizenship in Canada	No	Yes	
Canada-Mexico (NAFTA Art. 1138)	Incorporation	Yes	Yes
Canada-Panama	Incorporation	Yes	Yes
Canada-Trinidad & Tobago	Incorporation	Yes	Yes
Canada-Uruguay	Incorporation	Yes	Yes
Canada-Venezuela	Incorporation	Yes	Yes
U.S.-Argentina	Incorporation	Yes	Yes
U.S.-Bolivia	Incorporation and branches of incorporated companies	Yes	Yes
U.S.-Ecuador	Incorporation	Yes	Yes
U.S.-Grenada	Incorporation and branches of incorporated companies	Yes	Yes
*U.S.-Haiti	Incorporation + “substantial interest” held by natural persons of claimant state. No claim if company controlled by nationals of 3rd state	Yes	Yes
U.S.-Honduras	Incorporation and branches of incorporated companies	Yes	Yes, every investment owned or controlled
U.S.-Jamaica	Incorporation	Yes	Yes, investments owned or controlled directly or indirectly
U.S.-Mexico (NAFTA Art. 1138)	Incorporation	Yes	Yes
U.S.-Nicaragua	Incorporation	Yes	Yes, investments owned or controlled directly or indirectly
*U.S.-Panama	Incorporation + “substantial interest” held by natural persons of claimant state. No claim if company controlled by nationals of 3rd state	Yes	Yes

U.S.-Trinidad & Tobago	Incorporation & branches for both	Yes	Yes, includes company, and equity or debt participation
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Table 2. Nationality Provisions in Developing State-Developing State (40 Agreements)

	Required link with Claimant State	Reciprocal?	“Investment” includes shares in another company
Argentina-Bolivia	Incorporation and seat, or “effective control” by natural or legal persons	Yes	Yes
Argentina-Chile	Incorporation and seat	Yes	Yes
Argentina-Costa Rica	Incorporation and seat	Yes	Yes
Argentina-Ecuador	Incorporation and seat	Yes	Yes
Argentina-El Salvador	Incorporation and seat	Yes	Yes
Argentina-Guatemala	Incorporation and seat	Yes	Yes
Argentina-Jamaica	Incorporation and seat	Yes	Yes
Argentina-Mexico	Incorporation and seat	Yes	Yes
Argentina-Nicaragua	Incorporation and seat	Yes	Yes
Argentina-Panama	Incorporation and seat	Yes	Yes
Argentina-Peru	Incorporation and seat, or “effective control” by natural or legal persons	Yes	Yes
Argentina-Venezuela	Incorporation and seat, or incorporation and “effective control”	Yes	Yes
Barbados-Venezuela	Incorporation and seat, or “effective control” by natural or legal persons	Yes	Yes
Bolivia-Chile	Incorporation and seat, or “effective control” by natural or legal persons	Yes	Yes
Bolivia-Ecuador	Incorporation and seat	Yes	Yes
Bolivia-Peru	Incorporation or direct or indirect control	Yes	Yes
Brazil-Chile	Incorporation and seat	Yes	Yes

Brazil-	Incorporation and seat, or	Yes	Yes
Venezuela	“effective control” by natural or legal persons		
Chile-Costa Rica	Incorporation and branches or control	Yes	Yes
Chile-Ecuador	Incorporation and seat and effective economic activities	Yes	Yes
Chile-El Salvador	Incorporation and seat and effective economic activities	Yes	Yes
Chile-Guatemala	Incorporation and seat and effective economic activities	Yes	Yes
Chile-Honduras	Incorporation and seat and effective economic activities	Yes	Yes
Chile-Nicaragua	Incorporation and seat and effective economic activities	Yes	Yes
Chile-Panama	Incorporation and seat and effective economic activities	Yes	Yes
Chile-Paraguay	Incorporation and seat and effective economic activities	Yes	Yes
Chile-Uruguay	Incorporation and seat and effective economic activities	Yes	Yes
Chile-Venezuela	Incorporation and seat and effective economic activities or effective control by natural or legal persons	Yes	Yes
Columbia-Peru	Incorporation and control	Yes	Yes
Costa Rica-Paraguay	Incorporation and seat	Yes	Yes
Costa Rica-Venezuela	Incorporation and seat	Yes	Yes
Dominican Republic-Ecuador	(1) Incorporation, seat and effective economic activities OR (2) control by natural or legal persons or persons incorporated elsewhere with a seat in the claimant state	Yes	Yes
Ecuador-El Salvador	Incorporation and seat and effective economic activity	Yes	Yes

Ecuador-Paraguay	Incorporation and seat	Yes	Yes
Ecuador-Venezuela	Incorporation and seat	Yes	Yes
El Salvador-Peru	(1) Incorporation + seat + “substantial business activities” (2) control by natural or legal persons	Yes	Yes
Panama-Uruguay	Incorporation	Yes	Yes
Paraguay-Peru	Incorporation OR control (direct/indirect)	Yes	Yes
Paraguay-Venezuela	(1) Incorporation + seat (2) Control by natural or legal persons	Yes	Yes
Peru-Venezuela	(1) Incorporation (2) Effective control, direct or indirect	Yes	Yes

Footnotes

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¹ [Barcelona Traction, Light and Power Co \(Second Phase\) \(Belg. v. Spain\), 1970 I.C.J. 3 \(Feb. 5\)](#) [hereinafter Barcelona Traction].

² *Id.* at 44-45. See also F.A. Mann, *The Protection of Shareholders’ Interests in the Light of the Barcelona Traction Case*, 67 Am. J. Int’l L. 259, 272-74 (1973) (summarizing situations in which shareholders’ states may exercise diplomatic protection: when the corporation has suffered legal demise, the state of incorporation “lacks capacity” to make claim, the state of incorporation is the injuring state, or the shareholders suffer direct injury).

³ See generally U.N. Int’l L. Commission, *First Report on Diplomatic Protection*, U.N. Doc. A/CN.4/506 (Mar. 7, 2000) [hereinafter *First Report on Diplomatic Protection*].

⁴ *Id.* at 11. Article 1(1) of the draft articles on diplomatic protection reads, “[D]iplomatic protection means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.”

⁵ Emmerlich de Vattel, *The Law of Nations* 156 (1758) (“Whoever ill-treats a citizen indirectly injures the State, which must protect the citizen.”).

- ⁶ The question here is only how to define nationality for the purposes of international law claims. The decision to develop rules of nationality is the sovereign prerogative of the state. See First Report on Diplomatic Protection, *supra* note 3, PP 95-100 (noting that, for the most part, states have the right to determine who is a national under their own law). But the domestic definition of nationality may not control an international law dispute. See *id.*
- ⁷ See U.N. Int'l L. Commission, Fourth Report on Diplomatic Protection, P 29, U.N. Doc. A/CN.4/530 (Mar. 13, 2003) [hereinafter Fourth Report on Diplomatic Protection] (providing the first of seven options listed as potential rules of nationality).
- ⁸ See *id.* P 31 (third option).
- ⁹ See *id.* PP 44-46 (seventh option).
- ¹⁰ See *id.* PP 32-37 (fourth option).
- ¹¹ See *id.* PP 38-40 (fifth option).
- ¹² See *id.* PP 41-43 (sixth option).
- ¹³ See *id.* P 30 (second option).
- ¹⁴ [Barcelona Traction, 1970 I.C.J. at 7.](#)
- ¹⁵ [Id. at 24-25](#) (noting shares claim by Belgium in its pleadings).
- ¹⁶ Just after World War II, the Spanish government refused Barcelona Traction the foreign currency it needed to meet sterling-denominated interest payments. Spanish holders of the company's sterling debt asked a Spanish court to find Barcelona Traction bankrupt, which it did without notifying the company or providing it representation during the proceedings. [Id. at 9.](#) In an auction, a newly-formed Spanish company bought the remaining assets. [Id. at 10.](#) Belgium claimed that the company's attempts to contest the bankruptcy or get compensation in Spanish courts were futile. *Id.*
- ¹⁷ [Id. at 10.](#)
- ¹⁸ *Id.*
- ¹⁹ International law treatises seemed to acknowledge the existence of a genuine link requirement before Barcelona Traction, though no one test seemed dominant among the many used: *siège social*, domicile, incorporation, control, beneficial interest, and responsibility. See, e.g., Georg Schwarzenberger, *International Law* 391, 393-412 (3d ed. 1957).
- ²⁰ [Barcelona Traction, 1970 I.C.J. at 32-33.](#) The ICJ disposed of the case on the issue of Belgium's standing to bring a claim.
- ²¹ [Nottebohm Case \(Second Phase\) \(Liech. v. Guat.\) 1955 I.C.J. 4 \(Apr. 6\)](#) [hereinafter *Nottebohm*].
- ²² Compare, e.g., Mann, *supra* note 2, at 269 (suggesting *Nottebohm* should have influenced Barcelona Traction) with Herbert W. Briggs, *Barcelona Traction: The Jus Standi of Belgium*, 65 *Am. J. Int'l. L.* 327, 342-43 (criticizing Judges Fitzmaurice, Jessup, and Gros, each of whom delivered a separate opinion, for trying to apply *Nottebohm* to Barcelona Traction).

- ²³ In fact, the ICJ's holding was much narrower. It applied the genuine link requirement to naturalization, not birth or other ways of acquiring nationality. See *Nottebohm*, 1955 I.C.J. at 16-17, 24-26. The ICJ deemed it unfair to let Lichtenstein, which had no genuine links to Mr. Nottebohm and had bypassed its own residence requirement for naturalization, "protect Nottebohm in a claim against Guatemala," where he had lived for thirty-four years. See First Report on Diplomatic Protection, *supra* note 3, PP 106-109.
- ²⁴ *Nottebohm*, 1955 I.C.J. at 17 ("The Court does not propose to go beyond the limited scope of the question which it has to decide, namely whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court.").
- ²⁵ *Barcelona Traction*, 1970 I.C.J. at 42.
- ²⁶ *Id.* (asserting that there could be "no analogy with the issues raised or the decision given in [*Nottebohm*]"). See also Fourth Report on Diplomatic Protection, *supra* note 7, P 18 ("The Court's handling of the relevance of the *Nottebohm* case to the diplomatic protection of companies is far from satisfactory.").
- ²⁷ *Barcelona Traction*, 1970 I.C.J. at 42.
- ²⁸ *Id.* at 184 (separate opinion of Judge Jessup).
- ²⁹ *Id.*
- ³⁰ *Id.* at 42.
- ³¹ *Id.* Examples of the "manifold" links identified by the Court include the fact that the *Barcelona Traction* company remained incorporated in Canada for fifty years, maintained its "accounts and its share registers" in Canada, held board meetings there, and was "listed in the records of the Canadian tax authorities." *Id.*
- ³² Under Article 38(1) of the Statute of the International Court of Justice, the ICJ may resolve cases by referring to "general principles of law recognized by civilized nations." Statute of the International Court of Justice art. 38, para. 2, 9 Stat. 1031, TS No. 993, 1976 U.N.Y.B. 1052.
- ³³ *Barcelona Traction*, 1970 I.C.J. at 34-39.
- ³⁴ *Id.* at 34-35.
- ³⁵ *Id.* at 39.
- ³⁶ *Id.*
- ³⁷ *Id.* at 40-45. The ICJ considered only two exceptions to the rule of incorporation: when the company "ceased to exist" and when the company's state of incorporation "lack[s] capacity to take action on its behalf." *Id.* at 40. Another basis for admissibility of a claim, but not an exception to the general rule, is when shareholders suffer a direct injury, but Belgium did not make this argument. *Id.* at 36-37.
- ³⁸ *Id.* at 42 (emphasis added).

³⁹ Id. at 49.

⁴⁰ Id.

⁴¹ See id. at 64, 114, 161 (separate opinions of Judges Fitzmaurice, Tanaka, Jessup). See also id. at 334 (dissenting opinion of Judge Riphagen).

⁴² See generally id. at 243 (separate opinion of Judge Nervo). Specifically, Judge Nervo argues that, “[i]t is not the shareholders in those huge corporations who are in need of diplomatic protection; it is rather the poorer or weaker States, where the investments take place, who need to be protected against encroachment by powerful financial groups, or against unwarranted diplomatic pressure from governments” Id. at 248. He also criticizes the use of arbitral tribunal decisions as state practice because agreements establishing such tribunals were “on many occasions concluded under pressure, by political, economic or military threats.” Id. at 246.

⁴³ See generally id. at 286 (separate opinion of Judge Ammoun). “The opposition of the new or developing states, whose determinant influence on the development of international law and on the formation of its rules is already well-known, would in addition be much stronger as to the admission of a legal rule which would authorize the extension of diplomatic protection, beyond the interests of shareholders who have suffered injury by the act of a third States, to the interests of the general economy of the national State of the latter” Id. at 331.

⁴⁴ See generally id. at 222 (separate opinion of Judge Morelli). Judge Morelli argues that minimum standards of investment treatment were “analogous to the rules of international law concerning the protection of human rights” but could not be part of that corpus of binding law because minimum standards of treatment concerned matters of “fundamental importance, such as ... life or liberty, and never interests of a purely economic nature.” Id. at 232.

⁴⁵ Stanley D. Metzger, *Nationality of Corporate Investment Under Investment Guaranty Schemes--The Relevance of Barcelona Traction*, 65 *Am. J. Int'l. L.* 532, 534-37 (1971).

⁴⁶ Schwarzenberg, *supra* note 19; see also Ian Brownlie, *Principles of Public International Law* 482--95 (5th ed. 1998).

⁴⁷ See Richard B. Lillich, *The Rigidity of Barcelona*, 65 *Am. J. Int'l. L.* 522 (1971) (arguing that the ICJ analyzed state practice incorrectly to decide customary law in *Barcelona Traction*).

⁴⁸ See generally Metzger, *supra* note 45.

⁴⁹ Id. at 487-88. According to Brownlie, Switzerland and Italy require only a majority shareholding by nationals of the state, but he cites no sources for this. See id.

⁵⁰ See Brownlie, *supra* note 46, at 487.

⁵¹ See U.N. Int'l L. Comm'n, *Report of the International Law Commission, 56th Sess., U.N. Doc. A/59/10* at 13 (May 3--June 4 and July 5--Aug. 6, 2004) [hereinafter 2004 ILC Report]. Diplomatic protection was originally conceived of as being part of the project to codify draft articles on state responsibility. Id. at 22-23. Eventually, however, the ILC agreed to analyze diplomatic protection in a separate undertaking. Id. at 23.

⁵² Fourth Report on Diplomatic Protection, *supra* note 7, at 11.

⁵³ See id. at 12-20; see also *supra* notes 7-13 and accompanying text.

⁵⁴ Id. at 11.

⁵⁵ Id. at 11-12. The Special Rapporteur noted with dismay that all but one of the delegates were from developed states, but that developing states would be unlikely to favor a rule more likely to result in recovery for shareholders from developed states. Id. at 12.

⁵⁶ See id. at 20.

⁵⁷ See id. at 20-21 (on draft articles of nationality for legal persons):

Article 17. (1) A State is entitled to exercise diplomatic protection in respect of an injury to a corporation which has the nationality of that State. (2) For the purposes of diplomatic protection, the State of nationality of a corporation is the State in which the corporation is incorporated [and in whose territory it has its registered office].

Article 18. The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless: (a) The corporation has ceased to exist in the place of its incorporation; or (b) The corporation has the nationality of the State responsible for causing injury to the corporation.

Article 19. Articles 17 and 18 are without prejudice to the right of the State of nationality of shareholders in a corporation to protect such shareholders when they have been directly injured by the internationally wrongful act of another State.

Article 20. A State is entitled to exercise diplomatic protection in respect of a corporation which was incorporated under its laws both at the time of the injury and at the date of the official presentation of the claim [provided that, where the corporation ceases to exist as a result of the injury, the State of incorporation of the defunct company may continue to present a claim in respect of the corporation].

⁵⁸ Id. at 20 (brackets in original).

⁵⁹ 2004 ILC Report, *supra* note 51, at 49 (emphasis added).

⁶⁰ Id. at 50.

⁶¹ Id. at 51.

⁶² Id.

⁶³ Id.

⁶⁴ Id. at 52.

⁶⁵ [Barcelona Traction, 1970 I.C.J. at 42.](#)

⁶⁶ 2004 ILC Report, *supra* note 51, at 51 (noting that “[c]lose and permanent connection,’ the language employed by the [ICJ] to describe the link between the Barcelona Traction company and Canada, is not used as this would set too high a threshold for the connecting factor”).

⁶⁷ Id. at 49.

⁶⁸ Id. at 52.

⁶⁹ 2004 ILC Report, *supra* note 51, at 17.

⁷⁰ Under the traditional approach, there are two conditions that must be met to show that a rule exists under customary international law. *North Sea Continental Shelf (Fed. Rep. Germ. v. Denmark)* 1969 I.C.J. 3, 44 (Feb. 20). The first requirement is state practice, that is that the actions of states, cited in support a given rule of law, must be so frequent or habitual as to “amount to a settled practice.” *Id.* The second requirement is *opinio juris*, or evidence that states that engaged in actions constituting “settled practice” subjectively believed that they “were conforming to what amounts to a legal obligation.” *Id.*

⁷¹ See *Barcelona Traction*, 1970 I.C.J. at 32-50. The analysis of corporate nationality included multiple references to past PCIJ and ICJ cases but not one mention of state practice in diplomatic protection. Apparently the ICJ dismissed an analysis of custom without any reference to it at all. *Id.*

⁷² See, e.g., Metzger, *supra* note 45, at 542--43 (summarizing nationality requirements for investment guarantee schemes).

⁷³ See, e.g., David J. Bederman, Interim Report on “Lump Sum Agreements and Diplomatic Protection,” International Law Association: Second Report of the Committee on Diplomatic Protection of Persons and Property 3 (2002) (assessing a wide variety of lump-sum agreements from 1975-95).

⁷⁴ Interview with Anonymous Attorney-Advisor, U.S. Department of State (Nov. 3, 2001) (notes of interview on file with author). But see First Report on Diplomatic Protection, *supra* note 3, at 15-16 (observing that international tribunals have distinguished “diplomatic action” from the institution of judicial proceedings, while legal scholars have embraced a multiplicity of actions--anywhere from negotiation to the use of force--as within the rubric of diplomatic protection).

⁷⁵ Interview with Anonymous Attorney-Advisor, *supra* note 74.

⁷⁶ See George T. Yates III & Thomas E. Carbonneau, International Claims: Contemporary Belgian Practice, in *International Claims: Contemporary European Practice* 96 (Richard B. Lillich & Burns H. Weston eds., 1982) (arguing that states should publicize their claims practice so that the ICJ will be forced to “give more consideration to state practice in future cases” and to make it “more difficult to ignore as part of the customary rules of international law”).

⁷⁷ See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 *Am. J. Int'l L.* 757, 767 (2001) (noting that “[t]raditional custom is meant to be based on general and consistent state practice, but selective analysis inheres in this approach because of the impossibility of thoroughly analyzing the practice of almost two hundred states.”).

⁷⁸ See Richard D. Kearney, Diplomatic Protection of United States Foreign Investments, in *International Project Finance: 1975 Ford Corp. L. Inst.* 243, 246-50 (1975) (observing that, as the number of developing states grew during the 1960s and 1970s, there was gradual erosion of an agreement over the validity of diplomatic protection for the expropriation of property to be accompanied by “prompt, adequate and effective” compensation). See also Thomas M. Franck, Fairness in the International Legal and Institutional System, 240 *Recueil des cours* 442, 442 (1993) (“[T]he gap between developed and developing countries is [a] ... central ... element of the fairness problematic ...”).

⁷⁹ See Roberts, *supra* note 77, at 768 (“New, developing, and socialist states have objected to customs as having been created by wealthy European and imperialist powers. Instead of being apolitical, traditional custom is arguably hegemonic, ideologically biased, and a legitimating force for the political and economic status quo. For example, new states are bound by existing customs even though they did not participate in their formation.”).

⁸⁰ See *id.* at 767 (noting that traditional custom, often based on the practice of less than a dozen states, leads to a “democratic deficit” and that “a majority of states rarely participate in the create of customs that limit their sovereignty”).

- ⁸¹ See *infra* Appendix I: State Practice. The state practice catalogued in the appendix comes almost exclusively from various national yearbooks of international law and secondary sources quoting or citing official announcements.
- ⁸² With lump-sum agreements, the respondent state pays a fixed sum to the claimant, usually because the two states must settle many claims at once. The claimant state then distributes portions of the payment to its injured nationals. See Burns H. Weston, et al., *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995*, 3-4 (1999).
- ⁸³ See [The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, U.S.-Iran, art. VII, Jan. 18, 1981, 20 I.L.M. 223](#). See also Brownlie, *supra* note 46, at 487 n.62 (listing relevant Iran-U.S. Claims Tribunal decisions dealing with rules of nationality).
- ⁸⁴ See The Secretary-General, Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687, delivered to the Security Council, U.N. Doc. S/22559 (May 2, 1991), available at <http://www2.unog.ch/uncc/resolutio/res22559.pdf> (establishing the United Nations Compensation Commission).
- ⁸⁵ See *infra* note 217 and accompanying text.
- ⁸⁶ See [Barcelona Traction, 1970 I.C.J. at 40](#) (rejecting the invocation by both Spain and Belgium of lump-sum arrangements as evidence of state practice).
- ⁸⁷ Private settlements of claims and agreements that states understand not to be based on law are not relevant to an analysis of customary law. See Bederman, *supra* note 73, at 6.
- ⁸⁸ “Since World War II, approximately 95 percent of international claims have been handled by the lump-sum settlement-national claims commission process.” See Weston, et al., *supra* note 82, at 4.
- ⁸⁹ See Yates & Carbonneau, *supra* note 76, at 96 (arguing that lump-sum agreements and claims commissions are relevant state practice and are not *sui generis* arrangements or *lex specialis*, as held by the ICJ in *Barcelona Traction*).
- ⁹⁰ See Bederman, *supra* note 73, at 5 (noting that on the issue of full or partial compensation, tribunals have not regarded lump-sum agreements as a source of state practice because “the precise settlement amounts for lump-sum claims do reflect a process of negotiation and conciliation”).
- ⁹¹ See *infra* Appendix I. The commentary on each state notes when evidence of lump-sum agreement is available. Of six countries for which information on lump-sum agreements and claim espousal are available, five states (Belgium, France, Switzerland, the United Kingdom, and the United States) use the same rule for both, and for one state (Australia), it was unclear. See *id.*
- ⁹² See *infra* Appendix I, Part B.4, B.12. Both Canada and the United States accept lump-sum agreements as evidence of state practice.
- ⁹³ See *Barcelona Traction*, *supra* note 71 and accompanying text.
- ⁹⁴ See Hans Wassgren, *The UN Compensation Commission: Lessons of Legitimacy, State Responsibility and War Reparations*, 11 *Leiden J. Int'l L.* 473-74 (1998). But see David J. Bederman, [The United Nations Compensation Commission and the Tradition of International Claims Settlement](#), 27 *N.Y.U. J. Int'l L. & Pol.* 1, 42 (1994) (defending UNCC decisions as relevant to state practice).
- ⁹⁵ United Nations Compensation Commission Governing Council, Decision taken by the Governing Council of the United Nations Compensation Commission 10 at the 27th meeting, 6th sess., Art. 5(1)(b), U.N. Doc S/AC.26/1992/10 (June 26, 1992).

- ⁹⁶ See United Nations Compensation Commission UNCC Governing Council, Decision taken by the Governing Council of the United Nations Compensation Commission during its second session, at the 15th meeting held on 18 October 1991, Rule (f), U.N. Doc S/AC.26/1991/4 (Oct. 23, 1991) (“Shareholders of a corporation which [is not able] [because of its nationality, is not eligible] to claim for its losses, may claim for losses with respect to that corporation.”) (brackets in original). The context does not indicate if “is not able” means that a corporation may not bring a claim because it is legally defunct or because it has no genuine links to the state of registration, which Barcelona Traction rejected. It is even less clear what “because of its nationality, is not eligible” means, although it most likely exists to exclude the claims of Iraqi companies.
- ⁹⁷ See also Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* 631, 635 (1998) (observing that the Iran-U.S. Claims Tribunal contributed greatly to public international law by deciding many more cases than the ICJ and by applying customary law on state responsibility, diplomatic protection, and rules of nationality).
- ⁹⁸ See Algiers Accord, *supra* note 83, art. VII(1)(b) (defining a corporation as a national of the United States or Iran if “it is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, [and] if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock”).
- ⁹⁹ It is, for instance, not clear whether the Ethiopia-Eritrea Claims Commission has articulated rules for nationality. See [Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Dec. 12, 2000, art. 5\(8\), 2138 U.N.T.S. 94](#), available at <http://www.pca-cpa.org/ENGLISH/RPC/EEBC/E-E%20Agreement.html> (allowing for state to make claims on behalf of natural or juridical persons, which are not defined).
- ¹⁰⁰ See Anthony D’Amato, *The Concept of Custom in International Law* 104 (1971) (“What has not been sufficiently recognized in the literature of international law is a secondary, yet significant, effect of treaties. Not only do they carve out law for the immediate parties, but they also have a profound impact upon general customary law for nonparties. For a treaty arguably is a clear record of a binding international commitment that constitutes the ‘practice of states’ and hence is as much a record of customary behavior as any other states act or restraint. International tribunals have clearly recognized this effect of treaties upon customary law”). D’Amato further argues that treaties have an independent effect on the formation of a customary rule. If they were only relevant to the extent that they reflected existing customary law, then they would be superfluous—why not refer to the other state practice? Therefore, treaties themselves constitute a kind of state practice. See *id.* at 115.
- ¹⁰¹ See *id.* at 165 (“Moreover, changing law by treaty affords states a positive alternative for combating what they think are outmoded rules of customary law. Dissatisfied with the underlying customary law, two or more states enter into a treaty which changes the law for them and which becomes a factor in changing the law for all. Were it not for this process, boosted in recent years by the International Law Commission, international law would be deprived of most of its modern content.”).
- ¹⁰² See Gennady Pilch, *The Development and Expansion of Bilateral Investment Treaties*, 86 *Am. Soc’y Int’l L. Proc.* 532, 534 (1992) (reporting on remarks by panelist Kenneth Vandavelde, former member of the negotiating team for the U.S. BITs program at the Office of the Legal Adviser for the Department of State, that the U.S. started the BITs program to build state practice in support of a customary rule favoring prompt and effective compensation for expropriations of foreign-owned property).
- ¹⁰³ See D’Amato, *supra* note 100, at 113, 114 (“[The ICJ] clearly relied upon treaties as precedential facts for deriving a rule of custom that has become known as the ‘genuine link’ rule in cases of nationality.”).
- ¹⁰⁴ See *id.* at 105.
- ¹⁰⁵ See *id.* at 109 (“An easy example of a non-generalizable provision found in nearly every treaty is the clause, usually at its end, providing for specific means of ratification.”).

¹⁰⁶ Id. at 109.

¹⁰⁷ Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *Harv. Int'l L.J.* 67, 71 (2005) (“Due to the inadequacy of customary international law, capital-exporting nations since World War II have made efforts to create international rules to facilitate and protect the investments of their nationals and companies abroad.”).

¹⁰⁸ See *infra* Appendix I tbl.1 (Canada, France, Germany, the Netherlands, Taiwan, the United Kingdom, and the United States).

¹⁰⁹ See *id.* (Australia, Belgium, Italy, and Switzerland).

¹¹⁰ See *supra* note 55 and accompanying text.

¹¹¹ See *infra* Appendix I.C. Before Barcelona Traction, Belgium, Canada and the United States espoused claims on behalf of shareholders in companies incorporated in a third country. None of these countries now do this. France seemed to use the seat test exclusively but after Barcelona Traction changed its practice to espouse claims on behalf of companies incorporated in France but with their seat elsewhere. Italy, before Barcelona Traction, seemed to use, non-exclusively, the seat, control, and incorporation tests. See *id.* at C.7.

¹¹² See *id.* (Australia and Taiwan).

¹¹³ See *id.* (France, Germany and the Netherlands). Unlike Germany or the Netherlands, France primarily uses the seat test but, after Barcelona Traction, will espouse claims on behalf of companies which are only incorporated in France. It is unclear whether France will espouse claims on behalf of companies with their seat in France but incorporated elsewhere, although no evidence suggests that they currently do. See *id.* at Part A.5.

¹¹⁴ See *id.* (United States).

¹¹⁵ See *id.* (United Kingdom).

¹¹⁶ See *id.* (Belgium, Italy and Switzerland). Switzerland uses the control test, regardless of incorporation, but will also espouse claims on behalf of companies with their seat or incorporation in Switzerland. See *id.* at Part A.9.

¹¹⁷ See *id.* Austria refers exclusively to seat. See *id.* at Part A.2.

¹¹⁸ See *id.* at Part A.9.

¹¹⁹ See Lucius Cafilisch, *International Claims: Contemporary Swiss Practice*, in *International Claims: Contemporary European Practice* 139 (Richard B. Lillich & Burns H. Weston eds., 1982) (citing works by two others and a Swiss Foreign Ministry legal opinion of 1978 criticizing Swiss practice for being bound to criteria of control and of predominant interest, as imposed by international law).

¹²⁰ See *infra* Appendix I at Part A.2.

¹²¹ Belgium and Italy will espouse claims for companies with a seat in their territory even if they are incorporated elsewhere. See *id.* at Part A.3, A.7. Ian Brownlie observes that Italy also occasionally uses the control test, but does not seem to cite anything supporting this proposition. See Brownlie, *supra* note 46, at 487.

¹²² See supra notes 26-27 and accompanying text.

¹²³ See *id.* at Part A.12.

¹²⁴ See D'Amato, supra note 100, at 97 (“[A]n ‘illegal’ act by a state contains the seeds of a new legality. When a state violates an existing rule of customary international law, it undoubtedly is ‘guilty’ of an illegal act, but the illegal act itself becomes a disconfirmatory instance of the underlying rule. The next state will find it somewhat easier to disobey the rule, until eventually a new line of conduct will replace the original rule by a new rule.”).

¹²⁵ Certainly, the ILC’s addition of alternative “connecting factors,” such as “seat of management or other some similar connection” represents progressive development of the law. See 2004 ILC Report, supra note 51, at 49.

¹²⁶ See *id.* at 49--52. The ILC does not suggest that Article 9, which defines corporate nationality for diplomatic protection claims, is based on customary international law. By contrast, in discussing Article 14, the exhaustion of domestic remedies requirement, the ILC did say that it was simply “codify[ing] the rule of customary international law” *Id.* at 68.

¹²⁷ See Briggs, supra note 22, at 327. See also Georges Abi-Saab, *The International Law of Multinational Corporations: A Critique of American Legal Doctrines*, in *Third World Attitudes Toward International Law: An Introduction* 549 (Frederick E. Snyder & Surakiart Sathirathai eds., 1987).

¹²⁸ See Mann, supra note 2, at 272 (“There is much academic support for a system of ‘functional nationalities.’”); Francisco Orrego Vicuña, *Liber Amicorum: Ibrahim Shihata* 509-13 (2000).

¹²⁹ [Barcelona Traction](#), 1970 I.C.J. at 33.

¹³⁰ *Id.* at 49.

¹³¹ See Metzger, supra note 45, at 532.

¹³² Article 4 of the ILC draft articles on diplomatic protection suggested making the exercise of diplomatic protection obligatory for *jus cogens* violations. First Report on Diplomatic Protection, supra note 3, at 27. However, Article 4 was largely rejected by the ILC. See Report of the International Law Commission, at 155, U.N. GAOR, 52nd Sess., Supp. No. 10, U.N. Doc. A/55/10 (2000) [hereinafter 2000 ILC Report].

¹³³ See 1 *Encyclopedia of Public International Law* 116-17 (Max Planck Inst. for Comp. Public Law and Int'l Law ed., 1992).

¹³⁴ Despite this glaring fact, the ICJ wrote that *Barcelona Traction* had a “close and permanent connection” with Canada. See [Barcelona Traction](#), 1970 I.C.J. at 42; cf. 2000 ILC Report, supra note 132, at 162.

¹³⁵ See supra note 52 and accompanying text.

¹³⁶ 1 *Encyclopedia of Public International Law*, supra note 133, at 116 (noting that a claimant state may use “diplomatic protection as a tool for promoting other political or economic interests”).

¹³⁷ Recent examples of such abuses--at least on behalf of natural persons--include the U.S. armed interventions in Grenada in 1983 and Panama in 1989. See Marion Nash Leich, *Contemporary Practice of the United States Relating to International Law: Protection of Nationals*, 78 *Am. J. Int'l L.* 200, 200-04 (1984) (summarizing the State Department’s legal justification for the

American intervention in Grenada); see also Marion Nash Leich, *Contemporary Practice of the United States Relating to International Law: Use of Force*, 84 Am. J. Int'l L. 545 (1990) (summarizing the State Department's legal justification for the American intervention in Panama).

The ICJ's Breard case provides an interesting example outside of the diplomatic protection context of how states link unrelated issues. See Margaret Mendenhall, *A Case for Consular Notification: Treaty Obligation as a Matter of Life or Death*, 8 Sw. J.L. & Trade Am. 335, 343 n.68 (2001-02). Paraguay asked the ICJ for provisional measures to stop the execution of Breard, a national of Paraguay, in the United States, until the ICJ could determine if Breard's conviction had violated the Vienna Convention on Consular Relations. The ICJ indicated provisional measures, but the United States (the state of Virginia) executed Breard anyway. Paraguay intended to proceed with the ICJ case on the merits, but removed the case from the ICJ's docket after the United States removed Paraguay from a blacklist of intellectual property violators. Id.

¹³⁸ See Ko Swan Sik, *Chronicle of Events and Incidents Relating to Asia with Relevance to International Law*, 7 Asian Y.B. Int'l L. 391, 424 (1997):

It was reported in October 1996 that the efforts since 1991 to reach an agreement on [a U.S.-Hongkong investment promotion and protection accord] had not yet materialized. One of the toughest differences involved the 'denial of benefits' provision, which would entitle the U.S. to withhold investment protection from a company deemed to be using Hongkong as a base merely to benefit from the treaty ('treaty shoppers'). The U.S. was concerned that companies from China, which is no WTO member, would pose as Hongkong companies and would benefit from the treaty in case of their investing in the US.

¹³⁹ For instance, in *Nottebohm, Lichtenstein*, the country offering diplomatic protection, relaxed its own naturalization standards to make Mr. Nottebohm a national. *Nottebohm, 1955 I.C.J. at 15-16*.

¹⁴⁰ Judge Jessup used this potential abuse to justify the traditional rule of continuity of nationality in diplomatic protection claims. See *Barcelona Traction, 1970 I.C.J. at 189* (separate opinion of Judge Jessup) ("If a powerful State should seek to attract corporations to incorporate under its laws so that it could claim them as nationals even though the corporations had no further connection with that State, this Court should not 'regard itself as bound by the unilateral act' of that State.").

¹⁴¹ See Report of the International Law Commission, at 512, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/55/10 (2001) [hereinafter 2001 ILC Report].

¹⁴² Mr. Nottebohm may not have obtained Lichtensteinian nationality solely to avoid the expropriation of his property; he may also have wished to avoid internment as a German national during World War II. Despite changing nationality, Mr. Nottebohm was arrested in 1943 and deported to the United States, where he was interned for two years. While he was in the United States, Guatemala expropriated all of his property. See *Nottebohm, 1955 I.C.J. at 34* (dissenting opinion of Judge Read).

¹⁴³ 2001 ILC Report, *supra* note 141, at 512 ("[I]t was disputed that States would allow themselves to be abused easily as many had adopted complex procedures for the acquisition of nationality.").

¹⁴⁴ Nationality requirements can serve to "define and strictly to limit the number and aggregate values of claims that a state may espouse." D. Christopher Ohly, *A Functional Analysis of Claimant Eligibility*, in *International Law of State Responsibility for Injuries to Aliens* (Richard D. Lillich, ed.), at 284.

¹⁴⁵ See First Report on Diplomatic Protection, *supra* note 3, at 34. The ILC ultimately rejected this article. See 2000 ILC Report, *supra* note 132, at 156--58.

¹⁴⁶ See First Report on Diplomatic Protection, *supra* note 3, at 57--60.

¹⁴⁷ See 2001 ILC Report, *supra* note 141, at 509-11.

¹⁴⁸ See First Report on Diplomatic Protection, *supra* note 3, at 34-41.

- ¹⁴⁹ *Id.* at 10 (“As long as the State remains the dominant actor in international relations, the espousal of claims by States for the violation of the rights of their nationals remains the most effective remedy for the promotion of human rights. Instead of seeking to weaken this remedy by dismissing it as an obsolete fiction that has outlived its usefulness, every effort should be made to strengthen the rules that comprise the right of diplomatic protection.”).
- ¹⁵⁰ See, e.g., 2000 ILC Report, *supra* note 132, at 156 (noting that Article 4 of the First Report on Diplomatic Protection was “*de lege ferenda* and not supported by evidence in State practice” and that no evidence of *opinio juris* was provided).
- ¹⁵¹ See, e.g., *id.* at 157 (“Diplomatic protection was clearly not recognized as a human right and could not be enforced as such. It was stressed again that a distinction must be made between human rights and diplomatic protection, since, if the two were confused, more problems might be raised than solved.”).
- ¹⁵² Orrego Vicuña, *supra* note 128, at 524-25. He writes that one of the “current or prospective international trends” is that “[c]ontrol of a foreign company by shareholders of a different nationality, generally expressed in a fifty percent ownership of its capital stock or such other proportion needed to control the company, may entitle the State of nationality of such shareholders to exercise diplomatic protection on their behalf or otherwise to consider the company as having its nationality.”
- ¹⁵³ *Id.* at 507.
- ¹⁵⁴ *Id.* at 507--08.
- ¹⁵⁵ *Id.* at 507 (“[E]conomic rights are also considered today to be a part of human rights, justifying liberal mechanisms of protection.”).
- ¹⁵⁶ See *id.* at 507-08 (noting, after discussing changes in human rights law and the laws protecting investments, that “different areas of the law might follow different rules and requirements as to their protection ... but the underlying premise is always the same; that is the assertion of the rights of the individual in their own merit.”).
- ¹⁵⁷ See [International Covenant on Civil and Political Rights, Dec. 6, 1966, art. 1\(2\)](#), 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR] (“All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”).
- ¹⁵⁸ See [International Covenant on Economic, Social and Cultural Rights, Dec. 19 1966, art. 11\(1\)](#), 6 I.L.M. 360, 993 U.N.T.S. 3 [hereinafter ICESCR] (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”).
- ¹⁵⁹ [U.S. Const. amend. V](#) (“No person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation.”).
- ¹⁶⁰ See ICESCR, *supra* note 158, art. 2(3) (“Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”).
- ¹⁶¹ States asserted diplomatic protection claims on behalf of legal persons in both *ELSI* and *Barcelona Traction*. See [Case Concerning Elettronica Sicula S.p.a. \(ELSI\)](#), 1989 I.C.J. 15, 17 (July 20) (noting that the U.S. brought claim on behalf of Raytheon, majority shareholder in *ELSI*); see also [Barcelona Traction](#), 1970 I.C.J. at 7 (noting that Belgium espoused claim on behalf of holding

company Sidro, majority shareholder in Barcelona Traction).

¹⁶² Judge Morelli, in his separate opinion to Barcelona Traction, found such a proposition “unacceptable.” See [Barcelona Traction, 1970 I.C.J. at 239](#) (dissenting opinion of Judge Morelli) (“It is the very idea behind such reasoning which ... is unacceptable: the idea that international law must necessarily offer some kind of protection to shareholders’ interests. There is nothing necessary about such protection; it exists only within the limits and on the conditions which are fixed by international law itself.”).

¹⁶³ See Burns H. Weston, *The New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Some Reflections upon the Contemporary International Law Debate*, in *International Law of State Responsibility for Injuries to Aliens* 90 (Richard B. Lillich ed., 1983) [hereinafter NIEO] (noting that the developed countries, representing 26% of the world population, earn 79% of the world’s GNP, while the developing countries, 74% of the world population, produces only the remaining 21% of global GNP).

¹⁶⁴ Georges Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 *Howard L.J.* 95, 115 (1962) (noting that developing states do not want to “widen the scope of potential intervention” by developed states, and that the argument that developing states benefit from the rules of state responsibility reflects only a “hypothetical reciprocity” that does not apply to developing states, which do not have appreciable numbers of nationals in developed countries).

¹⁶⁵ See Abi-Saab, *supra* note 127, at 549-50.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *id.* at 552.

¹⁷² *Id.* at 563.

¹⁷³ See also Ohly, *supra* note 144, at 284 (noting that nationality requirements can serve to “define and strictly to limit the number and aggregate values of claims that a state may espouse.”).

¹⁷⁴ Abi-Saab, *supra* note 127, at 570-71.

¹⁷⁵ *Id.* at 571.

¹⁷⁶ See A.A. Fatouros, *Transnational Enterprise in the Law of State Responsibility*, in *State Responsibility for Injuries to Aliens*, *supra* note 144, at 377 (“It has not been shown what substantive difference the presence or absence of such a formal link [i.e., as required by Barcelona Traction] makes, from the point of view of the behavior of the enterprise in the host country or from that of the interests of the host country.”).

- ¹⁷⁷ See Franck, *supra* note 78, at 442. “One need not be an economist to be able to predict that investment by rich, developed economies in poor, underdeveloped ones is likely to give rise to social and political tensions capable of vitiating any potential economic benefits. Both the exporter and the importer of capital and technology may harbour false or exaggerated expectations. The former may believe that the mere act of investing in an underdeveloped country should make it the object of gratitude and protect it from all risk of State intervention in its high-risk venture. The latter may see the investor as little more than a thinly disguised emissary of an exploitative colonial regime, unconcerned with the social problems of a society to which it owes no loyalty.”
- ¹⁷⁸ See *id.* at 484 (“Fairness, in the law pertaining to foreign investments, is important not merely because it is a moral requisite, but because, in its absence, a major source of development capital would dry up, magnifying and perpetuating the unfairness of the existing inequalities between rich and poor. Thus there is a double imperative driving the search for a fairness consensus.”).
- ¹⁷⁹ See U.N. Development Program, *Integrating Human Rights with Sustainable Human Development* (Jan. 1998) available at <http://magnet.undp.org/Docs/policy5.html> (arguing that human rights and sustainable development are “interdependent and mutually reinforcing.”). See also The World Bank, *Development and Human Rights: The Role of the World Bank 3* (1998) (“Through its support of primary education, health care and nutrition, sanitation, housing, and the environment, the bank has helped hundreds of millions of people attain crucial economic and social rights. In other areas, the Bank’s contributions are necessarily less direct, but perhaps equally significant.... the Bank contributes to building environments in which people are better able to pursue a broader range of human rights.”).
- ¹⁸⁰ See Weston, *supra* note 163, at 107 (noting that the issue of compensation for wrongful acts is likely to be only “marginally relevant” to redistribution of global wealth (quoting Farer, *The United States and the Third World: A Basis for Accommodation*, 54 *Foreign Aff.* 79, 84)).
- ¹⁸¹ Fatouros, *supra* note 176, at 377 (criticizing *Abi-Saab* as advocating the “manipulation of essentially procedural requirements (more precisely, rules concerning conditions of access) to reach results desirable in terms of substantive law.”).
- ¹⁸² See *Abi-Saab*, *supra* note 127, at 551.
- ¹⁸³ Fatouros, *supra* note 176, at 378 (arguing that developing states have little to gain by clinging legal formalities, as “their interest lies in promoting the law’s piercing the veil of procedural and formal requirements to look at the actual substances of relationships.”).
- ¹⁸⁴ *Id.* at 377 (“[Transnational Enterprises] and their home countries ... are left free to exercise their not inconsiderable ingenuity to find ways by which they can bypass or even harness to their own uses the international law requirements concerning access. The more such requirements are divorced from substantive law principles and rules, the easier it is to manipulate them in whichever direction--and this gives an advantage to the party with more legal talent and resources at its disposition.”).
- ¹⁸⁵ United Nations Conference of Trade and Development, *Trends in International Investment Agreements: An Overview 16* (1999) [hereinafter *Investment Trends*]:
The first post-war years were marked by large-scale nationalizations of key industries, affecting foreign as well as domestic firms, not only in the countries that became part of the socialist bloc, but also in Western Europe As colonial territories began to acquire their independence, moreover, takings of foreign-owned property multiplied. For many of the countries emerging into political independence, but also for some of the economically weaker States that had been independent for some time, a principle political and economic goal was to regain national control over their natural wealth and their economy.
- ¹⁸⁶ See *id.* at 18 fig. 1 (noting that from 1970-74, there was an average of over 50 nationalizations each year).
- ¹⁸⁷ See *id.* at 22.

188 See id.

189 See id. at 23 (“[T]he developing countries’ demands for a radical restructuring of the world trading and financial system, under the banner of the creation of a New International Economic Order, found formal expression in a series of programmatic texts embodied in General Assembly resolutions, adopted by large majorities, but not without dissent.”).

190 G.A. Res. 3201(S-VI) (1974).

191 G.A. Res. 3281 (XXIX) (1974).

192 Id. art. 2(a).

193 Id. art. 2(c).

194 Weston, *supra* note 163, at 95.

195 See Osita C. Eze, *Legal Structures for the Resolution of International Problems in the Domain of Private Foreign Investment: A Third World Perspective Now and in the Future*, 9 *Georgia J. Int'l & Comp. L.* 535, 541 (1979) (“The Charter of Economic Rights and Duties of States, voted against by the majority of western capital exporting countries, confirmed this Third World posture”).

196 Weston, *supra* note 163, at 95.

197 See id. at 110 (noting that the resolutions “reflect both a profound (and by no means wholly unwarranted) belief that the present world order systematically discriminates against the interests of the poor and an equally profound (and by no means wholly unwarranted) conviction that there is no way to reverse this state of affairs except by challenging head-on the criteria, rules, and procedures by which that order, in particular its economic parts, have operated heretofore.”).

198 See *Investment Trends*, *supra* note 185, at 29.

199 Id. at 18 fig. 1 (noting that, from 1980-92, on average, fewer than 5 nationalizations took place every year).

200 Id. at 30.

201 See Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 *Harv. Int'l L.J.* 419, 420 (2000) (“[A] ‘paradigm shift’ has taken place in the terms of Third World oppositional engagements with the mainstream in international law, and the NIEO agenda for redistribution has been replaced by alternative Third World oppositional claims for cultural recognition.... Today, cries of foul play over arbitration are neither as vociferous nor as troubling as they were up to the end of the last decade.”).

202 See Fabienne Fortanier & Maria Maher, *Foreign Direct Investment and Sustainable Development*, 79 *Fin. Market Trends* 107, 109 (2001) (citing OECD statistics that in 1999 indicated that OECD states--the group of the most economically developed states--accounted for 92% of all world foreign direct investment outflows, totaling \$799 billion, and 77% of all inflows, totaling \$865 billion).

203 See id. at 127 n.1 (noting that in 1999, the world average ratio of FDI to GDP was 14%, but that this ratio reached 20% for countries like Colombia and Venezuela, 40% for Chile, 67% for Malaysia, and nearly 86% for Singapore).

- ²⁰⁴ United Nations Conference of Trade and Development, World Investment Report 2002: Transnational Corporations and Export Competitiveness 12 fig. 1.7 (2002). In 1990, foreign aid was the single largest source of resource flows, accounting for the majority of flows, to developing states. In 1994, foreign direct investment became the single largest sources of flows, and by 1996, it accounted for the majority of flows to developing states.
- ²⁰⁵ See *infra* Appendix II: Investment Flows 1970-2004. In 1970, when Barcelona Traction was decided, developing countries received about \$4 billion in foreign direct investment (FDI) inflows, while by 2004 developing countries received about \$233 billion in inflows. Most of that investment went to developing countries in Asia (about \$148 billion) and the Americas (about \$68 billion).
- ²⁰⁶ *Id.* In 2004, while receiving \$233 billion in inflows, developing countries invested \$83 billion abroad. By comparison, in developed countries, outflows almost matched or exceeded inflows. In 2000, developed countries invested \$1.093 trillion abroad and received \$1.134 trillion in inflows. In 2004, however, developed countries invested \$637 billion abroad and received \$380 billion in foreign investments.
- ²⁰⁷ Telephone Interview with Anonymous Attorney-Advisor, *supra* note 74 (noting that since NAFTA was ratified, claims made through NAFTA procedures have largely followed gross investment flows, i.e., most claims are against Mexico and between the U.S. and Canada, but Mexico espouses few claims).
- ²⁰⁸ See Shalakany, *supra* note 201, at 465-66 (“Third World governments may, for any variety of reasons, grow anxious over the distributive repercussions of neoliberal development policies and decide, for example, to reverse their deregulatory commitments to privatization and pursue a more active role in ensuring the equitable redistribution of wealth generated in the course of development.”). If the idea that nationalizations could happen again seems abstract, consider the recent election of left-leaning presidents in South America who have suggested that they may nationalize certain industries run by foreign multinational corporations. See, e.g., Juan Forero, *Bolivia’s Newly Elected Leader Maps His Socialist Agenda*, N.Y. Times, Dec. 20, 2005, at A8 (“The MAS [the Bolivian Movement Toward Socialism party] is now poised to push through legislation tightening the terms on British Gas, Repsol YPF of Spain, Petrobras of Brazil and other foreign energy companies operating here. [Newly elected President Evo] Morales has promised to ‘nationalize’ the lucrative natural gas industry, not by expropriating it, but rather by expanding state control over operations, policy and the commercialization of gas.”); David Rieff, *Che’s Second Coming?*, N.Y. Times, Nov. 20, 2005, at Section 6 (“But while it would be unwise to underestimate the force of knee-jerk anti-Americanism in Latin America, the ubiquitousness of leftist sentiments in Bolivia today has more to do ... with the complete failure of neoliberalism to improve people’s lives in any practical sense.”); *id.* (“It is quite accurate to speak of the rebirth of the left in Latin America, but the sad truth is that the movement’s return is more a sign of despair than of hope.”).
- ²⁰⁹ See William A. Stoeber, *Attempting to Resolve the Attraction-Aversion Dilemma: A Study of FDI Policy in the Republic of Korea*, 11 *Transnat’l Corp.* 49, 49 (2002) (noting that “policy swings have been more pronounced (or at least more public) in the Republic of Korea than in many other developing countries, but similar attraction-aversion patterns are seen in many such countries.”).
- ²¹⁰ See *id.* at 60-61 (“The Republic of Korea appears to have gone through a distinct attraction-aversion-attraction cycle in the first 20 years or so after it began consciously formulating a [foreign direct investment] policy.... This observation obviously cannot be generalized to other developing countries, but it does suggest that any initial cycle may tend to be measured in decades rather than years.”).
- ²¹¹ In 2001, developing countries did not suffer a precipitous decline in inflows. See *supra* note 206.
- ²¹² See *supra* note 204 and accompanying text.
- ²¹³ See *supra* note 198 and accompanying text.
- ²¹⁴ See *Investment Trends*, *supra* note 185, at 21 (“[I]n the early 1960s, developed countries embarked upon a process of gradual

investment liberalization. The two OECD Codes of Liberalization, of Capital Movements and of Current Invisible Operations, established binding rules for continuing liberalization and provided effective machinery for gradual implementation and expansion.”) (citation omitted).

- ²¹⁵ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, [March 18, 1965](#), 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].
- ²¹⁶ See The World Bank Group, ICSID: List of Contracting States and Other Signatories of the Convention (as of, 2006), <http://www.worldbank.org/icsid/constate/c-states-en.htm> (last visited February 25, 2006) [hereinafter ICSID Contracting States].
- ²¹⁷ See Kenneth J. Vandavelde, [Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties](#), 36 *Colum. J. Transnat'l L.* 501, 506-14 (1998). Note that developed states generally do not sign BITs with other developed states, partly because investment is more certain in developed states, and partly because developed states signed treaties of Friendship, Commerce, and Navigation (FCNs) with each other before and just after World War II. Cf, e.g., ELSI, *supra* note 161, at 22 (noting that United States claimed that Italy violated treaty of Friendship, Commerce and Navigation entered by the two states in 1948).
- ²¹⁸ Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 *Int'l Law.* 655, 655 (1990).
- ²¹⁹ See UNCTAD, *Investment Trends*, *supra* note 185, at 47 (“There is very little known on the use that countries and investors have made of BITs: they have been invoked in a few international arbitrations, and presumably in diplomatic correspondence and investor demands. Their most significant function appears to be that of providing signals of an attitude favoring FDI. Their very proliferation has made them standard features of the investment climate for any country interested in attracting FDI.”).
- ²²⁰ See, e.g., Alden F. Abbott, Latin American and International Arbitration Conventions: The Quandary of Non-Ratification, 17 *Harv. Int'l L.J.* 131, 138 (1976) (“Commentators have posited that Latin America has not ratified the ICSID Convention out of some inarticulated fear the ICSID tribunal would be a biased forum, and perhaps a surrogate for diplomatic intervention against the Latin state.”).
- ²²¹ See The World Bank Group, ICSID Contracting States, *supra* note 216 (Afghanistan, Austria, Belgium, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Congo, Democratic Rep. of, Côte d’Ivoire, Cyprus, Denmark, Ethiopia, Finland, France, Gabon, Germany, Ghana, Greece, Guinea, Guyana, Iceland, Indonesia, Ireland, Italy, Jamaica, Japan, Kenya, Korea, Rep. of, Lesotho, Liberia, Luxembourg, Madagascar, Malawi, Malaysia, Mauritania, Mauritius, Morocco, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Pakistan, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Togo, Trinidad and Tobago, Tunisia, Uganda, United Kingdom, United States, Zambia).
- ²²² *Id.* (Costa Rica, Paraguay, El Salvador, Ecuador, Honduras, Argentina, Bolivia, Chile, Grenada, Peru, Uruguay, Colombia, Venezuela, Nicaragua, Guatemala, Panama).
- ²²³ *Id.* (Albania, Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Lithuania, Moldova, Russian Federation, Turkmenistan, Czech Republic, Slovak Republic, Slovenia, Uzbekistan, Republic of Kyrgyz, Bosnia and Herzegovina, Croatia, Latvia, Macedonia, Ukraine, Serbia and Montenegro).
- ²²⁴ See *Investment Trends*, *supra* note 185, at 22 fig.2 (Bilateral investment treaties, 1959-1998).
- ²²⁵ *Id.*
- ²²⁶ Vandavelde, *supra* note 217, at 503.

²²⁷ ICSID Convention, *supra* note 215, art. 27.

²²⁸ See *id.* art. 25(2)(b) (stating that juridical persons with the nationality of contracting states may submit claims to ICSID tribunals).

²²⁹ *Id.*

²³⁰ See generally Christoph Schreuer, Commentary on the ICSID Convention, 11 ICSID Rev.-Foreign Inv. L.J. 318 (1996) (noting that both ICSID and most BITs define “investment” broadly enough to include claims by shareholders in an injured corporation).

²³¹ Andrew T. Guzman, [Why LDCs Sign Treaties That Hurt Them: Explaining The Popularity of Bilateral Investment Treaties](#), 38 Va. J. Int'l L. 639, 656-57 (1998).

²³² See *Lauder v. Czech Republic*, at 11 (UNCITRAL Arbitration) (Sept. 3, 2001) (Final Award), available at <http://www.investmentclaims.com/decisions/Lauder-Czech-FinalAward-3Sept2001.pdf> (alleging, *inter alia*, that the Czech authorities failed to “provide full protection and securities to investments” and violated its “obligation not to expropriate investments directly or indirectly through measures tantamount to expropriation”).

²³³ See *id.* at 74.

²³⁴ See *CME Czech Republic B.V v. Czech Republic*, at 178 (UNCITRAL Arbitration) (Sept. 13, 2001) (Partial Award), available at <http://www.investmentclaims.com/decisions/CME-Czech-PartialAward-13Sept2001.pdf>.

²³⁵ See *CME Czech Republic B.V v. Czech Republic*, at 161 (UNCITRAL Arbitration) (Mar. 14, 2003) (Final Award), available at <http://www.investmentclaims.com/decisions/CME-Czech-FinalAward-14Mar2003.pdf>.

²³⁶ See Guzman, *supra* note 231, at 679.52.

²³⁷ *Id.* at 671-72:

[A] small change in the price of the goods being sold [and thus the cost of investment for a capital exporting state] will lead to a large increase in demand. In the foreign investment context, the goods being sold are the resources of the LDC and the “price” at which investors can get access to those resources will fall as investors are offered more attractive conditions by the potential host.... a country that does sign one will gain an important advantage, and if other countries have already signed BITs, a country that signs one will eliminate the advantage those other countries had in the competition for foreign investment. Thus, regardless of what other countries are doing, a developing country has a strong incentive to be enthusiastic about signing a BIT.

²³⁸ *Id.* at 672:

The impact of this bidding contest on the distribution of the gains from an investment project is dramatic. The country that receives the investment will have won the competition to attract the capital, but will gain little or nothing from its victory. The benefits to the country generated by the investment (in the form of employment, technology transfers, tax revenues, and so on) will be offset by the incentives and concessions that were needed to attract the firm (tax breaks, reduced pollution controls, relaxed and employment regulations, and so on). In other words, as in any competitive market, the seller--here the host country--will receive no economic profit. The entire profit will be enjoyed by the investor.

²³⁹ *Id.* at 683-84.

²⁴⁰ *Id.* at 687.

- ²⁴¹ See *infra* Appendix III (Western Hemisphere BITs), Table 1 (Nationality Provisions in Developed-Developing State BITs).
- ²⁴² See *id.* (U.S.-Haiti & U.S.-Panama BITs).
- ²⁴³ See *id.*
- ²⁴⁴ The Canada-Argentina and Canada-Ecuador BITs allow Canadian corporations to make claims even if their only link is incorporation; companies from Argentina and Ecuador may only make claims against Canada if they are both incorporated and domiciled in those countries. See *id.*
- ²⁴⁵ See *infra* Appendix III, Table 2 (Nationality Provisions in Developing-Developing State BITs) (Bolivia-Peru, Chile-Costa Rica, Panama-Uruguay, Paraguay-Peru, Peru-Venezuela).
- ²⁴⁶ *Id.* (Argentina-Chile, Argentina-Costa Rica, Argentina-Ecuador, Argentina-El Salvador, Argentina-Guatemala, Argentina-Jamaica, Argentina-Mexico, Argentina-Nicaragua, Argentina-Panama, Bolivia-Ecuador, Brazil-Chile, Costa Rica-Paraguay, Costa Rica-Venezuela, Ecuador-Paraguay, Ecuador-Venezuela).
- ²⁴⁷ *Id.* (Chile-Ecuador, Chile-El Salvador, Chile-Guatemala, Chile-Honduras, Chile-Nicaragua, Chile-Panama, Chile-Paraguay, Chile-Uruguay, Ecuador-El Salvador).
- ²⁴⁸ See *id.* (Argentina-Bolivia, Argentina-Peru, Argentina-Venezuela, Barbados-Venezuela, Bolivia-Chile, Brazil-Venezuela, Chile-Venezuela, Dominican Republic-Ecuador, El Salvador-Peru, Paraguay-Venezuela).
- ²⁴⁹ See *id.* (Columbia-Peru).
- ²⁵⁰ [Barcelona Traction](#), 1970 I.C.J. at 49.
- ²⁵¹ See, e.g., *supra* notes 232-235 and accompanying text.
- ²⁵² See *supra* note 130 and accompanying text.
- ²⁵³ See *supra* notes 134-139 and accompanying text.
- ²⁵⁴ See *supra* note 225 and accompanying text.
- ²⁵⁵ See *supra* note 139 and accompanying text.
- ²⁵⁶ See *supra* note 179 and accompanying text.
- ²⁵⁷ See *supra* note 239 and accompanying text.
- ²⁵⁸ See *supra* notes 170-175 and accompanying text.
- ²⁵⁹ See *CMS Gas Transmission Co. v. Republic of Argentina (Jurisdiction)*, P 45 (ICSID Tribunal) (July 17, 2003), at 42 I.L.M. 788,

795 (2003), available at <http://www.investmentclaims.com/decisions/CMS-Argentina-Jurisdiction-17Jul2003.pdf>, (“Diplomatic protection itself has been dwindling in current international law To some extent, diplomatic protection is intervening as a residual mechanism to be resorted to in the absence of other arrangements under international law, particular in respect of foreign investments, the paramount example being that of [ICSID].”).

- ²⁶⁰ Juliane Kokott, Interim Report on “The Role of Diplomatic Protection in the Field of the Protection of Foreign Investment,” *International Law Association: Second Report of the Committee on Diplomatic Protection of Persons and Property* 21, 31 (2002), available at <http://www.ila-hq.org/pdf/DiplomaticProtection/DiplomaticProtectionSecondReport2002.pdf>.
- ²⁶¹ See supra notes 209-210 and accompanying text.
- ²⁶² Jonathan Brown, *Australian Practice in International Law 1988 and 1989*, 12 *Austl. Y.B. Int'l L.* 319, 396 (1992) (citing *Foreign Corporations (Application of Laws) Act, 1989, Bill[183]* (Austl.)).
- ²⁶³ See D.W. Greig, *Australian Practice in International Law 1978-1980*, 8 *Austl. Y.B. Int'l L.* 253, 342-43 (1983) (citing Treasurer’s announcement of new foreign investment policy, 109 *Parl. Deb., H.R.*).
- ²⁶⁴ See Burns H. Weston, Richard B. Lillich & David J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995*, 219 (1999) (reprinting *Austria-Czechoslovakian lump-sum agreement of Sept. 9, 1975*, 995 *U.N.T.S.* 325, in which Czechoslovakia paid compensation for confiscations and nationalizations of Austrian juridical person, defined as those “having their seat in the territory of the Republic of Austria”).
- ²⁶⁵ See Ignaz Seidl-Hohenveldern, *International Claims: Contemporary Austrian Practice*, in *International Claims: Contemporary European Practice*, supra note 76, at 32-33 (citing several lump-sum agreements preceding *Barcelona Traction* as evidence that Austria still uses *siège social* and citing one that infers that as of 1982, the date of publication, this was still true in practice).
- ²⁶⁶ Joe Verhoeven, *Jurisprudence Belge Relative au Droit International: Année 1971*, 9 *Revue belge de droit international* 633, 674-75 (citing Belgian court decisions).
- ²⁶⁷ See *Yates & Carbonneau*, supra note 76, at 70-71 (noting that while Belgium traditionally used the seat test, it also has been willing to use shareholder control, as evinced by the arguments of the Belgian Government in *Barcelona Traction*).
- ²⁶⁸ See Jean J.A. Salmon, *La pratique du Pouvoir Exécutif et le Contrôle des Chambres Législatives en matière de droit international*, 18 *Revue belge de droit international* 342, 436 (citing Belgian governments announcement on whether it would require effective control to espouse claims on behalf of Belgian shareholders in Malaysian corporations). Interestingly, in the *Revue Belge*, these government comments on investment protection treaties were put in the section on diplomatic protection. *Id.* at 435.
- ²⁶⁹ A.E. Gotlieb & J.A. Beesley, *Canadian Practice in International Law during 1968 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs*, 7 *Can. Y.B. Int'l L.* 298, 315 (1969) (“[T]he government generally does espouse claims of Canadian citizens who are shareholders in nationalized foreign corporations. At law, there would appear to be no difference between this and other types of claims, and claims arising out of such shareholdings can be included in lump-sum agreements.”) (quoting a Department of External Affairs letter of Aug. 19, 1968).
- ²⁷⁰ See *id.* at 316 (indicating that shareholders suffered “effective loss[es]” and had valid claims once corporations in which they had shares were nationalized) (quoting a Department of External Affairs letter of Dec. 19, 1968).
- ²⁷¹ Edward G. Lee, *Canadian Practice in International Law during 1973 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs*, 12 *Can. Y.B. Int'l L.* 272, 289-90 (1974) (quoting Department of External Affairs Legal Bureau brief of Sept. 6, 1973). See also Hugh M. Kindred et al., *International Law: Chiefly as Interpreted and Applied in Canada*

674-75 (6th ed. 2000) [hereinafter Kindred] (citing J.-G. Castel, *Legal Services Provided by the Department of External Affairs with Respect to International Judicial Co-operation and Other Matters*, Department of External Affairs (1987)).

272 Lee, *supra* note 271, at 289.

273 *Id.*

274 *Id.* But see Kindred, *supra* note 271, at 675 (“The Government of Canada may also intervene on behalf of a Canadian shareholder of a foreign company incorporated in a foreign state if that company is injured by the acts of a third states. In such a case, the intervention may be made in concert with the government of the state in which the company was incorporated.”).

275 Philippe Kirsch, *Canadian Practice in International Law: At the Department of Foreign Affairs 1995-96*, 34 *Can. Y.B. Int'l L.* 387, 397-98 (1996).

276 *Id.* at 398.

277 *Id.*

278 *Gotlieb & Beesley, supra* note 269, at 315 (indicating lump-sum settlements, as opposed to individual claims, are negotiated when another state undertakes “a policy of general nationalization and ... the property of a large number of Canadian citizens has been affected ...”).

279 See Burns H. Weston, *International Claims: Postwar French Practice* 91 (1971).

280 Jean François Lachaume, *Jurisprudence Française Relative Au Droit International Public (Année 1972)*, 19 *Annuaire Française de Droit International* 974, 1006 (1973) (quoting French cases that use *siège social* and incorporation to determine the state of nationality of a corporation but explicitly rejecting tests of economic control): “Ainsi une société ... doit être considérée comme française, même si elle est contrôlée par une société étrangère, dès lors qu’elle a été constituée en France, qu’elle y possède son siège social ses établissements principaux, sa direction, son exploitation et est soumise aux lois françaises.” [In this way a corporation ... must be considered as French, even if it is controlled by a foreign corporation, if it was constituted/incorporated in France, or if it has its seat, its principle establishments, its management and its operations in France and is subject to French law.] (quoting *Epelbaum c./Sté des Petroles Shell-Berre*, Cass. 3e civ., Feb. 8, 1972) (translation by author’s colleague Gita Kothari). Lachaume suggests that the tests applied by French courts don’t consider the economic reality of French-incorporated or headquartered companies belonging to multinational groups of companies. See *id.*

281 Weston, *supra* note 279, at 91-92 n.63.

282 See *id.* at 80 (“Generally speaking, consistent with the proposition that only French nationals should be entitled to benefit from French diplomatic protection, all the Settlements Agreements ... have expressly required possession of French nationality as a condition precedent--arguably the condition precedent--to compensatory eligibility.”).

283 See Joachim Karl, *The Promotion and Protection of German Foreign Investment Abroad*, 11 *ICSID Rev.--Foreign Invest. L.J.* 1, 8 (1996) (noting that the rule of nationality for German BITs “regards as German companies only those that have their seat in Germany,” meaning that they must be both incorporated under German law and have their “center of management” in Germany, and that Germany “does not protect firms that are located in third countries and that are controlled by German nationals.”).

284 See *id.* (“Germany is reluctant to deny the protection of [BITs] to certain companies established in its territory and controlled by nationals of the other contracting party, because this deviates from the principle that all companies having their seat in Germany

should be treated equally.”).

²⁸⁵ See *id.* The German BIT with Egypt also requires substantial shareholdings; conversely, the BIT with Liberia allows Germany to protect companies incorporated in a third state if the majority of shares are held by Germans.

²⁸⁶ *Id.*

²⁸⁷ Andrea Giardina, *Compensating Nationals for Damage Suffered Abroad: Italian Practice*, 7 *Ital. Y.B. Int'l L.* 3, 18 (1986-87) (citing Art. 2505 of the Italian civil code and “majority opinion in legal doctrine and the case law.”). A corporation is considered foreign if it is incorporated in another country and its seat is not in Italy. *Id.* at 18 n.59.

²⁸⁸ *Id.* at 20-21 (agreements with Yugoslavia, Czechoslovakia, and Bulgaria).

²⁸⁹ *Id.* at 21 (agreement with the United Arab Republic [Egypt and Syria]).

²⁹⁰ Tullio Scovazzi & Tullio Treves, *Treaties to which Italy is a Party*, 6 *Ital.Y.B. of Int'l L.* 322, 323-44 (1985) (reprinting nationality of Italian corporations provision of Agreement between Italy and Hungary concerning the Settlement of Pending Financial and Patrimonial Questions of 1973); see also Giardina, *supra* note 287, at 19 (1947 agreement with the US).

²⁹¹ Giardina, *supra* note 287, at 19-20 (1949 agreement with Greece).

²⁹² *Id.* at 20 (1967 agreement with the Federal Republic of Germany).

²⁹³ See Scovazzi & Treves, *supra* note 290, at 323-44 (reprinting nationality of Italian corporations provision of Agreement between Italy and Hungary concerning the Settlement of Pending Financial and Patrimonial Questions of 1973). See also Andrea Giardina, *International Claims: Contemporary Italian Practice*, in *European Claims Practice*, *supra* note 76, at 119-20 (observing that Italy has employed siege social in conjunction with the tests of incorporation and shareholder control).

²⁹⁴ See G.N.J van Wees, *Compensation for Dutch Property Nationalized in East European Countries*, 3 *Neth. Y.B. Int'l L.* 62, 70 (1972) (noting that almost all lump-sum claims settlement agreements required claimants to be “juridical persons established and having their seat in the Kingdom of the Netherlands.”).

²⁹⁵ Wees was Senior Legal Officer of the Dutch Ministry of Justice, and Secretary to the Netherlands Claims Commissions. *Id.* at 62. His survey of Dutch lump-sum agreements (written in his personal, not official, capacity) spanned from 1958 to 1971, including agreements before and after Barcelona Traction. Nevertheless, the rule of nationality remained consistent. *Id.* at 70.

²⁹⁶ *Id.* at 69 (“Almost all questions concerning compensation for Dutch property affected by nationalization or like measures in East European countries have been settled by lump-sum agreements.”). Those that are not settled by lump-sum agreements, however, did not seem to have been resolved by way of diplomatic protection, but instead by direct agreement between the injured corporation and the respondent state. *Id.*

²⁹⁷ See, e.g., R.C.R. Siekmann, *Netherlands State Practice for the Parliamentary Year 1985-1986*, 18 *Neth. Y.B. Int'l L.* 249, 305 (1987) (discussing nationality provisions of Dutch-Chinese BIT).

²⁹⁸ Andreas Kley-Struller, *Die Staatszugehörigkeit juristischer Personen (The Nationality of Juridical Persons)*, 2 *Swiss J. Int'l & Eur. L.* [Schweizerische Zeitschrift für internationales und europäisches Recht] 163, 174, 177 (1991).

- 299 *Id.* at 178 (“Der Kontrolltheorie wohnt also durchaus eine gewisse ‘Ängstlichkeit’ inne, indem sie zum vorneherein verhindern möchte, dass die juristische Person zu Umgehungszwecken missbraucht wird.”) (“Inherent in the control theory is a certain kind of ‘anxiety’ that a juridical person will be misused for evasive purposes, which the control theory seeks to prevent from the outset.”) (author’s translation).
- 300 See *id.* at 177 (“Art. 16R liesse allerdings auch Spielraum für eine Auslegung im Sinne einer anderen Theorie; in Frage kommt namentlich eine Kombination von Kontroll- und Inkorporationstheorie.”) (“Article 16R [of the Ministry of External Affairs’s 1978 internal paper on diplomatic protection] does leave room for an interpretation based on other theories [besides the control test]; it envisions specifically a combination of control and incorporation theories.”) (author’s translation). See also Lucius Cafilich, *Contemporary Swiss Practice, in International Claims: Contemporary European Practice*, *supra* note 120, at 144-45 (indicating that Switzerland had used the shareholder control test exclusively but, in recent years, has shown a willingness to espouse claims on behalf of companies registered in Switzerland).
- 301 Hungdah Chiu & Chih-Yu T. Wu, *Contemporary Practice and Judicial Decisions of the Republic of China Relating to International Law, 1998-1999*, 17 *Chinese Y.B. Int'l L. & Affairs* 141, 215 (1999) (citing Statute for Investment by Foreign Nationals, art. 3 (Amended Nov. 19, 1997)).
- 302 *United Kingdom Materials on International Law 1983*, 54 *Brit. Y.B. Int'l L.* 520-521 (1984) (quoting the Foreign and Commonwealth Office’s 1983 revision of Rules regarding the Taking up of International Claims by Her Majesty’s Government).
- 303 Rule V allows the UK to espouse claims on behalf of UK shareholders to foreign-incorporated companies if the company itself is defunct, and Rule VI allows the UK to make claims on behalf of UK shareholders on behalf of a foreign-incorporated company if the state of incorporation causes the injury. *Id.* at 521.
- 304 The commentary to the 1983 rules indicate that the UK “may consider whether the company has in fact a real and substantial connexion [sic] with the United Kingdom.” *Id.*
- 305 *Id.*
- 306 Geoffrey Marston, *United Kingdom Materials on International Law 1992*, 63 *Brit. Y.B. Int'l L.* 620, 784-85 (1993) (quoting UK amicus curiae brief, filed Nov. 19, 1992, before the U.S. Supreme Court in support of petitioners from Merrett Underwriters Agency Management Ltd., et al. v. *State of California*, 938 F.2d 919 (9th Cir. 1992)). The brief cited U.S. case law, Barcelona Traction, and the American Restatement on Foreign Relations in answering the court of appeals statement that “the interests of Britain are at least diminished where the parties are subsidiaries of American corporations.” See also Geoffrey Marston, *United Kingdom Materials on International Law 1999*, 70 *Brit. Y.B. Int'l Law* 386, 456-58 (2000); Geoffrey Marston, *United Kingdom Materials on International Law 2000*, 71 *Brit. Y.B. Int'l L.* 551, 551-56 (2001) (quoting amicus curiae briefs by the FCO arguing that companies incorporated under the laws of UK Overseas Territories are UK subjects and eligible for alienage jurisdiction in U.S. federal court).
- 307 Richard B. Lillich, *International Claims: Postwar British Practice* 38-39 (1967) (citing Foreign Compensation Commission’s refusal to espouse claims on behalf of corporations formed in Australia, Canada and France in 1956). Lillich criticized the UK’s FCC for maintaining a rule contrary to its professed belief that “in the end result, the slices of the cake should pass to British nationals.” *Id.* at 39.
- 308 *Restatement (Third) of The Foreign Relations Law of the United States* § 213 (1983). Section 213 on the Nationality of Corporations reads, “For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.”
- 309 See, e.g., Act to Amend the International Claims Settlement Act of 1949 to allow recovery by United States Nationals for losses incurred in Vietnam, ch. 702(1)(B), *Pub. L. No. 96-606* (1980) (codified as amended as 22 *U.S.C.* § 1645a(1)(B) (defining a U.S. national as a “corporation ... organized under the laws of the United States ... if natural persons who are citizens of the United

States own, directly or indirectly, 50 per centum or more of the outstanding capital stock or beneficial interest of such corporation or entity"); Act to Amend the International Claims Settlement Act of 1949 to allow recovery by United States nationals for losses incurred in Vietnam, ch. 601(1)(b), Pub. L. No. 94-542 (1976) (same).

³¹⁰ But the Reporters' Notes to the Restatement indicate that "a respondent state is entitled to reject representation by the state of incorporation where that state was chosen solely for legal convenience, for example as a tax haven, and the corporation has no substantial links with that state, such as property, an office or commercial or industrial establishment, substantial business activity, or residence of substantial shareholders." Id. at 126-27. See also supra note 306.

³¹¹ See, e.g., Agreement Between the Government of the United States of America and the Government of the Polish People's Republic Regarding Claims of Nationals of the United States, U.S.-Pol. Annex A(b), July 16, 1960, 11 U.S.T. 1953 [hereinafter Polish Claims Agreement] (defining an eligible corporate claimant as a "juridical person[] organized under the laws of the United States ... of which fifty per cent or more of the outstanding capital stock or proprietary interest was owned by natural persons who were nationals of the United States").

³¹² U.S. Department of State, 8 Digest of Int'l L. 1281-82 (Marjorie M. Whiteman ed., 1967) (noting a pre-Barcelona Traction decision by Foreign Claims Settlement Commission to espouse a claim against Panama for a company incorporated in Panama and 99.9% held by an American shareholder. The Commission stated that "the policy of the United States has been to grant diplomatic intervention where there is a substantial American interest in a foreign corporation.").

³¹³ See Restatement (Third), supra note 308, §§228-29 (discussing claims settlement commissions as part of US's historical "active diplomatic protection for United States nationals.").

³¹⁴ United Nations Conference of Trade and Development, Interactive Database: Major FDI [Foreign Direct Investment] Indicators, at <http://www.unctad.org/Templates/Page.asp?intItemID=3199&lang=1> (click "access" or go directly to <http://stats.unctad.org/FDI>) (last visited April 20, 2006).

³¹⁵ All information in this appendix comes from SICE: Foreign Trade Information System, Investment Agreements Covered in This Compendium, http://www.sice.oas.org/cp_bits/english99/listagrs.asp#ARG (last visited Apr. 17, 2006).

³¹⁶ Starred ("*") BITs are those that require some sort of genuine link.

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ANNEX 139

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Articles

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FOREIGN INVESTORS, DIPLOMATIC PROTECTION AND THE INTERNATIONAL COURT OF JUSTICE'S DECISION ON PRELIMINARY OBJECTIONS IN THE DIALLO CASE

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I. Introduction

Important issues of interest for foreign investors are involved in the ongoing Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) before the International Court of Justice (ICJ). The decision on the Preliminary Objections¹ has already introduced changes to the Court's prior jurisprudence that have had mixed impacts on foreign investors, host States, and even on the cost of the Court when conducting proceedings of this nature. In general, this decision clarifies the municipal law applicable to claims of diplomatic protection of corporations and shareholders; introduces changes to the burden of proof regarding the exhaustion of local remedies, both for the benefit of foreign investors and the Court itself; and restricts which States may be able to seek diplomatic *438 protection of corporations, thereby benefiting host States.

This paper is divided into four parts. The first part briefly introduces the concept of diplomatic protection in public international law. The second part presents the facts of the Diallo dispute between the Democratic Republic of the Congo

(DRC) and the Republic of Guinea. The third part analyzes the ICJ Diallo decision on Provisional Objections, highlighting its most important innovations for the future of diplomatic protection in international law. Finally, the fourth part presents the conclusions of the paper.

II. The Concept of Diplomatic Protection

Diplomatic protection is a principle of customary international law,² first defined by Emmerich de Vattel in 1758 when he stated that “whoever ill-treats a citizen indirectly injures the State, which must protect that citizen.”³ A contemporary notion is provided in Article 1 of the Draft Articles on Diplomatic Protection of the International Law Commission.⁴ The article defines diplomatic protection as an alien’s home state seeking to intervene to protect his rights when infringed upon by the “internationally wrongful act” of another state.⁵ This may be accomplished through the exercise of “diplomatic action or other means of peaceful settlement.”⁶

While diplomatic protection is a concept of customary international law, the violation of aliens’ rights does not impose a duty on their home States to seek the diplomatic protection of their injured nationals. Instead, the State has the discretion to use this tool as the ICJ held in *Case Concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, Second *439 Phase.⁷ This point is reiterated by the International Law Commission in Articles 2 and 19 of its recent Draft Articles on Diplomatic Protection, adopted in 2006.⁸

Diplomatic protection was the first instrument aimed at protecting foreign investors affected by decisions of their host States,⁹ and it may still be considered a useful tool for this purpose.¹⁰ The relevance of the ICJ decisions in this case is that they will play a significant role in how diplomatic protection is deployed by States in future judicial proceedings and non-judicial scenarios.

III. The Facts of the Diallo Dispute

The facts of the Diallo dispute before the ICJ can be summarized as follows. Ahmadou Sadio Diallo is a Guinean businessman who lived in the DRC, formerly known as Zaire, for 32 years.¹¹ Ten years after settling in the DRC in 1964, Diallo became the founder and manager of a company called Africom-Zaire.¹² In 1979 Africom-Zaire (Africom), along with two partners, created Africontainers-Zaire (Africontainers). However, in 1980 the two partners withdrew from the company, leaving its capital owned 60% by Africom and 40% by Mr. Diallo, who also became Africontainers’s manager.

Both Africom and Africontainers confronted problems with *440 major Congolese public institutions and private companies in the 1980s. Africom has debts recognized by the DRC for contracts celebrated and performed between 1983 and 1986¹³ and another dispute with a private company called Plantation Lever au Zaire.¹⁴ Africontainers, for its part, accumulated disputes with Zaire Shell, Zaire Mobil Oil and with the Congolese Office National des Transport and Générale des Carrières et des Mines.¹⁵ Both Africom and Africontainers started judicial proceedings to resolve their disputes, which remain unresolved to date.¹⁶ Both companies are claiming damages that amount to \$36 billion against Congolese public entities, an amount that is three times the DRC’s foreign debt.¹⁷ In one of these disputes, a DRC court ruled in favour of Africontainers and against Zaire Shell; however, the DRC Minister of Justice stayed proceedings for the enforcement of the ruling. The stay was later lifted and Zaire Shell’s property was attached, but the attachments were revoked upon instructions from the Minister.¹⁸

Relations between Mr. Diallo and the above-mentioned private Companies continued to deteriorate, and in 1995 the companies asked the Congolese government to intervene “to warn the courts and tribunals about Mr. Amadou Sadio Diallo’s conduct in his campaign to destabilize commercial companies.”¹⁹

On October 31, 1995, the Prime Minister of Zaire, today the DRC, ordered the expulsion of Mr. Diallo on the grounds that his “presence and conduct have breached public order in Zaire, especially in the economic, financial and monetary areas, and continue to do so.”²⁰ The order was mistakenly labeled as a “refusal to entry” rather than as a formal expulsion, and according *441 to Congolese legislation, the order had no appeal.²¹ Prior to his expulsion, Mr. Diallo had been arrested and imprisoned.²²

In the case before the ICJ, Guinea argued that Mr. Diallo’s detention and expulsion violated the Vienna Convention on

Consular Relations²³ and sought to exercise its diplomatic protection on behalf of Mr. Diallo as an individual and as associé²⁴ of Africom and Africontainers and, specifically, his rights to oversee, control, and manage the companies. Guinea also asked to exercise its right to diplomatic protection, by substitution, of both companies in order to recover the debts owed to them.²⁵ According to Guinea, the DRC violated the Vienna Convention on Consular Relations,²⁶ the Universal Declaration of Human Rights of 10 December 1948, and the International Covenant on Civil and Political Rights of 19 December 1966. Finally, Guinea claimed that the DRC failed to grant Mr. Diallo treatment according to “a minimum standard of civilization.”²⁷

In response to these claims, the DRC presented two preliminary objections: first, that Mr. Diallo had not exhausted the local remedies available to him, and second, that Guinea lacked standing to seek the diplomatic protection of Africom and *442 Africontainers, since these companies were not incorporated under its laws.²⁸ The ICJ rejected the first objection²⁹ and upheld the second.³⁰

IV. The ICJ’s Decision on Preliminary Objections in Diallo

The ICJ’s decision on preliminary objections in Diallo ratified its previous judgment in Barcelona Traction on a number of issues and put in place new features regarding diplomatic protection that will provide a clearer framework for the use and application of this legal institution by States, foreign investors, and the ICJ itself.

A. The Use of Specific Domestic Legislation by the ICJ to Decide on Claims of Diplomatic Protection of Corporations and Shareholders

The use of domestic legislation by the ICJ is important to ascertain who can exert diplomatic protection of rights on behalf of corporations and shareholders or associés and the scope of these rights. In Barcelona Traction, the Court recognized the need to consider municipal legislation when adjudicating disputes involving diplomatic protection of corporations and shareholders,³¹ but a passage in the judgment left doubts regarding what municipal law should be assessed in the identification and scope of the rights the claiming State was seeking to protect. In effect, the *443 Court stated rather confusingly:

[T]hus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers.³²

The Court seems to be suggesting that it would assess corporate municipal laws and infer from them general principles of law applicable to the international realm of diplomatic protection. Determining whether there are general principles of law regarding corporations, and if it appears that there are, defining their content with sufficient precision to make them workable for foreign investors, States, and adjudicators is a daunting task, full of practical obstacles and uncertainty. A much clearer method was required, and the ICJ rectified its approach in Diallo by considerably simplifying the use of municipal law. The Court can refer to the municipal law of a specified State and does not need to seek out general principles. In effect, the Court said that it was necessary to determine whether the laws of the State of incorporation give companies “a legal personality independent of their members.”³³ If a corporation has an “independent corporate personality,” the implication is that the corporation has property rights that it can alone protect.³⁴ To determine if an independent corporate personality exists, the Court established that international law must defer to “the rules of the relevant domestic law.”³⁵ By applying this standard the ICJ found that under the relevant law, that of the DRC, corporations do have a separate legal personality.³⁶

But the most important progress made by the ICJ in Diallo deals with the use of municipal law for the determination of the shareholders’ rights whose integrity is pursued through the exercise of diplomatic protection. The Court determined that such rights and their content are determined by the municipal law of the *444 respondent State only. The ICJ manifested, “what amounts to the internationally wrongful act, in the case of associés or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of the State, as accepted by both parties.”³⁷

To resort to the law of the State of incorporation of legal persons and to the law of the injuring host State to determine the

extent of shareholders' rights protection is clearly a more predictable, efficient, and easy-to-administer criterion in the realm of diplomatic protection than to search for general principles of law in the domain of corporations. The Court deserves credit for such progress.

B. Diallo and the Exhaustion of Local Remedies Rule

Under customary international law, diplomatic protection is available only once an alien has exhausted the local remedies available to her or him. This customary law provision is reflected in Article 14 of the International Law Commission (ILC) Draft Articles on Diplomatic Protection, which indicates:

A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.

'Local remedies' means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.³⁸

The ILC makes clear that the exhaustion of remedies rule requires a foreign national to "exhaust all the available judicial remedies provided for in the municipal law of the respondent State," even to the extent of appealing to the highest court available.³⁹ The ILC further notes that the "highest court available" may be either an ordinary or special court since "the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective *445 and sufficient means of redress."⁴⁰ Furthermore in addition to judicial remedies, aliens must exhaust any administrative remedies available which would have a binding effect on the parties involved.⁴¹ The ILC explicitly states that a foreign national is "not required to approach the executive for relief in the exercise of its discretionary powers" in order to fulfill the requirement of having exhausted all local remedies.⁴²

The arbitral tribunal in *Ambatielos* clearly set out the scope of the rule: "It is the whole system of legal protection, as provided by municipal law, which must have been put to the test."⁴³ The reason for the existence of this rule, as the Court stated in *Interhandel (Switzerland v. United States of America)*, is to ensure that "the State where the violation occurred. . . ha[s] an opportunity to redress it by its own means, within the framework of its own domestic legal system."⁴⁴

In *Diallo* the Court had the opportunity to assess two issues related to the exhaustion of the local remedies rule. The first was whether remedies that give the injuring State total discretion to respond to investors must be exhausted by them. The second issue dealt with the practical application of the rule allocating the burden of proof in cases where exhaustion of local remedies is at issue.

The first issue arose from the DRC argument that Mr. Diallo had not exhausted local remedies, since he had not requested the Prime Minister to reconsider, as a matter of grace, his decision refusing Mr. Diallo entry into the DRC.⁴⁵ The Court held that although all local legal remedies must be attempted before international remedies are sought, only remedies "aimed at *446 vindicating a right and not at obtaining a favour" should be considered, unless requesting a favour "constitute[s] an essential prerequisite for the admissibility of subsequent contentious proceedings" within local jurisdiction.⁴⁶ Thus Mr. Diallo's failure to ask the Prime Minister to reconsider, when such reconsideration was not a recognized legal avenue of appeal, did not amount to a failure to exhaust all local remedies.⁴⁷ There has been wide consensus regarding this finding, which contains a ratification of established international law.⁴⁸

The second dimension of the *Diallo* decision on preliminary objections regarding the exhaustion of local remedies dealt with who bears the burden of proof of such exhaustion. In a general statement, the Court allocated this burden first on the claimant and then on respondent States by declaring:

In matters of diplomatic protection, it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies. . . It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted.⁴⁹

Despite this statement of the rule, it is not the rule that was applied by the Court. According to the formulation of this allocation of burden of proof, the claiming State must demonstrate that its nationals exhausted all the local remedies available in order for its claim to be admissible. Once this is done, if the respondent State is to prevail in its objection, it must demonstrate that the aliens had at their disposal a remedy that they did not exhaust. However, the experience of the Court in *Barcelona Traction* and in the *Case Concerning Elettronica Sicula S.P.A. (ELSI)* (*United States of America v. Italy*), in which all the complexities of the application of this rule were made evident,⁵⁰ apparently compelled *447 the Court to design a more efficient way to verify the fulfillment of this requirement. The Court will not verify on its own whether the claimant effectively exhausted all the remedies. Instead, the respondent State must raise the issue of the alien's failure to exhaust remedies available and prove this objection. The respondent's silence is understood, for practical purposes, to mean that the alien effectively exhausted the remedies. The Court stated:

[A]s the Court has already noted . . . the DRC has for its part endeavoured. . . to show that remedies to challenge the decision to remove Mr. Diallo from Zaire are institutionally provided for in its domestic legal system. By contrast, the DRC did not address the issue of exhaustion of local remedies in respect of Mr. Diallo's arrest, his detention or the alleged violations of his other rights, as an individual, said to have resulted from those measures and from his expulsion or to have accompanied them. In view of the above, the Court will address the question of local remedies solely in respect of Mr. Diallo's expulsion.⁵¹

This is a very efficient way of applying the rule. After all, the Court cannot be required to be an expert in the domestic law of the respondent State and be able to verify on its own whether the alien had exhausted all the local remedies available, thus making the claim of diplomatic protection admissible.⁵² It is more efficient and less costly for the Court to leave the burden of demonstrating that not all the available remedies were tried in the hands of the respondent, which as a matter of course knows its own domestic legal system well.⁵³ The respondent State's silence may then be properly understood to mean that the alien exhausted such remedies.⁵⁴

*448 The Court took this method of applying the allocation of burden of proof to its limits regarding the exhaustion of local remedies in relation to Mr. Diallo's rights as a shareholder. Guinea did not adduce evidence regarding any remedy that Mr. Diallo used to protect his rights as a shareholder, nor did the DRC adduce evidence showing that he had remedies available that he did not exhaust. Instead, both parties concentrated on a general discussion of the effectiveness of any remedy he could have had at his disposal. The Court declared, however, that the DRC had not proved its objection, despite the fact that Guinea had not proved the requirement as to this sort of right. The ICJ stated:

The Court. . . observes that at no time has the DRC argued that remedies distinct from those in respect of Mr. Diallo's expulsion existed in the Congolese legal system against the alleged violations of his direct rights as associé and that he should have exhausted them. The Parties have indeed devoted discussion to the question of the effectiveness of local remedies in the DRC . . . without considering any which may have open to Mr. Diallo as associé in the companies. Inasmuch as it has not been argued that there were remedies that Mr. Diallo should have exhausted in respect of his direct rights as associé, the question of the effectiveness of those remedies does not in any case arise.

The Court concludes from the foregoing that the objection as to inadmissibility raised by the DRC on the ground of the failure to exhaust the local remedies against the alleged violations of Mr. Diallo's direct rights as associé of the two companies *Africom-Zaire* and *Africontainers-Zaire* cannot be upheld.⁵⁵

*449 This is certainly not an example of the well-established rule recognized by the Court according to which "[I]t is the litigant seeking to establish a fact who bears the burden of proving it."⁵⁶ In practical terms, what the Court is applying is a presumption of exhaustion of local remedies by aliens or foreign investors, which the respondent State has to refute in order to prevail in its objection to admissibility.

The Diallo decision thus contains an important development in this regard for the benefit of aliens and foreign investors,

which is also useful and economically rational for the Court. Obviously, the fact that the Court presumes for practical purposes that the local remedies were exhausted does not mean that that this requirement has disappeared. Aliens still have to exhaust local remedies to prevent States from prevailing in their objection later in judicial proceedings by demonstrating that there were some remedies that the former did not utilize.

The one important area that the Court is subject to criticism is that this presumption does not exactly correspond to the allocation of burden of proof of the exhaustion of local remedies previously articulated. If it is going to apply this presumption, the Court should state it clearly for the benefit of host States, which otherwise may be caught by surprise. For example, if the claimant State does not adduce proof of the exhaustion of local remedies and, due to this silence, the respondent State assumes that the Court will declare the claim inadmissible and so fails to raise the objection, the Court's application of the presumption would result in a ruling against the respondent for not having refuted it.

In sum, the foregoing presumption is an adequate way of dealing with the exhaustion of local remedies requirement, but it is regrettable that the Court decided to allocate the burden of proof in one way and then apply it in another. The oft-quoted saying, according to which one has to look at what judges do instead of at what they say, suggests that respondent States should be aware that the safest course of action in any diplomatic protection dispute is to always attempt to refute the presumption by alleging and proving that the alien had local remedies that he or she did not exhaust.

***450 C. Diplomatic Protection of Corporations**

In *Diallo*, the ICJ ratified and further strengthened the rule set in *Barcelona Traction*, holding that the State in which a company is incorporated is the only one that can seek its diplomatic protection.⁵⁷ After this judgment, however, debate arose regarding State practice. The central issue was whether, in addition to this State, the State of the *siège social* or of that of the nationality of the majority shareholders of corporations could also exercise diplomatic protection on behalf of corporations.⁵⁸ In *Diallo*, the ICJ ratified its approach in *Barcelona Traction*, but it departed to a certain extent regarding exceptions to the aforementioned rule. In *Barcelona Traction*, the ICJ, in dictum, stated that for equity reasons, the State of the nationality of the shareholders could invoke the diplomatic protection of the company. It said in this judgment:

[T]he Court considers that, in the field of diplomatic protection as in all others fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State.⁵⁹

Guinea invoked *Barcelona Traction* and relied on bilateral agreements for the promotion of foreign investments and on arbitral awards rendered upon them to demonstrate that the States of nationality of shareholders could also seek the diplomatic *451 protection of their corporations.⁶⁰ The Court sought to establish whether there was an exception to the general rule that would allow the States of the shareholders to exercise diplomatic protection on behalf of their companies on the basis of equity, and concluded that it did not:

The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in customary rules of diplomatic protection; it could equally show the contrary. The arbitrations relied on by Guinea are also special cases, whether based on specific international agreements between two or more States, including the one responsible for the allegedly unlawful acts regarding the companies concerned. . . or based on agreements concluded directly between a company and the State allegedly responsible for the prejudice to it. .

⁶¹

Thus Guinea's suggested argument of diplomatic protection by substitution was rejected. The Court considered State practice and international court decisions dealing with diplomatic protection of shareholders and concluded that there does not

currently exist an exception that would allow shareholders' States to exercise diplomatic protection.⁶² In consequence, the equitable exception provided in *Barcelona Traction*, which favored foreign investors, disappeared in *Diallo*. Once again, in the field of diplomatic protection, the trend of the Court seems to be to put in place criteria whose application by the Court is considerably easier than those existing before.

But the Court did not stop there in its efforts to definitely set the rule that only the State of incorporation of an entity can seek its diplomatic protection. The Court established a high threshold for the application of an exception contemplated by the ILC in its draft Articles on Diplomatic Protection. According to ILC draft *452 Article 11(b):

A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless: . . .

(b) The corporation had, at the time of injury, the nationality of the State alleged to be responsible for causing injury and incorporation in that State was required by it as a precondition for doing business there.⁶³

The Court found that, given that Mr. Diallo had not been compelled by Congolese legislation to constitute Africom and Africontainers, the exception was not applicable.⁶⁴ But in its apparent quest for not allowing the existence of exceptions to the basic rule, the Court subjected the ILC exception to such a high threshold that it is very unlikely that this exception will ever be applied. In effect, the Court established that such application required the demonstration that the Article 11(b) exception had become customary international law.⁶⁵ In its Commentaries to the draft Articles, the ILC based this exception on very limited State practice, a few arbitral awards and doctrine,⁶⁶ and it is unlikely that such sources support the customary character of this exception.⁶⁷

*453 In addition to offering a clearer rule of diplomatic protection of legal entities, the ICJ decision in *Diallo* has narrowed the scope of this protection of entities by reducing the number of States that are allowed to invoke it. Under the criteria set by *Barcelona Traction*, the State of incorporation, under the basic rule, and the State of shareholders, under the equity exception, could exercise diplomatic protection on behalf of corporations. Under the new rule, only the former can do it.⁶⁸

In sum, the Court in *Diallo* ratified the rule according to which only the State of incorporation of a legal person can invoke its diplomatic protection and strengthened this rule by suppressing the previous exception, on the basis of equity, of *Barcelona Traction* and set such a high threshold for the application of the other proposed by the ILC in Article 11(b) that, for practical purposes, this exception is simply a recommendation.

V. Conclusion

As has been shown, the ICJ decision on preliminary objections in the *Diallo* case has important implications for foreign investors, States and the Court itself. Investors are favored by the ICJ decision to define shareholders' rights according to the law of the host State. This finding is not only logical, but it also makes it easier for foreign investors and their States to raise claims of diplomatic protection, when it is required, because this definition determines with clarity the legal framework applicable. Additionally, the *de facto* rule of presumption of local remedies also may also benefit investors by allowing the claim of diplomatic protection to continue, whether or not all the local remedies were exhausted, should the respondent host State fail to raise the objection.

On the other hand, the ICJ decision is unfavourable to foreign *454 investors by having lowered the number of States that can protect the legal persons in which such investors have invested. In fact, this lowering has favoured host States' interests. No doubt, States, other than those of incorporation, raising claims of diplomatic protection of legal persons must rely on their power of persuasion (or on the persuasion of their power), but may not rely on the law as it has been declared by the Court in *Diallo*. For their part, host States are forced, by the presumption of exhaustion of local remedies, to be active in adducing proofs to refute the presumption in order to avoid a claim that they did not have the full opportunity to address from going straight to the decision by the Court on the merits of the case.

From the Court's viewpoint, its decision in Diallo sets clear applicable criteria for who can exercise diplomatic protection on behalf of legal persons and under which concrete legal regimes shareholders' rights will be protected. Finally, the de facto presumption of exhaustion of local remedies by aliens, while preserving the requirement, saves the Court's costs of monitoring compliance with the requisite by transferring them mainly to respondent host States. From the Court's perspective, "pragmatic" could be an appropriate label for the Diallo decision on preliminary objections.

Footnotes

- ⁴¹ PhD. University of Ottawa. Lecturer, Department of Law. Carleton University. E-mail address: aalva076@uottawa.ca.
- ¹ Case Concerning Ahmadou Sadio Diallo. (Rep. of Guinea v. Dem. Rep. Congo) (Preliminary Objections) (Judgment of May 24, 2007), available at <http://www.icj-cij.org/docket/files/103/13856.pdf> (last visited Jan. 29, 2008).
- ² See *id.* para. 39.
- ³ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns*, Vol III, at 136 (James Brown Scott ed., Charles Fenwick trans., Carnegie Institution of Washington 1916).
- ⁴ International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries 24* (2006), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf (last visited Jan. 29, 2008) [hereinafter ILC Commentaries].
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5). The Court said: "The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case...." *Id.* para. 79.
- ⁸ ILC Commentaries, *supra* note 4, at 29, 95.
- ⁹ See generally Richard B. Lillich, *International Claims: Postwar British Practice* (Syracuse University Press 1967); Burns H. Weston, *International Claims: Postwar French Practice* (Syracuse University Press 1971); *International Law of State Responsibility for Injuries to Aliens* (Richard B. Lillich ed., University Press of Virginia 1983).
- ¹⁰ Certainly, today, protection of foreign investors is guaranteed through bilateral investment treaties (BITs), but these instruments add to and do not necessarily replace diplomatic protection as a readily available instrument at the disposal of foreign investors to solve disputes with their host States.
- ¹¹ *Diallo*, *supra* note 1, at para. 1.
- ¹² *Id.* para. 14.
- ¹³ *Id.*

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Diallo, supra note 1, at para. 19.

¹⁸ Id. para. 18. The DRC recognized the stay, but it is considered as a normal proceeding in some African countries, under their understanding of the separation of powers. Id. para. 20.

¹⁹ Id. para.18.

²⁰ Id. para.15.

²¹ Id. para. 36, 7.

²² Id. para. 18. There are discrepancies between the parties' versions regarding Mr. Diallo's detention before his expulsion. Guinea argues that he was imprisoned for 75 days (Id. para.17), while the DRC claims that the imprisonment lasted only eight days (Id. para.19).

²³ See id. para. 29. This claim surely refers to Article 36.1(b) of the Vienna Convention on Consular Relations which provides: "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph." Vienna Convention on Consular Relations art 36.1(b), Apr. 24, 1963, 596 U.N.T.S. 261. This precept has been the subject of a series of ICJ judgments in the recent years, paramount among them the LaGrand case. LaGrand Case (Germany v. U.S.), Judgment of 27 June 2001, [2001] I.C.J. Rep. 466.

²⁴ The term associé is used by the Court in its decision. Diallo, supra note 1, at para. 25.

²⁵ Id. paras. 27- 29.

²⁶ Id. para. 29.

²⁷ Id. para. 28.

²⁸ Id. para. 32.

²⁹ Id. para. 48.

³⁰ Diallo, supra note 1, at para. 94. For practical purposes the DRC virtually won the case in economic terms. The Court will not deal with the diplomatic protection of Africom and Africontainers, and therefore, it will neither decide on nor award damages regarding the contractual claims that these companies have against Congolese public entities and private companies.

- ³¹ The Court pointed out in *Barcelona Traction*:
“In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.” *Barcelona Traction*, *supra* note 7, at para. 38.
- ³² *Id.* para. 50.
- ³³ Diallo, *supra* note 1, at paras. 61, 2.
- ³⁴ *Id.*
- ³⁵ *Id.*
- ³⁶ *Id.* para. 61.
- ³⁷ *Id.* para. 64.
- ³⁸ ILC Commentaries, *supra* note 6, at 70.
- ³⁹ International Law Commission, Report of the Fifty-Fifth Session (2003), A/58/10 at 87, available at <http://untreaty.un.org/ilc/reports/2003/2003report.htm>.
- ⁴⁰ *Id.*
- ⁴¹ *Id.* at 88.
- ⁴² *Id.*
- ⁴³ ILC Commentaries, *supra* note 4, at 72 n.177 (quoting *Ambietalos Claim of 6 Mar. 1956*, 12 UNRIAA 83, 120).
- ⁴⁴ Diallo, *supra* note 1, at para. 42 (quoting *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 27).
- ⁴⁵ Diallo, *supra* note 1, at para. 37. The expulsion of Mr. Diallo was mistakenly made by means of a refusal to entry order, which, as was mentioned, lacked any appeal under Congolese law. The DRC argued that, when some foreigners had asked for reconsideration as a matter of grace, the decisions affecting them had been resolved favourably. See *id.* paras. 36, 37.
- ⁴⁶ *Id.* para. 47
- ⁴⁷ *Id.*
- ⁴⁸ This is not to say that this finding is unimportant; it saves foreign investors’ time and money in not having to pursue such remedies.

⁴⁹ Diallo, *supra* note 1, at para. 44.

⁵⁰ See *Barcelona Traction*, *supra* note 7, pt. VII; *Elettronica Sicula S.P.A. (ELSI) (US v. Italy)*, 1989 I.C.J. 15, at paras. 55- 63 [hereinafter ELSI].

⁵¹ Diallo, *supra* note 1, at para. 45.

⁵² The Court implicitly recognized such difficulty in its judgment in ELSI where it said: “It is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been ‘exhausted’”. ELSI, *supra* note 50, at para. 63.

⁵³ This is certainly not to say that the ICJ would not be in a position to arrive at a conclusion in this regard, since, among other tools, it has the possibility of requiring the assistance of legal experts, pursuant to Article 50 of the Statute, to produce an analysis independent of that offered by the parties. But the use of these tools and the assessment of the report rendered by the experts imply costs that the Court avoids with the presumption.

⁵⁴ This also means that if the respondent State does not raise the preliminary objection of lack of exhaustion of local remedies, the ICJ will not assess whether the claiming State has met any standard of proof regarding the exhaustion of these remedies by its national. Absent such objection, the Court assumes on its face that the remedies were exhausted by the alien. For evaluation of the standard of proof regarding the exhaustion of local remedies in other areas of international law, see Bernard Robertson, *Exhaustion of Local Remedies in Human Rights Litigation. The Burden of Proof Reconsidered*, 39 *International and Comparative Law Quarterly* 1991 (1990).

⁵⁵ Diallo, *supra* note 1, at paras. 74, 75. This is not to say that Mr. Diallo had local remedies available to protect his rights as *associé* against the DRC’s decision to expel him, which was affecting those rights. As was said before, the order that materialized such determination did not have any appeal; therefore, there was no remedy to exhaust to protect Mr. Diallo’s rights. Oddly, Guinea framed the issue not with the lack of remedy to exhaust but with the ineffectiveness of any remedy he could have had at his disposal, and so did the DRC, as the ICJ stated in the quoted passage. (For Guinea’s arguments, see *id.* paras. 73, 3. For DRC’s arguments, see *id.* paras. 69- 71).

⁵⁶ *Military and Paramilitary Activities. (Nicar. v. U.S.)*, Decision on Jurisdiction of the Court, 1986 I.C.J. 392, 437.

⁵⁷ See Diallo, *supra* note 1, at paras. 88-89. The Court held in *Barcelona Traction*, “The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office...” *Barcelona Traction*, *supra* note 7, at para. 70. One of the policy reasons for this decision was to prevent the Court from receiving multiple claims from different States, since this would open the door for States of nationality of any shareholder to potentially exercise the diplomatic protection of the corporations in which they have invested. See ILC Commentaries, *supra* note 4, at 59.

⁵⁸ United States and European practice supported this debate. For an analysis of this practice, see D. Christopher Ollis, *A Functional Analysis of Claimant Eligibility*, in *International Law of State Responsibility for Injuries to Aliens*, *supra* note 9, at 281, 294-99.

⁵⁹ *Barcelona Traction*, *supra* note 7, at para. 93.

⁶⁰ Diallo, *supra* note 1, at para. 54.

⁶¹ *Id.* para. 90.

⁶² Id. para. 89.

⁶³ ILC Commentaries, *supra* note 4, at 58.

⁶⁴ See Diallo, *supra* note 1, at paras. 91- 93.

⁶⁵ See *id.* para. 93. The Court said: “The Court concludes on the fact before it that the companies, Africom-Zaire and Africontainers-Zaire, were not incorporated in such a ways that they would fall within the scope of protection by substitution in the sense of Article 11, paragraph (b), of the ILC draft Articles on Diplomatic Protection referred to by Guinea. Therefore, the question of whether or not this paragraph of Article 11 reflects customary international law does not arise in this case.” *Id.*

⁶⁶ ILC Commentaries, *supra* note 4, at 62-65.

⁶⁷ The ILC’s analysis is similar to the one carried out by Belgium in the Case Concerning the Arrest Warrant of 11 April 2000 in an attempt to demonstrate the that there was an exception provided for by customary international law to the rule of criminal immunity of Ministers for Foreign Affairs. The ICJ declared that such analysis was insufficient to prove the existence of international customs:

“The Court has carefully examined State practice, including national legislation and those few decision of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.” [Case Arrest Warrant of 11 April 2000 \(Dem. Rep.Congo v. Belg.\)](#), Judgment, 2002 I.C.J. 3, 24 (Feb. 14).

⁶⁸ It is important not to ignore the fact that State practice still can seek to protect corporations due to their nationals’ involvement as shareholders. See, e.g., ILC Commentaries, *supra* note 4, at 65 n.160 (noting that the UK 1985 Rules Applying to International Claims state, “where a United Kingdom national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, Her Majesty’s Government may intervene to protect the interest of the United Kingdom national.”). However, such States will not be able to seize the ICJ to solve the dispute in the event of the given host State’s refusal to end the dispute, provided that the Court has jurisdiction on the dispute.

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ANNEX 140

2019

Piercing the Corporate Veil: Historical, Theoretical & Comparative Perspectives

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PIERCING THE CORPORATE VEIL: HISTORICAL, THEORETICAL AND COMPARATIVE PERSPECTIVES

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INTRODUCTION

The concept of a company as a separate entity from its shareholders is well known and recognized in many common law and civil law countries. Generally, this is a fundamental aspect of corporate law and courts hesitate to depart from it. Nevertheless, the principle of separate personality is not absolute. In both, common law and civil law countries, the courts have the power to depart from it. Where the courts do not give effect to separate personality, it is often said that the courts “pierce” or “lift” the corporate veil. This will usually, but not

inevitably, lead to liability being imposed on another person, perhaps in addition to the corporate vehicle.¹

This paper aims to compare and critically examine the circumstances under which veil piercing takes place against the objectives of incorporation. Both common law jurisdictions, including England, Singapore, and the United States, and civil law countries, including China and Germany, are discussed in this paper. The main purpose of this comparison is to offer a reasonably comprehensive and thorough examination of how courts in these jurisdictions apply the principle of veil piercing, which has been formally adopted either through case law or legislation. This paper employs the functional method in comparative law, but we also consider other aspects, including the law in context method and the historical method. The countries being compared, whether they use common law or civil law systems, share many parallels in part because the historical circumstances leading to the rise of corporate personality were very similar, and also because the corporate laws in Asian countries referred to in this paper are legal transplants. The paper argues that in almost all the jurisdictions examined, some cases of veil piercing ought not to have been decided as such because such decisions give rise to sub-optimal outcomes. Instead, other legal tools should have been used, particularly those in the law of torts. We believe this paper fills a gap in the literature of comparative corporate law, as the doctrine of veil piercing has been frequently misapplied and there is a paucity of academic commentary in this area.²

This paper proceeds as follows. In the next part, we will outline the historical context that led to the rise of the modern corporation. After this, the paper sets out the conceptual framework behind separate personality and veil piercing. Thereafter, it will discuss the approaches to veil piercing in the jurisdictions mentioned earlier and critically evaluate these approaches in light of the rationale behind separate personality and other relevant objectives in corporate law.

HISTORICAL CONTEXT

Certain business arrangements, including forms approximating to the modern partnership, can be traced back to ancient Rome and perhaps even before. Today, we are familiar with the limited partnership as well as the general partnership, both of which have roots in Roman times. The Roman *societas* (partnership) allowed the *socius* (partner) to contribute capital or labor towards any enterprise,

1. It does not mean that the corporate entity ceases to exist but simply that corporate personality is not given its full effect.

2. In writing this paper, we have borne in mind the excellent advice to approaching comparative corporate law given by David C. Donald, *Approaching Comparative Corporate Law*, 14 *FORDHAM J. CORP. & FIN. L.* 83 (2008), in particular to be aware (as much as we can) of the natural distorting tendencies of one's own perspective.

commercial or otherwise, unless the enterprise was illegal.³ The relationship between the partners was contractual. Typically, the partners were responsible for the *societas*' debts and had rights to the *societas*' claims. However, it was possible to also structure the *societas* in a manner where a partner could be exempt from all losses.⁴ Therefore, the agreement between the partners resembles a current general or limited partnership. The essential difference was that in relation to third parties, a partner could not act for the *societas* or for other partners so as to bind them to such third parties. Any contract entered into by a particular *socius* on behalf of the *societas* was the responsibility of that *socius* only vis-à-vis the other contracting party.⁵ The contract between the *socii* determined the extent to which a *socius* could ask other *socii* to bear losses arising out of business transactions (as well as how gains were to be shared).

The *societas* proved to be a convenient and flexible basis for business associations and influenced the development of business forms throughout Europe, although over time some of its more individualistic characteristics were abandoned to facilitate management. For example, one important development was the idea of agency, which brought the *societas* closer to the modern conception of partnership. Agency allowed a *socius* to act in a manner that was binding on other *socii* if he acted for the *societas* and not in his own name.⁶ This made the other *socii* directly liable to creditors. Over time, this development and other concepts that formed part of the written, common laws of medieval Europe (the *ius commune*) helped give partnership law more of the characteristics that modern lawyers can identify with. This brief foray into Roman law illustrates that from early times there was a need for business forms that facilitated associations of persons wishing to engage in transactions with a view to profit.

The main disadvantage of the *societas* (and the modern partnership) was the absence of limited liability. The *societas* (and, subject to the terms of the partnership agreement, the general form of partnership) also did not have perpetual succession and would be terminated upon the withdrawal or death of one of the partners.⁷ Notwithstanding this, the Romans understood the benefits of the modern company. The *societas publicanorum* was a variation of the *societas* used by private entrepreneurs who entered into public contracts with the state. The *societas publicanorum* resembled the modern shareholder company with its ability to issue traded, limited liability shares, and the departure of *socii* did not affect its existence. A single person could contractually bind the firm and

3. Henry Hansmann et al., *Law and the Rise of the Firm*, 119 Harv. L. Rev. 1335, 1356–57 (2006).

4. ULRIKE MALMENDIER, SOCIETAS, THE ENCYCLOPEDIA OF ANCIENT HISTORY 6304, 6304–06 (2013).

5. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 455 (1996).

6. *Id.* at 469.

7. *Id.* at 455–56; Ulrike Malmendier, *Law and Finance “at the Origin”* 47 J. ECON. LITERATURE 1076, 1088 (2009).

assume rights in the name of the firm. Some sources even describe it as equivalent to a legal person.⁸ The private entrepreneurs constituting the *societas publicanorum* were known as “government leaseholders” or publicans.⁹

Therefore, unsurprisingly, from the 16th century in England there were attempts to create business organizations that had the same characteristics as the *societas publicanorum*. In England, the early forms of corporateness were the ecclesiastical and the lay. Of the latter, there were municipal corporations during the time of William the Conqueror. These corporations had the right to use a common seal, make by-laws, plead in the courts of law and hold property in succession. Boroughs, whether they had or did not have a royal charter, also apparently held these privileges.¹⁰ However, the rights that were not held through a charter were not safe until the Crown recognized them. The authority of the Crown supplemented natural prescriptive right.¹¹

The *gilda mercatoria*, which was an incorporated society of merchants having exclusive rights of trading within a borough, was another early form of corporateness. As they were associated with boroughs there is some controversy about whether the grant of *gilda mercatoria* to the merchants of a borough was a grant of corporateness to the borough as well. The intimate connection between them makes it difficult to separate the two as distinct organizations.¹² Nevertheless, the fact that, occasionally the status of *liber burgus* (free borough) and *gilda mercatoria* were granted separately suggests they were distinct.¹³

Subsequently, the grant of royal charters extended to commercial enterprises beyond those linked to a borough.¹⁴ A few of the most famous commercial enterprises included the East India Company, Standard Chartered Bank and Royal Bank of Scotland. Aside from royal charters, the corporate form could also be attained through an Act of Parliament. These were not frequently granted and likely required either political connections, wealth or a combination of both. Accordingly, a substitute developed. By the end of the seventeenth century, some idea had been gleaned of one of the primary functions of the corporate concept, namely the possibility of combining the capitalist with the entrepreneur.¹⁵ This

8. Malmendier, *supra* note 7, at 1084–89.

9. *Id.* at 1085.

10. See Cecil Thomas Carr, *Early Forms of Corporateness*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 129 (1909).

11. *Id.* at 138.

12. COLIN ARTHUR COOKE, CORPORATION, TRUST AND COMPANY: AN ESSAY IN LEGAL HISTORY 21 (1950).

13. *Id.* at 177–78.

14. The grant of royal charters also extended to other bodies, such as universities and professional organizations. Further, see STEPHEN BAINBRIDGE & TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS 27–31 (2016).

15. PAUL L. DAVIES, GOWER’S PRINCIPLES OF MODERN COMPANY LAW 23 (6th ed. 1997).

was effected through the formation of large quasi-partnerships known as joint stock companies.¹⁶

The term ‘company’ in this context was of course a misnomer by modern standards as it simply meant association. Joint stock companies were unincorporated associations,¹⁷ many of which were originally formed as partnerships by agreement under seal, providing for the division of the undertaking into shares which were transferable by the original partners.¹⁸ In England they emerged in the 16th century because of the demands of foreign trade which required capital in large amounts to be tied up for lengthy periods.¹⁹ In essence, such ‘companies’ continued to be partnerships. They differed from a typical partnership because they generally consisted of many members, and this meant that the articles of agreement between the parties were usually very different.²⁰ This structure was not without its problems as partnership law was not well suited for a large association. For example: (1) each of the investors was liable for the joint stock company’s debts; (2) each investor had power to bind the others to a contract with outsiders; and (3) if the joint stock company wanted to sue a debtor all investors had to be joined as plaintiffs.²¹ The converse was also true if the joint stock company was to be sued; all investors had to be joined as defendants.²²

As a result of the transferability of shares, speculative activity took place. The British Parliament intervened to curb the gambling mania by enacting the ‘Bubble Act’ of 1720.²³ The purpose of the Act was to prevent persons from acting as if they were corporate bodies, or to have transferable shares without any authority from the British Parliament.²⁴ Throughout the eighteenth century and beyond the shadow of 1720 retarded the development of incorporated companies.²⁵

16. *Re Agriculturist Cattle Ins. Co.* (1870) LR 5 Ch. App. 725, 733–34 [hereinafter *Baird’s Case*]. As a result of this historical fact, the term “joint stock company” is today sometimes used synonymously with “company” in its modern form. For example, in Europe, the term joint stock company is used to refer to a corporation limited by shares such as the French *societe anonyme* and the German *Aktiengesellschaft*.

17. ROBERT P. AUSTIN ET AL., FORD, AUSTIN & RAMSAY’S PRINCIPLES OF CORPORATIONS LAW ¶ 2.110 (17th ed. 2018).

18. DAVIES, *supra* note 15, at 21.

19. See C. E. Walker, *The History of the Joint Stock Company*, 6 ACCOUNTING REV. 97, 99 (1931).

20. WILLIAM WATSON, A TREATISE OF THE LAW OF PARTNERSHIP 3, 101 (2d ed. 1807); see also NATHANIEL LINDLEY, A TREATISE ON THE LAW OF COMPANIES, CONSIDERED AS A BRANCH OF THE LAW OF PARTNERSHIP 608–09 (5th ed. 1889).

21. AUSTIN ET AL., *supra* note 17, at ¶ 2.110.

22. See also Paul G. Mahoney, *Contract or Concession: An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 888–89 (2000).

23. Royal Exchange and London Assurance Corporation Act, 1719, 6 Geo. 1, c. 18 (Eng.).

24. COOKE, *supra* note 12, at 85.

25. DAVIES, *supra* note 15, at 28; see also WILLIAM ROBERT SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720, at 438 (1912).

Notwithstanding the Bubble Act, unincorporated joint stock companies continued to exist. An important provision of the Act was in section 25, that exempted ‘trade in partnership’ that ‘may be lawfully done.’ Given that joint stock companies were in essence partnerships, there was considerable scope to work around the Bubble Act. This manifested itself in the ‘deed of settlement company’ which was linked to the two equitable forms of group association, the partnership and the trust.²⁶ Many such ‘companies’ were established during the period the Bubble Act was in force.²⁷ In this incarnation, the ‘company’ would be formed under a deed of settlement (something approximating to a cross between a modern corporate constitution and a trust deed for debentures or unit trusts), whereby the subscribers would agree to be associated in an enterprise with a prescribed joint stock divided into a specified number of shares; the provisions of the deed could be varied with the consent of a specified majority of the proprietors; management would be delegated to a committee of directors; and the company’s property would be vested in a separate body of trustees, some of whom would also be directors.²⁸ The deed of settlement would also provide that the trustees could sue or be sued on behalf of the company to get around the difficulty of claims by or against an unincorporated body with a potentially large membership.²⁹

In addition, the deed would provide that each shareholder was to be liable only to the extent of his share in the capital stock. Although such a provision could only apply to the shareholders *inter se* and not be binding on third parties dealing with the company,³⁰ limited liability could be achieved if contracts between the company and third parties stipulated that the other party to the contract could only look to the common stock of the company and not the assets of individual shareholders.³¹ A number of English cases in the insurance context held that policyholders were bound by the terms of the deed of settlement of the insurance company if such terms were incorporated into the insurance contract.³²

Holdsworth, writing about the joint stock company of the seventeenth century, said that this and other advantages which followed from the corporate form meant that the promoters were able to secure the supreme advantage of attracting capital more easily to finance their undertakings.³³ It gave capitalists an opportunity for investment and made available trade capital that would not

26. COOKE, *supra* note 12, at 85.

27. DAVIES, *supra* note 15, at 30; ROB McQUEEN, *A SOCIAL HISTORY OF COMPANY LAW: GREAT BRITAIN AND THE AUSTRALIAN COLONIES 1854–1920* 20 (2009).

28. DAVIES, *supra* note 15, at 29. See also COOKE, *supra* note 12, at 86–87.

29. See *Baird’s Case*, LR 5 Ch. App. at 734–35 (James L.J.).

30. *Hallett v. Dowdall* (1852) 18 QB 2, 50–51, 118 Eng. Rep. 1, 20 [hereinafter *Hallett*].

31. See COOKE, *supra* note 12, at 87.

32. *Hallett*, 21–22; *Re. Family Endowment Soc’y* (1870) L.R. 5 Ch. App. 118, 136–37; *Re European Assurance Soc’y (Hort’s Case)* (1875) 1 Ch. D. 307, 323–25.

33. See WILLIAM SEARLE HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 205 (3rd ed. 1925).

otherwise have been employed in trade.³⁴ Nevertheless, there was ambivalence towards the corporate form. Adam Smith, for example, had reservations about joint stock companies on the basis that directors of such companies, being the managers of money from others, could not be expected to watch over it with the same vigilance as partners would watch over their own.³⁵ Negligence and profusion must therefore “always prevail, more or less, in the management of the affairs of such a company.”³⁶ Joint stock companies were less efficient than private individuals and could usually succeed only with monopoly rights.³⁷ Despite such ambivalence, the Joint Stock Companies Act was passed in 1844 and marked the beginning of modern company law in England.³⁸ The Act of 1844 came about because of the continued importance of joint stock companies. In addition, concerns over dishonest promoters gave rise to a view that such entities had to be regulated.³⁹

Nonetheless, limited liability was not a feature of the Act of 1844 and it did not arrive easily. It had not been included in the 1844 Act because there continued to be strong reservations against any extension of limited liability.⁴⁰ For instance, according to the 1854 report of the Royal Commission on Mercantile Laws appointed in 1853, a majority opposed extending limited liability to joint stock companies.⁴¹ The commercial community also expressed dissenting views. For example, the Manchester Chamber of Commerce thought that limited liability was subversive of the high moral responsibility that was the hallmark of the law of partnership.⁴² A Manchester manufacturer said limited liability “would become the refuge of the trading skulk; and, as a mask cover the degradation and moral guilt of having recklessly gambled with the interests of traders; and then the stain which now attaches to bankruptcy would cease to exist.”⁴³ In this, we find the familiar concern over unscrupulous promoters using corporate vehicles as an instrument of fraud or other sharp practice, and the lessening of incentive for personal responsibility and vigilance. Yet one wonders if some of the concern might not have been motivated by self-interest on the part

34. *See id.* at 213.

35. An early observation of what is today known as the ‘agency’ problem.

36. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 326 (1869).

37. *Id.*

38. The Act provided *inter alia* for incorporation by registration thereby paving the way for incorporation to be available widely, and disclosure of key information relating to the company which continues to be seen as an important safeguard to third parties dealing with corporate vehicles.

39. MCQUEEN, *supra* note 27, at 44–46; COOKE, *supra* note 12, at 123; BISHOP CARLETON HUNT, THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND 1800–1867 at 90–95 (1936); RON HARRIS, INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844, at 281, 287 (2000).

40. HARRIS, *supra* note 39, at 282.

41. DAVIES, *supra* note 15, at 42.

42. COOKE, *supra* note 12, at 156–57.

43. Quoted in HUNT, *supra* note 39, at 117–18.

of those who did not welcome the democratisation of a business vehicle that could lead to more competition.⁴⁴

Evidently, these concerns did not prevail.⁴⁵ One reason was capital flight as money flowed overseas, particularly into joint stock companies that offered limited liability.⁴⁶ Allowing limited liability would potentially raise the investment opportunities available domestically. This is an early illustration of how, in some areas, the power of the marketplace can bring about greater legal convergence. Another was “social amelioration”.⁴⁷ Limited liability would allow the middle and working classes not to be excluded from fair competition through the fear of personal bankruptcy. It would open up more opportunities for them. It was also thought that the ability to involve a wider segment of people in business might unleash creative energies and revitalise English industry that was in danger of losing its edge and being overtaken by overseas capitalists.⁴⁸ Accordingly, the Limited Liability Act of 1855 was passed. It was soon repealed but substantially re-enacted in the Joint Stock Companies Act 1856.

The incorporated form, and limited liability, came about in England because of the utility of a business organization that could effectively accumulate capital for more productive use.⁴⁹ There is an economic purpose, but more broadly the corporation and limited liability are regarded as beneficial to society as a whole.⁵⁰ Their purposes are as much social and political⁵¹ as they are economic. Ultimately, corporations, like other institutions, must continue to justify their existence by demonstrating that whatever their faults, they bring utility to society that is not easily substitutable. It follows (or at least is implied) that in principle incorporators, owners and managers of companies ought not to expect the full benefits of incorporation if their conduct undermines faith in the institution, and therefore its utility to society. The next part of this paper will discuss this further.

The experience of England is mirrored in other jurisdictions that over time adopted liberal corporate laws to facilitate development. In the United States, as in England, a number of alternatives to the corporate form were used from time to time. These included the limited partnership, the business trust, and the joint stock company and it was by no means certain that a corporation was the best way to raise and manage money for enterprise.⁵² After the American Revolution,

44. See MCQUEEN, *supra* note 27, at 81–86.

45. Mahoney, *supra* note 22.

46. MCQUEEN, *supra* note 27 at 99–100.

47. HUNT, *supra* note 39, at 120.

48. See MCQUEEN, *supra* note 27, at 125.

49. This is not to suggest that other alternative business forms would not have been able to achieve such goals: see HARRIS, *supra* note 39, at 291.

50. For example, it has been said that limited liability “clearly encouraged the flow of capital into new enterprise”: see HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW: 1836-1937*, at 54 (1991).

51. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 53–54 (2003).

52. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 176–77 (1973).

a strong and growing prejudice in favour of equality opposed the English tradition that corporate powers be granted only in rare instances. This led almost immediately to the enactment of general incorporation acts for ecclesiastical, educational, and literary corporations. It was also easier to obtain corporate charters from the new state legislatures than it was in England, leading to a considerable extension of corporate enterprise in the field of business before the end of the eighteenth century.⁵³ The United States was 30 years ahead of English practice, as charters were granted fairly frequently between 1800 and 1830, albeit with conditions and restraints placed on the corporate bodies.⁵⁴ Special chartering, however, smacked of privilege and set off a reform movement that sought to bring about equal access to corporate chartering. States also began to compete for corporate charters in order to increase taxes paid by corporations.⁵⁵

In 1811, the State of New York became the first to pass a general incorporation statute for businesses, although it originally only applied to companies seeking to manufacture particular items, such as anchors and linen goods.⁵⁶ Soon, the types of businesses eligible to incorporate included all forms of transportation and nearly all forms of manufacturing and financial services as well. Other states followed the New York approach. The combined result of a more liberal approach to charters and general incorporation statutes caused the corporation to become crucial to the American economy by the last third of the nineteenth century.⁵⁷ It provided an efficient and trouble free device to aggregate capital and manage it in business, with limited liability and transferable shares.⁵⁸ The adoption of limited liability was an important development. It arose because of the pressure on the growing corporations (of the first half of the nineteenth century) to raise the capital required to take advantage of the emerging technology of the times. It was also a matter of protracted political struggle.”⁵⁹

Taking two examples in Continental Europe, in 1848, Sweden issued a governmental decree that recognised the legal position of the joint stock company. The coming of the railroad with its necessity for a large accumulation of capital was the initial catalyst.⁶⁰ In a number of German states, the pressure to

53. JOSEPH STANCLIFFE DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 7–8 (1917).

54. COOKE, *supra* note 12, at 134. *See also* JOHN STEELE GORDON, *AN EMPIRE OF WEALTH – THE EPIC HISTORY OF AMERICAN ECONOMIC POWER* 229 (2004) (observing that between 1800 and 1860, the state of Pennsylvania alone incorporated more than 2000 companies).

55. WILLIAM A. KLEIN ET AL, *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 114 (2010).

56. FRIEDMAN, *supra* note 52, at 172; BAINBRIDGE & HENDERSON, *supra* note 14 at 37–38.

57. GORDON, *supra* note 54, at 228–29; FRIEDMAN, *supra* note 52, at 177 (suggesting that the triumph of the corporation as a business form over other business forms was due to almost random factors).

58. FRIEDMAN, *supra* note 52, at 178 (quotations omitted).

59. Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 *HASTINGS INT’L & COMP. L. REV.* 297, 301 (2001) (quotations omitted).

60. CHARLES P. KINDLEBERGER, *A FINANCIAL HISTORY OF WESTERN EUROPE* 204 (2006).

move towards a system of free incorporation became progressively irresistible in the 19th century as the country faced the question of how to raise and regulate large capital sums needed for major industrial and infrastructure projects. As with many other countries, the coming of the railways was an important spur for this.⁶¹

Moving to Asia, the first company law in China was enacted by the Qing Dynasty in 1904. It established four types of companies, one of which was the company limited by shares. To qualify as juridical persons with limited liability, all companies had to register with the Ministry of Commerce with registration fees assessed as a percentage of capitalization.⁶² Prior to 1904, there was little formal law associated with business enterprises. In part this was because engaging in commerce did not attract high social prestige. Farmers and artisans enjoyed higher social prestige, the former reflecting the importance of agricultural pursuits for much of Chinese history. Business, on the other hand, was regarded as parasitic without creating anything of value.⁶³ Given the lack of formal law, many Chinese businesses were family affairs, and people often entered transactions based on trust. Private ordering rather than law played a more important role.⁶⁴ The objectives of the 1904 law were to promote China's industrial development; to attain perceived Western standards of law so as to justify demands for the abolition of the system of extraterritoriality that had been imposed on China since the 1840s; and the strengthening of the power of the central government. These broad aims informed revisions of Chinese Company Law over the next eight decades.⁶⁵

After the People's Republic of China was established in 1949, company law was abolished. A process of collectivisation and nationalisation took place that only began to be reversed after the death of Mao Zedong and the era of Deng Xiaoping. This eventually led to the promulgation of the 1993 Company Law, which took effect on July 1, 1994. Article 1 of that Act stated that it was intended to meet *inter alia* the needs of establishing a modern enterprise system, to maintain the socio-economic order, and to promote the development of the socialist market economy.⁶⁶ These stated objects illustrate the instrumentalist nature of corporate law in China.

61. Peter Muchlinski, *The Development of German Corporate Law Until 1990: An Historical Appraisal*, 14 GERMAN L.J. 339, 345–46 (2013) (citations omitted).

62. William C. Kirby, *China Unincorporated: Company Law and Business Enterprise in Twentieth-Century China*, 54 J. ASIAN STUD. 43, 48 (1995).

63. FREDERICK W. MOTE, *IMPERIAL CHINA: 900–1800*, at 390–91 (1999).

64. See generally Kirby, *supra* note 62, at 44–46; Tan Cheng-Han, *Private Ordering and the Chinese in Nineteenth Century Straits Settlements*, 11 ASIAN J. COMP. L. 27, 44–47 (2016).

65. Kirby, *supra* note 62, at 43–44.

66. WANG JIANGYU, *COMPANY LAW IN CHINA – REGULATION OF BUSINESS ORGANIZATIONS IN A SOCIALIST MARKET ECONOMY* 5–7 (2014).

In fact, the process in Asia of creating a commercial law comparable to that found in Western countries began earlier in Japan. The impetus was similar to China's. Japan wanted to end the legal extraterritoriality granted to foreign residents that had been imposed by the "unequal treaties" that forced the opening of the country to foreign trade. In addition, the Meiji government felt that a modern commercial and corporate law system was necessary for the evolution of modern corporations which were regarded as indispensable for nursing strong economic growth. In turn, this would allow the country to create a strong military to assure her safety and independence.⁶⁷

It will be clear from the foregoing that the development of corporate law in China (and Japan) was driven significantly by socio-political objectives. As both countries adopted the German civil law model, their corporate laws were at one time heavily modelled after German corporate law, although American law has since become increasingly influential. In many other parts of Asia that were colonized such as Singapore, colonial governments introduced Western corporate law and naturally mirrored the law in the colonizing country.⁶⁸

VEIL PIERCING – A THEORETICAL ANALYSIS

The brief historical analysis outlined above reminds us that even though we currently take separate personality and limited liability for granted, neither came about naturally or easily. They were accepted ultimately because of a hard-nosed assessment that their benefits outweighed the risks, the latter of which was clear to most. Corporate legislation implicitly tolerates these risks for the greater good.

Statements such as the following have been made in numerous US cases⁶⁹ and is true for many other jurisdictions as well:

The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice....It is clear that a corporation is in fact a collection of individuals, and that the idea of a corporation as a legal entity or person apart from its members is a mere fiction of the law introduced for convenience in conducting the business in this privileged way.

This is the norm today; however, corporate legislation will often contain express exceptions to separate personality or limited liability,⁷⁰ and it is not

67. Harald Baum & Eiji Takahashi, *Commercial and Corporate Law in Japan: Legal and Economic Developments After 1868*, in HISTORY OF LAW IN JAPAN SINCE 1868, at 336–37 (Wilhelm Röhl ed. 2005).

68. For example, Singapore's Companies Ordinance, 1940 (Act No. 49/1940) (Sing.) was based on England's Companies Act, 1929, 19 & 20 Geo. 5, c.23 (Eng.).

69. See e.g., *William H Sanders v. Roselawn Memorial Gardens, Inc.*, 159 S.E.2d 784, 800 (W. Va. 1968) (hereinafter "Sanders"); *TLIG Maintenance Services, Inc. v. Deann Fialkowski*, 218 So. 3d 1271, 1282 (Ala. Civ. App. 2016) (hereinafter "TLIG Maintenance Services").

70. See e.g., Companies Act (Cap. 50, Rev. Ed. 2006) (Sing.), § 340(1) (imposing personal liability on a person who was knowingly a party to a company carrying on business with the intent to defraud creditors of the company, or of any other person, or for any fraudulent purpose).

unusual for other legislation to express exceptions as well in specific circumstances.⁷¹ Such exceptions arise because of a policy choice that the benefits of incorporation ought not to be fully available in such instances.

Given the existence of specific legislative carve outs, and the apparently unqualified nature of limited liability in most jurisdictions,⁷² it is conceivable that any limits to corporate personality or limited liability should be determined within such limited parameters. This has not been the case. The courts have gone beyond exceptions found in legislation to ignore corporate personality and extend liability to shareholders or directors of companies. When corporate personality is ignored or liability is extended, it is often said that the courts are piercing or lifting the corporate veil, thereby allowing the courts to take legal notice of the persons behind the company, usually the shareholders, to whom personal liability may then be attached for obligations that prima facie ought to be attributed only to the company.

What justifies such judicial intervention? In common law countries, statutory interpretation allows a court to determine the scope of a legislative provision, not only from the express language used, but also from what may be fairly implied from the express terms of the legislation and its purpose. As an English judge, Willes J, put it, the legal meaning to be ascribed to a legislative provision is “whatever the language used necessarily or even naturally implies.”⁷³

In the well-known case, *Salomon v. A. Salomon & Co. Ltd.*, it was established, beyond doubt in England, that the company was to be treated as a person separate and distinct from its shareholders, including the principal shareholder and director. Lord Watson observed:⁷⁴

In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.

Accordingly, separate personality cannot be extended to a point beyond its reason and policy, and will be disregarded when this occurs.⁷⁵ Separate corporate identity is conferred “to further important underlying policies, such as the promotion of commerce and industrial growth” and as such “may not be asserted

71. See e.g., Residential Property Act (Cap. 249, Rev. Ed. 2009) (Sing.), § 2, defining a “Singapore company” as generally one which is incorporated in Singapore, and additionally all its directors and members must be Singapore citizens. Thus for the purpose of this legislation, the nationalities of non-Singaporean directors and members are attributed to the company. This in turn determines whether the company falls within or outside the legislative prohibitions.

72. China, which has a more general and open legislative exception which is found in Article 20 of the PRC Company Law promulgated by the National People’s Congress, is an outlier, as we discuss in the part on the People’s Republic of China *infra*.

73. *Chorlton v. Lings* (1868) L.R. 4 C.P. 374 (Ct. Common Pleas) 387. See also *Russian and English Bank v. Baring Brothers*, [1936] 1 A.C. 405 (H.L.) 427 (the House of Lords held that it was a necessary implication of the relevant winding up provisions in the Companies Act that the dissolved foreign company was to be wound up as if it had not been dissolved but had continued in existence).

74. *Salomon v. A. Salomon & Co. Ltd.*, [1897] A.C. 22 (H.L.) 38.

75. *Sanders* 159 S.E.2d at 784; *TLIG Maintenance Services*, 218 So. 3d at 1271.

for a purpose which does not further these objectives in order to override other significant public interests which the state seeks to protect through legislation or regulation.”⁷⁶ In other words, at common law the courts, in construing corporate legislation as giving rise to entities with separate personality and shareholders with limited liability, have concluded that there are implicit limits to this separateness.⁷⁷ These limits are ascertained by reference to what the court construes as the legislative intent behind such legislation, namely to bring about positive social and economic outcomes through an organizational framework that facilitates business transactions.⁷⁸

Using Germany as a civil law comparator, Germany shares similarities with the English common law approach insofar as courts are showing growing reluctance to pierce the corporate veil. In Germany, when limited liability is disregarded, it is referred to as “*Durchgriffshaftung*” and relates to situations not governed “expressly by statutory or other legal rules in which an entity’s existence is disregarded and the owner is held individually liable for the obligations of the company.”⁷⁹ Under the modern approach, courts limit veil piercing to the scenario of commingled assets and otherwise rely on the law of torts to deal with instances in which shareholders intentionally lead companies into insolvency.

Given the importance of legislative policy to determine when piercing the corporate veil takes place, it is unsurprising that generally, in the jurisdictions discussed above, the courts disregard the corporate personality very sparingly and there are few real instances of piercing taking place.⁸⁰ This is consistent with the fact that limited liability was eventually settled upon by legislatures after decades of debate that fleshed out its advantages and disadvantages. The separation of power between judiciaries and legislatures necessitates that due respect be given to the policy choice made. In addition, the advantages of limited liability are regarded as crucial to the development of mature market economies. These advantages have been discussed widely elsewhere and will not be repeated here.⁸¹ Also, courts tend to be sensitive to the need for certainty in matters of

76. *Glazer v. Comm’n on Ethics for Public Employees*, 431 So. 2d 752, 754 (La. 1983) (hereinafter “Glazer”).

77. Tan Cheng-Han, *Veil Piercing: A Fresh Start*, J. BUS. L. 20, 29 (2015).

78. *See e.g., First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

79. Overall outdated because of recent judicial changes, but still correct in this respect. *See* Carsten Alting, *Piercing the Corporate Veil in American and German Law – Liability of Individuals and Entities: A Comparative View*, 2 TULSA J. COMP. & INT’L L 187, 190, 197 (1994) (citations omitted).

80. *See e.g., Prest v. Petrodel Resources Ltd* [2013] UKSC 34; [2013] 3 WLR 1 (Eng.) (hereinafter “*Prest*”); Alting, *supra* note 79, at 191. Although US courts affirm the exceptional nature of veil piercing, the courts there appear more willing to pierce the corporate veil, and courts in China appear even more willing to do so. This is discussed in the part on the People’s Republic of China *infra*.

81. *See e.g.,* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 93–107 (1985); Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 95, 99–107 (1991); BAINBRIDGE & HENDERSON, *supra* note 14, Chapter 3.

business. The importance attributed to certainty is part of the explanation as to why courts do not generally draw a distinction between voluntary creditors who choose to contract with a company and involuntary creditors such as tort victims.

Considering that veil piercing occurs only in exceptional circumstances where the use of the corporate vehicle is inconsistent with the legislative purpose behind corporate personality and limited liability, the courts in the jurisdictions surveyed above express a remarkably similar rationale underlying veil piercing. In the United Kingdom (UK), Lord Sumption, who delivered the leading judgment in *Prest v. Petrodel Resources Ltd.*, opined that “recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse.”⁸² According to his Lordship, the considerations found in the English cases reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality.⁸³ Arguably, this approach by the UK Supreme Court is to be welcomed as it: (1) moves the focus away from metaphors such as “sham” and “façade” to justify veil piercing and which provide virtually no guidance to future courts, and (2) provides an approach that is based on policy.⁸⁴

A court in Singapore, another common law jurisdiction, has framed the approach in similar terms:⁸⁵

Courts will, in exceptional cases, be willing to pierce the corporate veil to impose personal liability on the company’s controllers. While there is as yet no single test to determine whether the corporate veil should be pierced in any particular case, there are, in general, two justifications for doing so at common law — first, where the evidence shows that the company is not in fact a separate entity; and second, where the corporate form has been abused to further an improper purpose.

Courts in the US have also invoked abuse as the underlying principle justifying disregard of the corporate personality. Under *Glazer v. Commission on Ethics for Public Employees*, a court may, “pierce the corporate veil when the established norm of corporateness has been so abused in conducting a business

82. *Prest* [2013] 3 WLR 1 [27].

83. *Id.* at [34]. See also *VTB Capital Plc v Nutritek International Corp* [2012] EWCA (Civ) 808, [2012] 2 C.L.C. 431, 460 (where the Court of Appeal of England and Wales stated that the “relevant wrongdoing [for veil piercing purposes] must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts”); *Faiza Ben Hashem v. Abdulhadi Ali Shayif* [2008] EWHC 2380 (Fam), [2009] 1 F.L.R. 115 [163] (“it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing.”).

84. Tan, *supra* note 77, at 20–21. See also Tan Cheng-Han, *Piercing the Separate Personality of the Company: A Matter of Policy?*, 1999 SING. J. LEG. STUD. 531, 537–43 (1999) (foreshadowing *Prest v Petrodel*). Admittedly, Lord Sumption saw the application of the doctrine in very narrow terms but in this regard he was not in the majority. While all the Justices on the panel agreed that veil piercing was exceptional, they were not prepared to foreclose possible situations where veil piercing may take place beyond the category of “evasion” cases that Lord Sumption felt was the only true category where the corporate veil is lifted.

85. *Tjong Very Sumito v. Chan Sing En* [2012] SGHC 125 (Sing.) [67]; see also *Simgood Pte Ltd v. MLC Shipbuilding Sdn Bhd* [2016] 1 Sing. L. Rep. 1129 [195]–[204].

that the venture's status as a separate entity has not been preserved."⁸⁶ Corporate personality will be respected unless the "legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime,"⁸⁷ acts that speak to abusive conduct. Although under the Federal system in the US courts are not bound by a uniform position on veil piercing, generally there must be an element of wrongdoing to justify disregarding corporate personality.⁸⁸

The importance of wrongdoing towards establishing abuse of the corporate form is another reason piercing is an exceptional remedy. Controllers of companies who in such capacity engage in wrongdoing will often find themselves incurring liability to their companies. While such liability may be academic where the entities are operating under the control of such persons, the issue of veil piercing often arises where the companies are insolvent and incapable of meeting their obligations or liabilities to third parties. In such instances, insolvency regimes usually impose a collective framework within which creditors of companies have their claims adjudicated. Insolvency laws typically frown on creditors who obtain preferential treatment when the corporation is already insolvent.⁸⁹ This is economically efficient as it facilitates an orderly and fair distribution of an insolvent entity's assets to all creditors. When piercing takes place, there is a danger that it may undermine the collective insolvency process and place the claimant in a superior position compared to other creditors of the insolvent corporation. Any successful claim against a corporate controller will diminish the controller's assets and increase the probability that the company will not be able to obtain the full measure of any loss caused to it by the controller's wrongful act. This in turn diminishes the pool of assets available for distribution to creditors as a whole and places those creditors who are able to act more quickly, usually those that are more sophisticated and with greater financial resources, in a superior position. The more liberal the approach to veil piercing, the greater the risk of undermining the insolvency process.

Another perspective favoring a narrow approach to veil piercing is its potential overlap with other legal doctrines. In *Prest v. Petrodel*, Lord Sumption opined that the veil piercing "principle is a limited one because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it

86. *Glazer*, 431 So.2d at 757 (citations omitted).

87. *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255 (E.D.Wis. 1905).

88. This is discussed below.

89. *See generally*, ROY GOODE, PRINCIPLES OF CORPORATE INSOLVENCY 235-237 (4th Ed. 2011); Secured creditors are a significant exception to this as security arrangements are generally regarded as falling outside the general insolvency process. In common law jurisdictions such as England and Singapore, this is because a secured creditor is regarded as having a proprietary interest in property taken as security, allowing such secured creditor the right vis-à-vis such security to stand outside the liquidation process. *See* IAN FLETCHER, THE LAW OF INSOLVENCY 747- 749 (5th Ed. 2017).

unnecessary to pierce the veil.” Where this was not necessary, it would not be appropriate to do so because there would be no public policy imperative to justify such a course.⁹⁰ Another member of the panel, Lord Neuberger, expressed the view that a number of cases that involved veil piercing could and should have been decided on other grounds.⁹¹ Such a view of veil piercing confines the doctrine to a residual category. Nevertheless, this is consistent with the doctrine operating in exceptional circumstances. While a set of facts can raise overlapping legal rules, the exceptional nature of veil piercing justifies its application to situations of abuse that do not potentially fall within other areas of the law. Thus, where the situation overlaps with another area of law, the underlying policies and principles of that area, rather than veil piercing, should set the boundaries for personal liability. Veil piercing in such circumstances gives rise to a risk that corporate law may overreach. The difficulty lies in determining whether individual cases fall into gaps that corporate law should fill or if the lack of any other more obvious remedy reflects the inherent inappropriateness of the claim.

An example of potential overreach may be found in cases where directors (or senior management) were found liable for a tort committed by, for instance, an employee of the company on the basis that the tortious act had been procured, facilitated or directed by the said directors. In many common law countries, this raises a difficult question of policy. On the one hand, directors do not act personally in the discharge of their directorial responsibilities. There are good reasons for this, including the need for the benefits of corporate personality to extend to corporate officers lest it gives rise to disincentives to manage companies. Yet, this view conflicts with the principle that a person should answer for their own tortious acts.⁹² In Australia, judicial statements have been made that this “is a complex and burgeoning field of law”⁹³ and has led to “a confusing picture on an issue that has persistently vexed the common law.”⁹⁴

In Canada and Singapore, there is authority to support the proposition that corporate personality is disregarded where a director is found liable for procuring a tortious act by another person. Canadian courts have made it clear that a particular mental state is required before authorization, direction or procurement sufficient for secondary tortious liability is made out. In *Mentmore Manufacturing Co v. National Merchandise Manufacturing Co*, Le Dain J expressed the view:

But in my opinion there must be circumstances from which it is reasonable to conclude that the purpose of the director or officer was not the direction of the

90. *Prest* [2013] 3 WLR 1 [35].

91. *Prest* [2013] 3 WLR 1 [64].

92. *Mentmore Manufacturing Co v. National Merchandise Manufacturing Co* (1978) 89 DLR (3d) 195 para. 23 (hereinafter “*Mentmore Manufacturing*”).

93. *G M (North Melbourne) Holdings Pty Ltd v. Young Kelly Pty Ltd* [1986] FCA 164 para. 58 (Austl.).

94. *Root Quality Pty Ltd v. Root Control Pty Ltd* [2000] FCA 980 para. 115 (Austl.).

manufacturing and selling activity of the company in the ordinary course of his relationship to it but the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it.⁹⁵

This approach has been accepted in a number of other Canadian decisions.⁹⁶ In *Halford v. Seed Hawk Inc.*,⁹⁷ Pelletier J said the principle underlying the approach in *Mentmore Manufacturing* was that the courts would not allow a corporation to be used as an instrument of fraud. Personal liability attaches to a director where such behavior is tortious, or when the corporation is used as a cloak for the personal activities of the director.⁹⁸ This is the language of veil piercing.

Under Canadian law, the courts will disregard the separate legal personality of a company where it is dominated and controlled, and being used as a shield for fraudulent or improper conduct. Thus, the conduct in question must be akin to fraud to warrant veil piercing.⁹⁹ Indeed, the similarity between secondary liability for procuring a tort and veil piercing under Canadian law can be seen from the following statement:¹⁰⁰

The question of whether the appellant, as an officer and director of ACPI and ACL, could be found to be personally responsible for the tort committed by the corporations — had this question been raised on the pleadings — would require evidence to support a finding that the appellant exercised clear domination and control over the corporations in directing the wrongful things to be done, and that the conduct he engaged in was akin to fraud, deceit, dishonesty or want of authority and constituted a tort in itself.

The above statement was made in the context of piercing the corporate veil but the reference to “directing” wrongful acts is similar to the imposition of secondary liability as a joint tortfeasor.

In Singapore, the link between veil piercing and secondary liability in tort has been more explicit. In *TV Media Pte Ltd v. De Cruz Andrea Heidi*,¹⁰¹ Singapore’s apex court, the Court of Appeal, held that where a statement of claim alleged that the defendant had authorized, directed and/or procured acts that amounted to corporate negligence, this was essentially a submission to lift the

95. *Mentmore Manufacturing*, (1978) 89 DLR (3d) 195 para. 28.

96. See e.g., *Steinhart v. Moledina*, (2005) 37 C.P.R. 4th 443 (Can. Ont. Sup. Ct. J.) para. 23; *Dimplex North America Ltd v. Globaltec Distributors Ltd*, 2005 FC 298 (2005), 137 A.C.W.S. 3d 716 (Can. Fed. Ct.) para. 13; *Cinar Corp v. Robinson* 2013 SCC 73, [2013] 3 S.C.R. 1168 (Can. Sup. Ct.) para. 60; *XY, LLC v. Canadian Topsires Selection Inc.*, 2016 BCSC 1095 (Can. B.C. S.C.) para. 231.

97. *Halford v. Seed Hawk Inc.* 2004 FC 455, (2004) 31 C.P.R. 4th 434 (Can. Fed. Ct.).

98. *Id.* [330] – [331].

99. See e.g., *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996) 28 O.R. 3d 423 (Can. Ont. Gen. Div) [22]–[23]; *A-C-H International Inc v. Royal Bank of Canada* (2005) 254 D.L.R. 4th 327 (Can. Ont. Sup. Ct. J.) [29]; *Burke Estate v. Royal Sun Alliance Insurance Co of Canada*, 2011 NBCA 98, 381 N.B.R. 2d 81 (Can. N.B. C.A.) para. 60.

100. *A-C-H International Inc* (2005) 254 D.L.R. 4th 327 para. 29.

101. *TV Media Pte Ltd v. De Cruz Andrea Heidi*, [2004] SGCA 29, [2004] 3 Sing. L. Rep. (R.) 543 (“*TV Media*”) [118].

corporate veil. The court also agreed with the trial judge that the veil should be pierced as the defendant director had authorized, directed or procured acts of negligence.¹⁰² In particular, the court said:

After all, a court can only find a director personally liable for authorizing, directing or procuring the company's tort if it has first lifted the company's corporate veil which otherwise protects a director from being found liable.¹⁰³

While such an approach seems to provide a basis to impose personal liability, the issue may be better resolved within the framework of tort law, so that it can consider the relevant policies that should underpin the imposition of secondary tortious liability, an issue that goes beyond corporate entities. In English tort law, where a person “authorizes, procures or instigates the commission of a tort” by another, the former becomes a joint tortfeasor who is equally liable with the primary tortfeasor.¹⁰⁴ This is not to suggest that the understanding of what amounts to authorization or procurement in the corporate and non-corporate context should necessarily be the same. Rather tort law, which constantly must balance and assess the appropriate measures to regulate civil wrongdoings, may be more suited to determining this issue than corporate law. The contours of liability for civil wrongs are the essence of tort law. Accordingly, the law of torts, not the doctrine of veil piercing, may provide a superior framework to determine the circumstances under which a corporate officer should be responsible for the tortious act of a subordinate.

Similarly, where a director has caused a company to commit a tort and this leads to the insolvency of the corporation and therefore inadequate compensation for the tort victims who are involuntary creditors, there should not be recourse to veil piercing. The real question is whether the circumstances justify imposing a duty on the director to the tort victims, or if the director has breached a duty of care to the company that entitles the liquidator to bring a claim on behalf of the corporation against the director. These are policy issues at the heart of tort law, while corporate law lacks the analytical tools to address them. Engaging in veil piercing creates a messy and uncertain shortcut.

VEIL PIERCING – A COMPARATIVE ANALYSIS

Having outlined the conceptual framework behind veil piercing, we now analyze from a comparative perspective the judicial reasoning in veil piercing cases and the specific factors that courts take into consideration when such issue arises. The jurisdictions considered are England, Singapore, the United States, Germany and China.

102. *TV Media* 3 Sing. L. Rep. at [132]–[140] The more traditional view is that both are separate doctrines and the court's approach in the earlier case of *Gabriel Peter & Partners v. Wee Chong Jin*, [1997] SGCA 53, [1997] 3 Sing. L. Rep. (R.) 649 [31]–[35] is consistent with this.

103. *TV Media* 3 Sing. L. Rep. at [119].

104. DAVID HOWARTH ET AL., *HEPPLE AND MATTHEWS' TORT LAW* 1121 (7th ed. 2015).

England and Singapore

Both England and Singapore have broadly similar approaches. Their courts have increasingly recognized that the main issue in dispute in these corporate liability cases revolves around whether corporate officers have abused or misused the corporate form. Accordingly, England and Singapore have begun to move away from the use of metaphors such as sham and façade as the basis to disregard corporate personality.

One significant uncertainty in England relates to the scope of the veil piercing doctrine. While it is an exceptional doctrine, Lord Sumption would limit it only to a category of “evasion” cases,¹⁰⁵ namely those where a company has been interposed to frustrate the enforcement of an independent legal right that exists against the controller of the company.¹⁰⁶ The majority of the judges in *Prest v. Petrodel* left the matter open, and it is suggested that in principle it is difficult to see why other instances of veil piercing should be foreclosed if the underlying basis is abuse of the corporate form.¹⁰⁷ Human ingenuity suggests that we should be wary of bright-line rules.

Although Lord Sumption also spoke of a second category of “concealment” cases, he did not consider this to involve veil piercing. This was because the interposition of a company to conceal the identity of the real actors will not stop a court from identifying who the real parties to the transaction or act are if identification is relevant. Here, there is no lifting of the corporate veil, as the court is merely looking behind the corporate structure to see what it is concealing.¹⁰⁸ This is a well-known principle that goes beyond veil piercing. According to Diplock LJ in *Snook v. London and West Riding Investments Ltd*, parties carry out sham transactions when they execute documents or perform other acts that are intended to give the appearance of legal rights and obligations being created that are different from what they intend.¹⁰⁹ A company may be used to create the appearance that it is a party to a transaction so as to mask who the real parties are.¹¹⁰ Although this may not involve true veil piercing, the effect is very similar and it is also unclear to what extent the other judges agreed with this view. Traditionally, it has been considered an aspect of veil piercing and

105. *Prest* [2013] 3 WLR 1 [28], [33].

106. An example of which can be found in *Gilford Motor Co Ltd v. Horne*, [1933] Ch 935 (Eng. C.A.) (hereinafter “*Gilford Motor*”) (see *Prest* [2013] 3 WLR 1 [29]). See also *Winland Enterprises Group Inc v. WEX Pharmaceuticals Inc*, CACV 154/2011 (C.A. Mar. 29, 2012), [2012] HKCA 155, [2012] 5 H.K.C. 494 [50]–[51].

107. Tan, *supra* note 77, at 31–32.

108. *Prest* [2013] 3 WLR 1 [28].

109. *Snook v. London and West Riding Investments Ltd* [1967] 2 QB 786, 802 (Eng. C.A.).

110. As in *Adams v. Cape Industries Plc* [1990] 2 WLR 657 (HL) in relation to AMC which the court held was a mere corporate name and had no real role in the transactions.

there are jurisdictions that treat it as such.¹¹¹ Concealment cases will therefore be discussed in this paper.

Although the Singapore courts have generally endorsed the approach in *Prest v. Petrodel*, that abuse of corporate personality is what underlies veil piercing,¹¹² the Singapore Court of Appeal had previously also accepted an “alter ego” ground as a distinct basis to lift the corporate veil. This ground is premised on the company carrying on the business of its controller.¹¹³ This may arise because the company was the agent or nominee of the controller.¹¹⁴ The former basis is clearly incorrect. If a company is an agent for another person, such other person will generally be personally liable because of the law of agency and not because of any disregard of corporate personality. Indeed, for an agent to bind its principal, the agent must be a distinct person in the agent’s own right.

Leaving aside cases where there is an agency relationship, in the case of *Alwie Handoyo v. Tjong Very Sumito*,¹¹⁵ the Court of Appeal accepted that the appellant, Alwie, was the alter ego of a company known as OAFI. Accordingly, the court reasoned that OAFI’s corporate veil should be pierced. Alwie beneficially received payments from OAFI’s bank account and Alwie admitted that he used the account as his personal bank account, which is an example of commingling. In Alwie’s view, he was authorized and entitled to receive money paid to this bank account.¹¹⁶ In addition, Alwie also actively procured a payment due to OAFI into his personal bank account.¹¹⁷

Given the facts, Lord Sumption would have regarded this as a concealment case. The real actor was Alwie and OAFI was merely a convenient vehicle for him to structure a transaction to which he was the true protagonist. Other cases provide additional examples. In *Re FG Films Ltd*,¹¹⁸ the court found that the film in question, which was the subject of an application to receive a British film classification, could not be classified as such for the purposes of the Cinematograph Films Act 1938. The applicant company had a share capital of only £100 and it could not be said that this “insignificant company” undertook the making of the film in any real sense, which had cost at least £80,000. On this basis, the court held that the applicant company was merely the nominee or agent of the American company that had financed the making of the film. Although the

111. For example, see the discussion below of cases involving commingling.

112. *Manuchar Steel Hong Kong Ltd v. Star Pacific Line Pte Ltd* [2014] SGHC 181, [2014] 4 Sing. L. Rep. 832 [95]-[96]; *Singood* [2016] 1 Sing. L. Rep. 1129 [198]-[199]; *Max Master Holdings Ltd v. Taufik Surya Dharma* [2016] SGHC 147 [136]; *Goh Chan Peng v. Beyonics Technology Ltd* [2017] 2 Sing. L. Rep. 592 [75]. See also *Tjong* [2012] SGHC 125 [67], which was decided before *Prest v Petrodel*.

113. *Alwie Handoyo v. Tjong Very Sumito* [2013] SGCA 44, [2013] 4 Sing. L. Rep. 308 [96]; *NEC Asia Pte Ltd. v. Picket & Rail Asia Pacific Pte Ltd.* [2010] SGHC 359, [2011] 2 Sing. L. Rep. 565 [31].

114. *NEC Asia Pte Ltd* [2011] 2 Sing. L. Rep. 565 [31].

115. *Alwie* [2013] 4 Sing. L. Rep. 308 [96] – [100].

116. *Tjong* [2012] SGHC 125 [70]; *Alwie* [2013] 4 Sing. L. Rep. 308 [98].

117. *Alwie* [2013] 4 Sing. L. Rep. 308 [99].

118. *Re FG Films Ltd* [1953] 1 WLR 483 (Eng. Ch. Div.).

decision was based on agency, it could also have been justified on the concealment principle as the learned judge considered that the applicant company's involvement was "purely colourable."¹¹⁹ Another example is *Gencor ACP v. Dalby*,¹²⁰ where a company had no sales force, technical team or other employees capable of carrying on any business. Its only function was to make and receive payments. On this basis, the court found that the controller of the company was the alter ego of that company.

United States

Generally, in the United States, a plaintiff seeking to pierce the corporate veil must establish "(a) the 'unity' of the shareholder and the corporation and (b) an unjust or inequitable outcome if the shareholder is not held liable."¹²¹ In establishing the unity part of the test, courts will look at factors such as "a failure to observe corporate formalities, a commingling of individual and corporate assets, the absence of separate offices, and treatment of the corporation as a mere shell without employees or assets." The unjust outcome aspect is more difficult to specify but one common example would be a shareholder stripping essential assets from the corporation by dividends, or excessive salaries or other payments for services. A more uncertain basis involves companies that were undercapitalized at the outset so that it could not pay its foreseeable debts.¹²²

Although corporate law in the US is based primarily on state law, virtually all state jurisdictions in the US subscribe to one of the two traditional formulations of veil piercing jurisprudence. These are the three factor "instrumentality doctrine" and the "alter ego" doctrine.¹²³

The instrumentality doctrine was outlined in *Lowendahl v. Baltimore & O. R. Co.*¹²⁴ First, it requires more than control of the corporate entity. Liability must depend on "complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own."¹²⁵ Second, the defendant must have used such control "to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of the plaintiff's legal rights." Finally,

119. *Id.* at 486.

120. *Gencor ACP v. Dalby* [2000] EWHC 1560 (Ch), [2000] All Eng. Rep. (D) 1067.

121. KLEIN ET AL., *supra* note 55, at 148.

122. *Id.* (quotation omitted).

123. Blumberg, *supra* note 59, at 304, n. 17; *see also* BAINBRIDGE & HENDERSON, *supra* note 14, at 86–102.

124. *Lowendahl v. Baltimore & O. R. Co.*, 287 N.Y.S. 62, 76 (N.Y. App. Div.), *aff'd* 6 N.E.2d 56 (N.Y. 1936).

125. *Id.*

the control and breach of duty must have caused the injury or loss complained of.

In *RRX Indus, Inc. v. Lab-Con, Inc.*,¹²⁶ the court stated that the alter ego doctrine applies where “(1) such a unity of interest and ownership exists that the personalities of the corporation and individual are no longer separate, and (2) an inequitable result will follow if the acts are treated as those of the corporation alone.” Although these appear to be separate tests, it is difficult to see any real difference between them. At their essence, they both require some form of wrongdoing as a result of the control of another person or persons, the extent of which meant that the corporation was unable to function as an entity in its own right. The domination was used to support a corporate fiction and the entity was organized for fraudulent or illegal purposes.¹²⁷

Indeed, in *Wm. Passalacqua Builders, Inc v. Resnick Developers South, Inc.*,¹²⁸ the court was of the view that the instrumentality and alter ego doctrines are “indistinguishable, do not lead to different results, and should be treated as interchangeable.”

As mentioned earlier, of the jurisdictions considered in this paper the US (apart from perhaps China) seems to have a more liberal approach in practice to veil piercing. Although courts often say that the corporate form will be disregarded reluctantly or exceptionally, the cases in the United States appear to take into consideration a wider range of matters than other common law courts in England, Singapore, Australia, Hong Kong or New Zealand.

One reason for this may be that the approach in the United States is more explicitly policy-based. Thus, in *Wm. Passalacqua Builders, Inc v. Resnick Developers South, Inc.*, the court remarked that ultimately it had to be decided whether “the policy behind the presumption of corporate independence and limited shareholder liability—encouragement of business development—is outweighed by the policy justifying disregarding the corporate form—the need to protect those who deal with the corporation.”¹²⁹ US courts appear to place more emphasis on the need for persons dealing with corporations to be protected while the emphasis on *caveat emptor* in many other common law jurisdictions seems to be stronger.

A second reason may be the importance of domination and control in the American jurisprudence. While many cases say that it is insufficient in itself, it is a central element of veil piercing in US cases,¹³⁰ but has relatively little weight

126. *RRX Indus, Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 545 (9th Cir. 1985).

127. *Sabine Towing & Transportation Co, Inc v. Merit Ventures, Inc.*, 575 F.Supp. 1442, 1446 (E.D. Tex. 1983).

128. *Wm. Passalacqua Builders, Inc v. Resnick Developers South, Inc.*, 933 F.2d 131, 138 (2d Cir. 1991) (“*Wm. Passalacqua Builders Case*”).

129. *Id.* at 139.

130. In *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 150 (3d Cir. 1988) the court opined that only after there has been a finding of dominance does one reach the fraud or injustice issue. In *Morris*

in the other common law jurisdictions mentioned previously. Considering the two elements of wrongdoing and control/dominance, one could take the view that the presence of wrongdoing is significantly more important from a practical standpoint; where a corporation has been used to achieve a purpose that is regarded as abusive, it is hard to see a court finding that this has not been brought about in circumstances where the corporation has been so dominated as to justify veil piercing. In jurisdictions such as England and Singapore, the issue of wrongdoing (and therefore what constitutes sufficient wrongdoing) is the focus. Where the relevant abuse has been established, the inquiry then turns to the person or persons responsible for bringing about the abusive conduct in order to determine the liable party. The American approach, on the other hand, places significant weight on formalistic requirements as indicators of control and dominance.

In accordance with control and dominance occupying a central place in the United States to determine whether it is appropriate to ignore corporate personality, the courts have set out a list of factors that would tend to show that the defendant was a dominated corporation, such as:

- (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.¹³¹

The centrality of dominance and control inclines courts in the United States to see these as being undesirable in themselves and, it is suggested, predisposes them to have a more expansive view of wrongdoing compared to courts from other common law jurisdictions.¹³² There almost seems some inevitability in imposing liability when the initial conclusion is that a shareholder/parent has utterly dominated the subsidiary. This is demonstrated by the “identity” doctrine which is discussed in the next paragraph. Taken as a whole, there is a danger of

v. New York State Department of Taxation and Finance, 623 N.E.2d 1157, 1161 (N.Y. 1993), it was said that “complete domination of the corporation is the key to piercing the corporate veil” though establishing a wrongful or unjust act towards the plaintiff was also necessary. See also BAINBRIDGE & HENDERSON, *supra* note 14, at 91–93.

131. *Wm. Passalacqua Builders Case*, 933 F.2d at 139. See also PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS – TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* 137–40 (1987).

132. See also KAREN VANDEKERCKHOVE, *PIERCING THE CORPORATE VEIL: A TRANSNATIONAL APPROACH* 81 (2007) (finding that some courts “have been quite liberal in defining the ‘wrong’ required” for the instrumentality doctrine).

the doctrine being over and under inclusive. In relation to the latter, as the elements for veil piercing are conjunctive, scrupulous adherence to formality will go a long way towards reducing the risk of veil piercing.¹³³ Conversely, relatively unsophisticated shareholders or businesses that have not been properly advised are at greater risk of being subject to the doctrine.

Third, aside from the “instrumentality” and “alter ego” doctrines, reference is also sometimes made to “agency,”¹³⁴ or to a person using “control of the corporation to further his own rather than the corporation’s business,” with the consequence that the corporation was only a “dummy”¹³⁵ or “shell.”¹³⁶ Where piercing takes place in these circumstances, the existence of wrongdoing does not appear to be crucial as this category seems to be distinct from the two earlier doctrines, even if at times it is conflated with them.¹³⁷ It is perhaps best described as the “identity” doctrine which has been criticized as being “such a diffuse and relatively useless approach that it does not deserve extended discussion.”¹³⁸ Certainly agency, properly speaking, ought to be distinct from veil piercing.¹³⁹ Where the law finds that an agency relationship has arisen, it means that the agent is a distinct person from the principal. Although the principal is bound by the agent’s acts, this is because the principal has authorized the agent to act in a certain manner and the agent has done so in accordance with the principal’s instructions.¹⁴⁰ Aside from agency, where a corporation is merely a “dummy” or “shell,” this could include situations similar to the concealment principle that has been recognized in England where the real party to a transaction is not the corporation but some other person.¹⁴¹ The understanding in the United States

133. At least in theory. As a practical matter, where a court is of the view that the corporate vehicle has been used in an abusive manner, it would in all likelihood strive to find the necessary dominance and control, which begs the question of whether control and dominance should occupy such a central place in the judicial reasoning. Certainly the conjunctive nature of the elements is unusual by the standards of the other jurisdictions discussed in this paper as it suggests that control or wrongdoing simpliciter cannot as a matter of principle ever give rise to piercing.

134. *Walkovszky v. Carlton*, 223 N.E.2d 6, 7–8 (N.Y. 1966).

135. *Id.* at 8. The concept of agency has also been invoked in this context, *see e.g.*, *Berkey v. Third Ave Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926); *Port Chester Elec. Constr. Corp. v. Atlas*, 40 N.Y.2d 652, 657 (1976).

136. *Wm. Passalacqua Builders Case*, 933 F.2d at 138.

137. *See e.g.*, *Wm. Passalacqua Builders Case*, 933 F.2d 131, 138; *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458 (2d Cir. 1995).

138. BLUMBERG, *supra* note 131, at 122.

139. *See e.g.*, *Lowendahl*, 287 N.Y.S. at 74–75, which also noted that “agency” in this context was not being used in its technical legal sense.

140. RESTATEMENT OF THE LAW (THIRD) OF AGENCY §1.01 (AM. LAW INST. 2006).

141. Given the vague nature of this doctrine, some cases have regarded it as interchangeable with the other veil piercing theories. *See e.g.*, *Wm. Passalacqua Builders Case*, 933 F.2d 131, 138 (the corporate veil may be pierced “either when there is fraud or when the corporation has been used as an alter ego”); *Fletcher*, 68 F.3d 1451 (finding that fraud was not necessary under the “alter ego” doctrine though there must be an overall element of injustice or unfairness which are somewhat vague concepts; *contra Walton Construction Co, LLC v. Corus Bank*, N.D.Fla., July 21, 2011, at *3 (stating that “fraud, or a similar injustice or wrongdoing” must be demonstrated); *Wausau Business Insurance Co. v. Turner Construction Co.*, 141 F.Supp.2d 412 (S.D.N.Y. 2001) (adopting the approach from *Wm. Passalacqua Builders Case*,

goes beyond this, as some courts simply ask if the company is merely a conduit for the shareholder/parent, or exists simply as a mere tool, front or personal instrumentality.¹⁴²

Fourth, some cases of veil piercing have arrived at the right conclusion in terms of liability, but the reasoning may have been better justified on some basis other than veil piercing. Where, for example, an appropriate officer of the parent company has made representations assuring the plaintiff that the parent company will be the responsible party, and the plaintiff reasonably placed reliance on this, either an estoppel against the parent would arise, or a contract may have come into existence between the parent and the plaintiff on the objective theory of contract formation. In such cases, there is no need to resort to veil piercing.¹⁴³ As mentioned earlier in a different context, engaging in veil piercing risks creating a messy and uncertain shortcut. Indeed, *McFerren v. Universal Coatings, Inc* utilized an alternative approach.¹⁴⁴

Where proof of wrongdoing is unnecessary for veil piercing (wrongly, it is submitted), or where an expansive notion of wrongdoing is applied because the level of control or identification is regarded as excessive, it is difficult to resist the notion that the doctrines are a proxy for what is really taking place, namely that the real basis for veil piercing in such cases is what courts regard as extremely poor corporate governance. The courts have pierced the corporate veil because of the failure to sufficiently distinguish the company's activities from its parent/owner. Some examples will illustrate this. In *Gorill v. Icelandair/Flugleider*,¹⁴⁵ the corporate veil was pierced on the "instrumentality" theory. The court was of the view that the element of domination and control was made out. In addition, the subsidiary's wrongful termination of employment was a sufficient "wrong" for the doctrine to be made out.¹⁴⁶ With respect, this seems to go too far. Wrongful termination of employment is a breach of contract. Unless there is something special about employment contracts, to find that a breach of contract is a sufficient wrong that can lead to veil piercing suggests that a wide

933 F.2d 131); In *re MBM Entertainment, LLC*, 531 B.R. 363 (S.D.N.Y. Br. 2015) (also following *Wm. Passalacqua Builders Case*, 933 F.2d 131). Although some cases that apply the "instrumentality" and "alter ego" doctrines do so in the absence of proof of inequitable conduct, many cases do not, see BLUMBERG, *supra* note 131, at 117–24. It is suggested that proof of wrongdoing should be a critical element. In countries such as England and Singapore where small companies predominate, even what is referred to as "one-man" companies, over-reliance on concepts of dominance and control will likely lead to corporate personality being potentially ignored in a very large number of companies. English and Singapore courts have therefore reiterated that control and dominance are in themselves unimportant, see e.g., *Adams* [1990] 2 WLR 657; *Public Prosecutor v. Lew Syn Pau* [2006] SGHC 146, [2006] 4 Sing. L. Rep. (R) 210.

142. *Harris v. Wagshal*, 343 A.2d 283, 287 (D.C. Ct. App. 1975); *International Union v. Cardwell Manufacturing Co., Inc.*, 416 F.Supp 1267, 1286 (D. Kan. 1976); *Miles v. American Telephone & Telegraph Co.*, 703 F.2d 193, 195 (5th Cir. 1983); *Vuitich v. Furr*, 482 A.2d 811, 817 (D.C. Ct. App. 1984).

143. See e.g., *Morgan Bros, Inc. v. Haskell Corp.*, 604 P.2d. 1294 (Wash. Ct. App. 1979).

144. *McFerren v. Universal Coatings, Inc.*, 430 So. 2d 350, 353 (La. 1983).

145. *Gorill v. Icelandair/Flugleider*, 761 F.2d 847, 853 (2d Cir. 1985).

146. *Id.* at 853.

variety of legal wrongs are in themselves sufficient for such purpose. Given that a successful claim against a corporate defendant is a pre-requisite for veil piercing, it is difficult to see when this element will not be satisfied. On such a liberal view of “wrong,” any real limit on veil piercing will amount to little more than the element of domination/control.

*Carte Blanche (Singapore) Pte Ltd v. Diners Club International, Inc*¹⁴⁷ provides another example of a liberal approach to the understanding of wrongdoing in veil piercing. A subsidiary entered into a franchise agreement with the plaintiff company. As a result of a corporate reorganization, the subsidiary transferred its operations to its parent such that by the end of 1983, it had no separate offices, officers, books, or bank accounts. The plaintiff’s franchise was serviced solely by employees of the parent company. Subsequently, a dispute arose over certain provisions of the franchise agreement and the chairman of the subsidiary, who was also chairman of the parent, gave notice of default to the plaintiff. The notice indicated the chairman’s title as chairman of the parent company and not the subsidiary. The parties proceeded to arbitration and it was found that the subsidiary was in breach of the franchise agreement when it withheld services from the plaintiff. As the plaintiff was unable to collect damages from the subsidiary, it attempted to do so from the parent.

The court held that this was an appropriate case for the corporate veil to be pierced. The court accepted that the subsidiary acted as a separate corporation from its organization from 1972 until mid-1981. The question was whether it did so in 1984 when the franchise agreement was breached. This depended on whether its parent dominated or controlled its actions. It was noted that at the time of the breach in 1984: (1) the subsidiary had observed no corporate formalities for at least two years; (2) it kept no corporate records or minutes and had no officers or directors elected in accordance with its by-laws; (3) it had no assets, and its initial capitalization of \$10,000 was insignificant when compared to the more than \$7,000,000 in loans that it received from group companies to finance its business activity; (4) it had no separate offices or letterhead; (5) it had no paid employees or a functioning board of directors; (6) all of its revenues were put directly into the parent’s bank account, which paid all of its bills; (7) services provided to the plaintiff from 1983 came from full-time employees of the parent; (8) its revenues and marketing reports were not recorded independently, but were treated as part of the parent’s revenues and statistics; and (9) the chairman was the only person who functioned on behalf of the subsidiary and he was also chairman of the parent’s board. He was paid no salary by the subsidiary and occasionally acted not in the name of the subsidiary but in the name of the parent.

147. *Carte Blanche (Singapore) Pte Ltd. v. Diners Club International, Inc.*, 2 F.3d 24 (2d Cir. 1993) (hereinafter “Carte Blanche Case”).

While the preceding facts indicate a failure to properly segregate the activities of group companies, it is difficult to see any wrongdoing aside from the breach of the franchise agreement.¹⁴⁸ The risk of breaches of contract are inherent in any contractual relationship and should be the subject of a specific bargain if a contracting party wishes to extract greater security from a parent company or other shareholder. In addition, as American law recognizes the tort of inducing a breach of contract, it might seem more appropriate for such wrongs to be determined within this framework, which is shaped by policies relevant to such liability. From a policy perspective, the decision is also difficult to justify as providing an optimal measure of protection for those who deal with corporations. It would seem from the judgment that if the breach had taken place before mid-1981, no veil piercing should take place. Was the plaintiff in any way materially prejudiced after such date?¹⁴⁹ It is difficult to see how it was. The subsidiary's financial position did not appear to be any worse after this date. While its capitalization was low, there is nothing wrong with financing a business from loans, and a substantial sum was advanced to it for its business. Prima facie, it would appear that such loan was unrecoverable with the consequence that the parent company also made a substantial loss. The other factors listed by the court are failures relating to proper formalities reflecting poor governance but are of marginal relevance upon closer scrutiny.¹⁵⁰ The business of the subsidiary was almost moribund given the existence of only one remaining franchisee, the plaintiff. For the subsidiary to have continued operations on this basis might have led to a greater drain on its remaining financial resources (if any). This could have led to its winding up and consequently brought the franchise agreement to an end. *Carte Blanche* is a good example of the potentially distorting effects when the element of control/dominance sits at the heart of the test for veil

148. It is possible that because the court expressed the test for veil piercing using the disjunctive "or" for the elements of control and wrongdoing, rather than the conjunctive "and" which New York courts have since endorsed (*see Cary Oil Co., Inc v. MG Refining & Marketing, Inc.*, 230 F.Supp.2d 439, 488 (2002)), the court in *Carte Blanche* may have arrived at its decision purely on the basis of control.

149. In *Abraham v. Lake Forest, Inc.*, 377 So.2d 465, 469 (La. Ct. App. 1980) the subsidiary was undercapitalized, there was commingling of funds, and almost all the business of the subsidiary was accomplished by unanimous consent of the shareholders. Nevertheless, no piercing took place as the plaintiff was a sophisticated real estate entrepreneur who exercised business judgment when contracting with the subsidiary and was not relying on the credit of the parent corporation.

150. It would have been possible to structure the relationship between the parent and subsidiary more formally to minimize the danger of veil piercing. For example, there could have been an agreement between both companies under which employees of the parent would provide services to the subsidiary in consideration for which the parent would be allowed to collect the subsidiary's revenues and apply them towards such costs with any excess held for the benefit of the subsidiary. This would have addressed some of the criticisms of the parent's conduct. Once again, this illustrates the sub-optimal nature of rules that may trip up small and relatively unsophisticated businesspeople or entities even though in this case the parent was not such a person. A similar point is made by BAINBRIDGE & HENDERSON, *supra* note 14, at 108–09.

piercing. It gives rise to the danger that it can be applied in a formulaic manner without regard to the proper context of the case.¹⁵¹

Nevertheless, the outcome itself may have been correct as the subsidiary's operations and assets had been absorbed into the parent company.¹⁵² This meant that when the parent's employees and its chairman dealt with the plaintiff, they did so on behalf of the parent which had stepped into the shoes of the subsidiary. In other words, the conduct of the parties brought about a novation of the contract from the subsidiary to the parent. Veil piercing would not be necessary in these circumstances. The parent was liable to the plaintiff under the contract that the parent and plaintiff became parties to.

Similarly, in *Sabine Towing & Transp. Co., Inc. v. Merit Venture, Inc.*,¹⁵³ the court apparently relied on a breach of contract as one aspect of wrongdoing. However, given that the wrongdoing included acts that were designed to keep creditors from reaching the subsidiary's remaining assets, one wonders if reliance on laws designed to prevent fraudulent conveyances would have been more appropriate and sufficient.¹⁵⁴ And in *Vuitch v. Furr*, the court opined that insolvency or undercapitalization is often an important factor evidencing injustice.¹⁵⁵ No elaboration was given and it is suggested that in and of themselves such situations should not be equated with injustice.

Parker v. Bell Asbestos Mines, Ltd provides a further example illustrating a broader understanding of wrongdoing in the United States.¹⁵⁶ The issue related to the extent to which a parent could be insulated by its subsidiary from tort liability for asbestos related harm. In England, where there was similar litigation, the issue was resolved in favour of the parent with the court taking the view that the purpose of incorporation was to allow a person to limit potential future liabilities.¹⁵⁷ In *Parker v Bell Asbestos Mines, Ltd*, the court came to the opposite conclusion from that in England by drawing a distinction between:¹⁵⁸

151. On the other hand, in *Penick v. Frank E. Basil, Inc.*, 579 F.Supp. 160, 166 (D.C. Cir. 1984), no piercing took place because the plaintiff failed to establish "that the employees of either failed to observe proper corporate formalities." In any event, the claim was for breach of a contract of employment with the subsidiary which should generally not be a sufficient act of wrongdoing to justify piercing. In *Amsted Industries, Inc v. Pollak Industries, Inc.*, 382 N.E.2d 393 (Ill. App. Ct. 1978), the court held that while there may have been some failures to adhere to formalities within the corporations, the veil would not be pierced as against the individual shareholder as there were other indicators that the separation between the corporations existed. The companies had separate employees that were paid by the company which employed them; the companies had separate meetings of directors and kept separate minute books; they had separate bank accounts; they never advertised together; and they never circulated a joint financial statement. In other words, there was at least a threshold observance of corporate formalities.

152. *Carte Blanche Case*, 2 F.3d at 28.

153. *Sabine Towing & Transportation Co.*, 575 F.Supp. at 1448.

154. See *Lowell Staats Mining Co, Inc v. Pioneer Uravan, Inc.*, 878 F.2d 1259 (10th Cir. 1989).

155. *Vuitch v. Furr*, 482 A.2d at 819 (D.C. 1984).

156. *Parker v. Bell Asbestos Mines, Ltd*, 607 F. Supp. 1397 (E.D. Pa. 1985).

157. *Adams* [1990] 2 WLR 657. Such an approach is also the position in Singapore, see *Simgood* [2016] 1 Sing. L. Rep. 1129 [195].

158. *Bell Asbestos Mines, Ltd.*, 607 F. Supp. at 1403.

(1) carrying out the everyday affairs of corporate business (e.g., the mining and sale of asbestos)—the sort of activity which traditionally merits the privilege of limitation of liability bestowed by the protective corporate form; and (2) carrying out legal maneuvers aimed at maximizing the limitation of liability to a point of near invulnerability to responsibility for injury to the public. In our view, the latter, which may well be the situation here, constitutes an abuse of privilege, which in an equitable analysis of competing public policy considerations must surely fail.

On the face of it such a distinction is difficult to justify. Business activities inevitably give rise to the possibility of tortious acts, and it is hard to see why a corporate structure that is intended to maximize the limitation of liability for such acts is an abuse of privilege. It may be if the activity in question will inevitably give rise to a tort, and in such an instance the directors of the company may also be personally liable for procuring the company to engage in a tortious act. As a general and unqualified statement of the law, however, *Parker* with respect probably goes too far.¹⁵⁹

In England, the effect of separate personality in the context of the tort of negligence can be limited by finding that a parent company has assumed responsibility towards the employees of a subsidiary so as to give rise to a duty of care towards such employees. Arguably, this is the real issue, namely what are the circumstances where a parent ought to incur tortious liability to employees of a subsidiary. For this to arise in England, it is not necessary that the parent should have absolute control over the subsidiary. Tortious liability was found where “(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection. . . . A court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.”¹⁶⁰

It is worth pausing at this stage to make a broader point. It is arguable that in a tort or contract case, where negotiation is not plausible (for example where contracts are in a standard form), if a corporation has an amount of capital that is unreasonably low given the nature of its business and the risks it faces, from an *ex ante* perspective, veil piercing may be justifiable. On the other hand, veil piercing should not take place where creditors can protect themselves *ex ante*.¹⁶¹ Having a company operate in a way that puts third parties at risk of uncompensated harm where such risks would reasonably be expected to occur, or that similarly puts the other contracting party at risk of contract breach because

159. See also *Lake Asbestos of Quebec, Ltd.*, 843 F.2d at 145.

160. *Chandler v. Cape plc* [2012] EWCA (Civ) 525, [2012] 1 WLR 3111, 3131.

161. BAINBRIDGE AND HENDERSON, *supra* note 14, at 110.

it is clear that the other contracting party has to deliver the goods or products ordered to another person, would be unjust and an abuse of corporate personality as required by veil piercing doctrine. Limited liability in such circumstances provides incentives to invest recklessly.¹⁶²

As powerful as this view may be, veil piercing may not be the best solution. Should veil piercing in such situations take place, the courts are really holding the shareholders and/or directors of such a corporation accountable for the loss suffered by the tort victim or unfortunate counterparty to the contract. The broader (and real) policy issue therefore is whether the circumstances are such as to impose a direct duty of care on the said shareholders or directors to such persons. Again, tort law may provide a superior framework for analysis and, depending on the facts, other areas of tort may be applicable.

It is worth noting that many of the US cases discussed above involved parent-subsidiary relationships.¹⁶³ It may be that a more liberal approach to veil piercing in the US is explicable on this basis. It has been argued that, in the context of a corporate group, the theoretical analysis behind limited liability largely becomes irrelevant. For instance, any veil lifting within a corporate group does not affect the ultimate investors of the enterprise as the piercing is generally not extended beyond the corporate parent.¹⁶⁴ Such an approach reflects the perceived reason and policy behind limited liability and hence its limits. An alternative approach that is more accommodative of group enterprises may reflect a view that, given the right circumstances, large firm size can bring about efficiencies (e.g. through risk spreading, economies of scale and scope, access to capital markets, more favourable borrowing terms) which as a whole benefit society. A mix of large and small firms may also provide the most optimal environment for innovation to take place.¹⁶⁵ Part of the reason for this is because some innovation takes place in start-up companies founded by former employees of large enterprises.¹⁶⁶ This also applies to large firms that decide to spin off divisions or lines of businesses into subsidiaries. It is therefore optimal to treat corporate shareholders no differently from individual investors. This will avoid disincentivizing enterprises from growing without endangering the entire enterprise given the greater

162. Henry Hansmann and Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 *Yale Law Journal* 1879, 1882–83 (1991).

163. For example, see *Walkovszky v. Carlton*, *supra* note 134; and see also *Mangan v. Terminal Transportation System, Inc.*, 247 A.D. 853 (1936).

164. BLUMBERG, *supra* note 131, at 93–97; see also BAINBRIDGE & HENDERSON, *supra* note 14, at 293–301 which argues that veil piercing should be abolished with respect to individual shareholders.

165. Ajay K. Agrawal et al., *Why Are Some Regions More Innovative than Others? The Role of Firm Size Diversity* (NBER Working Paper No. 17793, 2012), available at <http://www.nber.org/papers/w17793.pdf>.

166. Paul Gompers et al., *Entrepreneurial Spawning: Public Corporations and the Genesis of New Ventures, 1986 to 1999*, 60 *J. FIN.* 577 (2005); Aaron K. Chatterji, *Spawned with a Silver Spoon? Entrepreneurial Performance and Innovation in the Medical Device Industry*, 30 *STRATEGIC MGMT'J.* 185 (2009).

complexity and therefore risk inherent in larger enterprises. Such a viewpoint probably underpins the approach in England and Singapore where arguments relating to group enterprise liability have not been met with much success.¹⁶⁷

On the whole, the body of cases relating to veil piercing in the US is somewhat confused. It is difficult to disagree with the following comment:¹⁶⁸

In light of the diversity of judicial approaches, the use of expansive rhetoric, and the sheer volume of legal opinions, veil-piercing jurisprudence in the US lacks the degree of certainty and predictability that the modern business requires. The veil-piercing common law of torts and contracts remains highly discretionary and problematic for the business planner.¹⁶⁹

Germany

Veil piercing by courts is rare in Germany.¹⁷⁰ The courts restrict direct claims of harmed creditors against shareholders to situations in which assets have been commingled. In all other instances, the principles established and applied by German courts have recently changed.¹⁷¹ Shareholders that strip a company of its assets to the disadvantage of creditors may be liable, but for tort and not on the basis of veil piercing. Courts avoid veil-piercing because the liability of the shareholders is to the company, not to its creditors since the latter's losses are of a reflective nature.

Shareholders are also never personally liable in situations of undercapitalization or for abuse of the corporate form, and a dominant influence exercised on a company is by itself no basis for such liability either. Earlier judgments that applied the principles relating to corporate groups¹⁷² to instances where shareholders exercised a dominant influence over a company in the group

167. See e.g., *Adams* [1990] 2 WLR 657; *Win Line (UK) Ltd v. Masterpart* (Singapore) Pte Ltd [1999] 2 SLR(R) 24; *Manuchar Steel* [2014] SGHC 181.

168. Sandra K. Miller, *Piercing the Corporate Veil among Affiliated Companies in the European Community and in the US: A Comparative Piercing Approaches Analysis of US, German and U.K. Veil Piercing Approaches*, 36 AM. BUS. L.J. 73, 94 (1998). see also BAINBRIDGE & HENDERSON, *supra* note 14, at 129–131.

169. It has been suggested, however, that although many aspects of veil piercing doctrine from judicial decisions make little sense, if the actual outcomes of cases are analyzed, piercing cases can be explained as judicial efforts to remedy one of three problems, namely to ensure behavior that conforms to a statutory scheme, to preserve the objectives of insolvency law, and to remedy what appears to be fraudulent conduct, see Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99 (2014). There is no difficulty with the first two categories but in the third it is clear that fraudulent conduct is construed broadly so the difficulty of construing what conduct crosses the line remains.

170. For a similar conclusion, see COMPARATIVE COMPANY LAW – A CASE-BASED APPROACH 219 (Mathias Siems & David Cabrelli eds. 2nd ed. 2018).

171. As such, observations such as those made in *Am. Lecithin Co. v. Rebmann*, 12-CV-929 (VSB) (S.D.N.Y. Sep. 20, 2017) as to the similarity between the German law on veil piercing and New Jersey or Delaware law are no longer correct.

172. Aktiengesetz [AktG] [Stock Corporations Act], Sept. 6. 1965, BGBL I at 1089, last amended by Gesetz [G], July 17, 2017 BGBL I at 2446, art. 9 (Ger.), available at <https://www.gesetze-im-internet.de/aktg/AktG.pdf>, §§ 291-318.

to its financial detriment are obsolete.¹⁷³ They have been absorbed by newly established principles that apply when the existence of the company is threatened by shareholders. The term used in the relevant German rulings (“*existenzvernichtender Eingriff*”) translates literally into “existence annihilating interference.” We have chosen to refer to it as “annihilating interference.”

For a better understanding of the policy reasons underpinning the German position, the discussion of the principles of veil piercing is preceded by some introductory remarks about relevant aspects of German company law.

Veil-piercing in the context of the smaller German company type, the GmbH

Whereas English law, and the jurisdictions that have derived their corporate laws from it, typically subject the private limited company to essentially the same rules and requirements as the public limited company,¹⁷⁴ German law has created two substantially different forms of corporations. One form is the *Gesellschaft mit beschränkter Haftung* (“GmbH”), which is the company of choice of small- and medium-sized businesses and therefore frequently closely held.¹⁷⁵ Its typical structure explains why veil-piercing or a functional equivalent is a relevant issue for the GmbH.¹⁷⁶ In closely-held companies, shareholders can exercise a dominant influence and attempt to enrich themselves to the disadvantage of the company and its creditors. German law also grants the shareholder meeting a dominant influence over the GmbH. In contrast to other jurisdictions where directors may generally manage companies independently of directions from shareholders,¹⁷⁷ the German GmbH requires directors to adhere to shareholder resolutions decided in meetings.¹⁷⁸

173. GÜNTER H. ROTH & PETER KINDLER, *THE SPIRIT OF CORPORATE LAW – CORE PRINCIPLES OF CORPORATE LAW IN CONTINENTAL EUROPE* 68 (2013).

174. Even the UK follows this rule although its public limited company is subject to EU legislation and therefore while there are some differences between the two corporate forms, the overall conceptual approaches are similar and accordingly substantially different from the German concept. Some US states offer a separate regime for closely-held corporations, particularly Delaware, that shareholders can opt into. In other states, the courts apply special principles to closely held corporations that serve the interests of minority shareholders. However, the deviations from the general rules are rather insignificant compared to the existence of fundamentally different regimes for different types of companies in jurisdictions that follow the German and French approaches.

175. For these elementary principles of German company law, *see generally* Gregor Bachmann, *Introductory Editorial: Renovating the German Private Limited Company - Special Issue on the Reform of the GmbH*, 9 GERMAN L.J. 1064 (2008).

176. As GÖTZ HUECK & CHRISTINE WINDBICHLER, *GESELLSCHAFTSRECHT* § 24 Rdn 27 (21st ed. 2008) correctly emphasize, the issues of limited liability and veil piercing are not limited to the GmbH, but factually-speaking of little relevance for the stock corporation. It could be added that this is so because the particular liability-triggering scenarios are very rare for larger, widely-held corporations with a strict structure of corporate governance that reduces the influence of shareholders to a minimum.

177. An example is in Singapore, where this principle is firmly expressed in §157A of the Singapore Companies Act, subject to any provisions in the Act itself or the corporate constitution.

178. This principle is derived from section 37(1) GmbHG that provides that the powers of the directors are limited by the resolutions of the shareholders in meeting.

The GmbH is not simply a smaller version of the stock corporation (*Aktiengesellschaft* or “AG”), which relies on a detailed regime underpinned by largely mandatory statutory law. The corporate governance structure of the AG vests the decision-making powers in its two-tier board and not in the shareholders.¹⁷⁹ It is therefore generally considered a company form that is, conceptually speaking, entirely different from the GmbH.¹⁸⁰

German legislation created the GmbH in 1892,¹⁸¹ and the GmbH Act (GmbHG)¹⁸² became the model law for similar forms of limited liability companies in civil law jurisdictions throughout the world. This seems, in particular, interesting and relevant from an Asian perspective. In the late 19th and early 20th centuries, German law had a significant influence over East Asian jurisdictions.¹⁸³ Although German company law remains important in the region, a wave of legal transplantation of US corporate law has dramatically reduced the impact it once had. This decline in influence is most obvious in Japan where the legislature in its 2006 company law reform abolished its GmbH-equivalent, the *yūgen kaisha*, and reduced Japanese company law to one type of corporation, the *kabushiki kaisha* with no minimum capital requirement, and adopted a US-style LLC called the *gōdō kaisha*.¹⁸⁴

Cases of undercapitalization and liability for “annihilating interference”

Whether undercapitalization of the GmbH may justify a piercing of the corporate veil was controversially discussed in German literature until the Federal High Court firmly decided against it in a 2007 ruling.¹⁸⁵ This discussion about a potential liability for undercapitalized companies is best understood with

179. For details about the AG from a comparative corporate governance perspective, see Theodor Baums & Kenneth Scott, *Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany*, 53 AM J. COMP. L. 31 (2005); Paul Davies & Klaus Hopt, *Corporate Boards in Europe: Accountability and Convergence*, 61 AM J. COMP. L. 301 (2013); Klaus Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM J. COMP. L. 1 (2011).

180. See e.g., Michael Beurskens & Ulrich Noack, *The Reform of German Private Limited Company: Is the GmbH Ready for the 21st Century?*, 9 GERMAN L. J. 1069, at 1070 (2008).

181. ROTH & KINDLER, *supra* note 173, at 16.

182. Gesetz betreffend die Gesellschaften mit beschränkter Haftung [GmbHG] [Limited Liability Companies Act], Apr. 20, 1892, RGBI. at 477, last amended by Gesetz [G], Jul. 17, 2017 BGBI I at 2446, art. 10 (Ger.), <https://www.gesetze-im-internet.de/gmbhg/>.

183. For Japan, see e.g., KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 298 (Tony Weir trans., 3d ed. 1998); MATHIAS SIEMS, COMPARATIVE LAW 211–12 (2014); CARL F. GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 20 (4th ed. 2017).

184. See Beurskens & Noack, *supra* note 180, at 1071.

185. On the discussion of the literature prior to the ruling, see Rüdiger Veil, *Gesellschafterhaftung wegen existenzvernichtenden Eingriffs und materieller Unterkapitalisierung* [Liability of Members under Annihilating Interference and Substantial Undercapitalization], 2008 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3264, 3265.

some insight in the basics of German principles of minimum capitalization and capital maintenance.¹⁸⁶

Principles of German law of capital maintenance

The minimum initial legal capital of the stock corporation (AG) must amount to EUR 50,000.¹⁸⁷ This is double the amount required by the EU second directive that pursues a minimum harmonization approach and applies in all EU member states. It permits the member states to implement higher, but excludes lower, minimum capital requirements.¹⁸⁸ The United Kingdom is another prominent member state of the EU that goes well beyond the minimum required by EU legislation and sets the minimum capitalization of its public companies at GBP 50,000.¹⁸⁹

The registration of the GmbH requires a minimum legal capital of EUR 25,000.¹⁹⁰ German law therefore requires a substantial amount of initial capital for the incorporation of any company because even the so-called ‘Entrepreneurial Company’ (*Unternehmergesellschaft*), created by a 2008 reform of the GmbHG and sometimes referred to as “GmbH-lite,”¹⁹¹ is ultimately a GmbH with a minimum capital of EUR 25,000. Although it can be established without any legal capital, it remains an imperfect company with inconvenient restrictions until capital up to the amount of EUR 25,000 has been contributed, at which time it converts into a GmbH.¹⁹²

In this respect, Germany contrasts with the UK. The minimum capital requirements stemming from EU legislation¹⁹³ only apply to the public limited and its civil-law equivalents (i.e., the German stock corporation AG), rendering the decision whether to require a minimum capital for smaller company forms a national matter. While the United Kingdom has exercised its legislative discretion in a way typical of common law-countries and abstained from minimum capital requirements for its private limited companies, Germany still

186. For more detail on the principles of capital maintenance in German company law, see ROTH & KINDLER, *supra* note 173, at 54–66.

187. AktG, § 7.

188. Directive 2017/1132/EU of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification), 2017 O.J. EU (L 169) 46 [hereinafter Codification Directive], art. 45.

189. Companies Act 2006 (c. 46) (UK), § 763(1). For further examples of EU countries going beyond the required minimum, see ROTH & KINDLER, *supra* note 173, at 33.

190. Section 5(1) GmbHG. For a comparative look at different European jurisdictions, see ROTH & KINDLER, *supra* note 173, at 33.

191. On the reform, see Bachmann, *supra* note 175, at 1063–68; Beurskens & Noack, *supra* note 180, at 1069–1073.

192. See GmbHG, § 5a, especially paragraph 5 for the transformation into a “proper” GmbH and paragraph 4 for the restrictions until its legal capital reaches EUR 25,000, especially the requirement that one-fourth of its annual profit must be allocated to its legal capital. On this aspect, see Beurskens & Noack, *supra* note 180, at 1084.

193. Art 45(1) Codification Directive, *supra* note 188.

pursues what was once the typical fashion of civil law jurisdictions and requires a substantial legal capital as a precondition for the incorporation of a GmbH.¹⁹⁴

In addition, principles of capital maintenance are strict in German company law. The traditional German approach to capital and its maintenance for purposes of creditor protection strongly influenced the rules of EU law, which have forced the United Kingdom to deviate from general common law principles that apply to the distribution of profits to shareholders in the case of public companies.¹⁹⁵ Profits, and more generally assets necessary to maintain the legal capital are not to be distributed to shareholders,¹⁹⁶ and shareholders who receive payments contrary to this principle must make repayment. If such repayment falls short of the amount owed, all other shareholders are jointly and severally liable for the remaining sum.¹⁹⁷ In addition, a solvency test applies and holds the directors of the GmbH liable for any asset transfers to shareholders (including those in fulfilment of contractual obligations such as repayment of loans to a shareholder or payment for goods purchased from a shareholder) if such transfers have led to the illiquidity or balance-sheet insolvency of the company.¹⁹⁸

We emphasize these principles of German law here because we believe that they help to explain the decisions of the German courts that will be discussed below, especially the Federal High Court's reluctance to pierce the corporate veil in instances where undercapitalization of a GmbH is suggested, i.e., where its legal capital looks inadequate in light of its business purpose and/or obligations. When requirements for initial capitalization and maintenance of capital are strict, calls for penalties for undercapitalization in a material sense are less appealing.

As emphasized in the German legal literature, minimum capital requirements bear no indication of the correct or appropriate amounts of capitalization for companies. The minimal capital requirements aim to establish integrity of the business that the founding members commit to, and they seek to prevent insolvencies at an early stage of a company's life. The underlying theory

194. Many other civil-law jurisdictions have abolished such minimum capital requirements. On the French s.à.r.l., see CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L223-2 (Fr.). On Japan, see Beurskens & Noack, *supra* note 180, at 1071, and see also the discussion on the People's Republic of China at *infra*.

195. Section 830 of the UK Companies Act 2006 represents the general company law approach to the distribution of profits to shareholders and applies to the private limited company. In contrast, section 831, in relation to public companies, implements the principles of capital maintenance stemming from the Codification Directive, *supra* note 188, and correspond to the stricter principles that have traditionally been pursued in Germany. For an analysis of the drastic change in common law principles that took place in the early 20th century, see Basil S. Yamey, *Aspects of the Law Relating to Company Dividends*, 4 MOD. L. REV. 273 (1941). On Germany's influence on the directive Stefan Grundmann, *European Company Law* (Intersentia 2012) 205.

196. GmbHG, §30(1). See CARSTEN JUNGSMANN & DAVID SANTORO, *German GmbH Law – Das deutsche GmbH-Recht* 39 (2011).

197. GmbHG, §§31(1) and (3). For exemptions from this rule, see JUNGSMANN & SANTORO, *supra* note 196, at 42.

198. GmbHG, § 64. See also JUNGSMANN AND SANTORO, *supra* note 196, at 44.

provides that shareholders, and often shareholder-directors in small companies, whose own equity is at stake are prudent decision-makers, rely on sounder business plans and try to stay clear of exorbitant risk. By contrast, minimum capital requirements do not seek to provide a guarantee as to whether the amount of legal capital to which the shareholders commit in the corporate constitution is adequate for the pursuit of the planned business endeavours. Neither the registration authorities that incorporate a company, nor the shareholders that commit to the corporate constitution, provide any implicit statement of this kind. Similar to all the jurisdictions discussed in this paper, creditors need to be aware that German company law expects them to exercise their own due diligence and business judgment.¹⁹⁹

The Trihotel judgment of the Federal High Court (BGH)

As early as the 1920s, German courts recognized that shareholders could be held personally liable when companies became insolvent as a result of their conduct.²⁰⁰ The requirements for such personal liability have changed over time, and from the 1980s to early 2000s courts tended to look unfavorably at dominant shareholders in GmbHs that went into insolvency and left creditors unpaid. Such tendencies ignited hopes in disgruntled creditors who demanded that shareholders be held personally liable for the company's debts on the basis that they had insufficiently capitalized it. Several recent judgments of the BGH (*Bundesgerichtshof*, literally Federal Court of Justice, but more commonly translated as Federal High Court or Supreme Court) have crushed such expectations and led to important clarifications that have strengthened the principle of limited liability. The majority of academic commentators has welcomed this new series of judgments.²⁰¹

In its 2007 *Trihotel* judgment,²⁰² the BGH reaffirmed older judgments and held that shareholders could be found personally liable for wrongful conduct in cases where they improperly handled assets intended to be reserved preferentially for creditors, and thereby triggered or aggravated the company's

199. See also ROTH & KINDLER, *supra* note 173, at 36 (with references to literature in German); JUNGSMANN & SANTORO, *supra* note 196, at 27; Detlev Kleindiek, *Materielle Unterkapitalisierung, Existenzvernichtung und Deliktshaftung – GAMMA* [Substantial Undercapitalization, Existence-Annihilation and Tort Liability – GAMMA], 2008 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 687.

200. For an overview of the developments, see Holger Altmepfen, *Abschied vom "Durchgriff" im Kapitalgesellschaftsrecht* [Farewell to Veil-Piercing in Capital-based Companies], 2007 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2657.

201. See e.g., Altmepfen, *supra* note 200, at 2659. Christian Glöger et al., *Die neue Rechtsprechung zur Existenzvernichtungshaftung mit Ausblick in das englische Recht (Teil I)* [The New Jurisprudence on Liability for Existence-Annihilating Interference, with an English Law Perspective (Part 1)], 2008 DEUTSCHES STEUERRECHT [DStR] 1141. For a critical view, see Marcus Lutter & Walter Bayer, *GMBH-GESETZ § 13 Rdn 46* (Marcus Lutter & Peter Hommelhoff eds., 18th ed. 2012).

202. Bundesgerichtshof [BGH] [Federal Court of Justice] II ZR 3/04, Jul. 16, 2007 (*Trihotel*), 2007 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2689.

insolvency.²⁰³ However, the court made the requirements for such liability more onerous. It explicitly reversed its previous holdings that had created a subgroup of veil-piercing based not on torts, but on abuse of the corporate form as an exception to the principle of limited liability.²⁰⁴ This had resulted in shareholders being held directly liable vis-à-vis the company's creditors²⁰⁵ in situations where recourse under the statutory provisions protecting the maintenance of the GmbH's capital²⁰⁶ was insufficient to fully compensate them.²⁰⁷ Liability was imposed on shareholders where they openly or secretly depleted the company of assets that were needed to satisfy creditors.²⁰⁸

Based on the civil law understanding that courts do not establish but simply apply the law, German courts are not held to the principle of *stare decisis* and are therefore not bound by their previous rulings or those of other courts.²⁰⁹ However, in the interests of legal certainty, it is understood that courts should not arbitrarily change past decisions and ought to explain their reasons when they do so. The cases regarding veil-piercing form no exception to this rule. The BGH explained that it considered its former rulings questionable from a doctrinal perspective because they had resulted in shareholders being held directly liable to creditors although no duties owed to creditors were breached. The duties that were breached were owed to the company and only resulted in losses to the company. The BGH considered it flawed to assume that any loss of corporate assets immediately affected the creditors.²¹⁰ Instead, the losses were of a purely reflective nature, and reflective losses generally did not give creditors any remedies.²¹¹ The previous decisions created contradictory outcomes because “annihilating interference” (a concept explained immediately below) resulted in direct external liability of shareholders, whereas the statutory provisions for the

203. *Id.* ¶ 16.

204. *Id.* ¶ 22. The overruled principles were developed and applied in BGH II ZR 178/99, Sep. 17, 2001 (*Bremer Vulkan*), 2002 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 38; BGH II ZR 196/00, Feb. 25, 2002, 2002 NZG 520; BGH II ZR 300/00, Jun. 24, 2002 (*KBI*), 2002 NZG 914; BGH II ZR 206/02, Dec. 13, 2004 (*Autovertragshändler*), 2005 NZG 177; BGH II ZR 256/02, Dec. 13, 2004 (*Handelsvertreter*), 2005 NZG 214.

205. BGH *Trihotel*, 2007 NJW 2689 ¶ 17.

206. GmbHG, §§ 30 & 31.

207. BGH *Trihotel*, 2007 NJW 2689 ¶ 18.

208. *Id.* ¶ 21.

209. For an introduction to basic differences between court rulings in common and civil law countries, see Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 426–27 (1967); Ewoud Hondius, *Precedent in East and West*, 23 PENN ST. INT'L L. REV. 521, 525 (2005) (with references to the Kingdom of Prussia, one of the legal predecessors of today's Germany). The situation has since changed as courts discuss their and other court's former rulings, but they are still not legally bound by them.

210. BGH *Trihotel*, 2007 NJW 2689 ¶ 23.

211. *Id.* ¶ 26.

maintenance of capital (§§30 and 31 GmbHG) only led to shareholders' internal liability.²¹²

The Court emphasized that veil-piercing had to be applied cautiously because it could undermine the principle of limited liability. It was evidently worried that supporting widely-worded categories of veil piercing would create a mechanism that courts could use too lightly. It emphasized that the loss of the privilege of limited liability would threaten the very existence of the GmbH as a popular and useful type of business entity and thereby go against the intentions of the legislature. Thus, the court concluded that shareholders could not be liable for "abuse of the corporate form" as set out in its previous decisions.²¹³

However, shareholders continued to be personally liable in cases of "annihilating interference," but no longer based on the considerations previously applied.²¹⁴ The Court held that "annihilating interference" was henceforth to be understood as tortious liability for improperly and self-servingly tampering with corporate assets. These corporate assets are subject to strict rules of capital maintenance in the interest of creditors. Tampering with these assets results in tortious liability when it causes or aggravates corporate insolvencies.²¹⁵ Damages are owed to the company alone and not to its creditors because their losses are of a purely reflective nature.²¹⁶ In practice, this means that administrators in insolvency proceedings enforce these claims on behalf of the company.²¹⁷ Outside of insolvency, creditors must obtain an enforceable title against the company and then request to be assigned the company's claims against its shareholders.²¹⁸

To be held liable for "annihilating interference" under tort law, the shareholders' conduct must conform to the strict requirements of section 826 of the German Civil Code ("BGB") which provides: "A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable

212. *Id.* ¶ 32. In addition, the Court stated at paragraph 20 that the previous principles had proved difficult to apply for practitioners and lower courts alike.

213. *Id.* ¶ 27.

214. As explained above, "annihilating interference" is the loose translation chosen here for the German expression *existenzvernichtender Eingriff*. Other authors speak of "endangering the existence of the company", see ROTH & KINDLER, *supra* note 173, at 68, but the wording chosen here reflects the drastic language used by the courts in German.

215. BGH *Trihotel*, 2007 NJW 2689 ¶ 28.

216. *Id.* ¶ 17. The Court held at paragraphs 19 and 24 that liability for "annihilating interference" was still needed because a lacuna of legal consequences was left by the statutory provisions in cases where shareholders drain companies of their assets without crossing the line set out in sections 30 and 31 GmbHG, i.e. without touching the subscribed capital of the company. As the Court said at paragraph 25, corporate assets require protection even beyond the lines drawn by the capital requirements if this is necessary to meet the obligations owed to creditors. On this need for principles protecting the assets of the company below the threshold of subscribed capital, see also ROTH & KINDLER, *supra* note 173, at 68.

217. BGH *Trihotel*, 2007 NJW 2689 ¶ 34.

218. *Id.* ¶ 34 and confirming BGH II ZR 129/04, Oct. 24, 2005, 2006 NZG 64.

to the other person to make compensation for the damage.”²¹⁹ This requires a shareholder to harm the company intentionally and in bad faith.²²⁰ The provision’s premise is that the shareholder is aware that his behaviour is detrimental to the corporation’s finances and equally aware of all facts that render the act contrary to public policy, but not necessarily that he understands that the law holds his acts to be contrary to public policy, nor that he intends to harm the creditors. It suffices to know and accept that the company’s ability to pay its obligations is permanently impaired as a result of his actions, a state of mind referred to as *dolus eventualis*.²²¹ As a result, a shareholder can, factually speaking, only be held liable when the risk of insolvency is very real and obvious to the shareholder.²²² Importantly, not only the shareholders of the disadvantaged company, but also the shareholders of a second company that itself holds shares in the company can be liable. The BGH has confirmed this rule where such shareholders in effect dominate the disadvantaged company. The supporting argument is that no shareholder should be allowed to hide behind formalities, i.e., the fact that he is not a shareholder himself is of no defense when effectively the harm done is the same as if he were.²²³

The GAMMA judgment of the BGH

The BGH confirmed these new principles shortly afterwards in its *GAMMA* ruling. This ruling of the BGH was preceded by the judgment of a state court of appeal that held the shareholders of a GmbH personally liable for using the company as a so-called “Cinderella company”. The term is commonly used in German cases and legal writing for companies in which shareholders exercise their influence in ways that ultimately prove detrimental to creditors.²²⁴ These shareholders had burdened the company that subsequently became insolvent with obligations originally owed by other companies in the same group although

219. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 826, translation at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3497 (Ger.).

220. ROTH & KINDLER, *supra* note 173, at 68.

221. BGH *Trihotel*, 2007 NJW 2689 ¶ 30; BGH II ZR 292/07, Feb. 9, 2009 (*Sanitary*), 2009 NZG 545 (547).

222. See Lutter & Bayer, *supra* note 201, at Rdn 40.

223. BGH *Trihotel*, 2007 NJW 2689 ¶ 44 referring to BGH *Autovertragshändler*, 2005 NZG 177. From a comparative perspective there are similarities to some of the common law rules relating to directors in whom the power of management is usually vested. Where directors are aware or ought reasonably to be aware that their acts will cause the company to become insolvent, they owe duties to creditors of the company, see *Liquidators of Progen Engineering Pte Ltd. v. Progen Holdings Ltd.* [2010] SGCA 31, [2010] 4 Sing. L. Rep. 1089 [48]; *Chip Thye Enterprises Pte Ltd. v. Phay Gi Mo* [2003] SGHC 307, [2004] 1 Sing. L. Rep.(R.) 434; *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722 (Court of Appeal)(NSW). In addition, persons who act as de facto directors are deemed to be directors even if they were never appointed to such office, see *Primlake Ltd v Matthews Associates* [2006] EWHC 1227 (Ch), [2007] 1 B.C.L.C. 666.

224. On the terminology, see BGH II ZR 264/06, Apr. 28, 2008 (*GAMMA*), 2008 NJW 2437 ¶ 13; Lorenz Fastrich, GMBHG § 13 Rdn 51 (Adolf Baumbach & Alfred Hueck eds., 21st ed. 2017).

it had been clear, as the court put it, that the subsequently insolvent company was inadequately capitalized in view of the obligations transferred to it. They also convinced a number of workers employed by other companies in the group to move to this subsequently insolvent company, a further fact that became relevant for the BGH's decision.

The BGH overruled the appellate court's judgment and reaffirmed its former ruling in *Trihotel* that shareholders whose actions endanger the company's existence cannot be held directly liable to creditors.²²⁵ It went on to clarify further points. It emphasized that instances of mere undercapitalization in a material sense, i.e., instances that do not involve a breach of the principles of capital maintenance, do not meet the requirements of an "annihilating interference."²²⁶ The BGH emphasized that such undercapitalization alone could not lead to shareholder liability and explicitly rejected academic writing to the contrary.²²⁷ It emphasized that shareholders are responsible for providing the required legal capital of the GmbH, but are under no obligation to furnish it with the financial means necessary to meet all its legal obligations; such a duty would be incompatible with the company's nature as an entity of limited liability.²²⁸ Shareholders are under no obligation to assess and provide adequate financing to the company. They are only required to abstain from depriving the company of its assets in any manner incompatible with the rules of capital maintenance.²²⁹ Such acts can take place when they channel corporate assets to a sister company, themselves or other shareholders or parties related to shareholders.²³⁰

In the case at hand, the court held that an annihilating interference of the shareholders could not be based on their failure to adequately finance the company to enable it to pay off its debt. The company was formally fully capitalized as required by the law and the shareholders did nothing to deprive the creditors of their right of legal access to all of the company's assets when it was a going concern.²³¹ However, in an interesting twist, the court ultimately held the shareholders liable for compensation payable to the company's employees because they had failed to disclose the precarious financial situation when these employees agreed to move from their former employer to this company. The BGH based this liability also on section 826 of the BGB. As a result, the employees had a direct claim against the shareholders because of a tortious act committed against them, not against the company.

225. BGH *GAMMA*, 2008 NJW 2437, overruling Oberlandesgericht [OLG] Düsseldorf [Düsseldorf Higher Regional Court] 6 U 248/05, Oct. 26, 2006, 2007 NZG 388, confirming BGH *Trihotel*, 2007 NJW 2689.

226. BGH *GAMMA*, 2008 NJW 2437 ¶ 13.

227. *Id.* ¶¶ 16–22.

228. *Id.* ¶ 23. The principle of limited liability follows from section 13(2) GmbHG.

229. BGH *GAMMA*, 2008 NJW 2437 ¶ 23.

230. Lutter & Bayer, *supra* note 201, at Rdn 35.

231. BGH *GAMMA*, 2008 NJW 2437 ¶ 12.

A direct claim against shareholders may therefore exist, but only when a tortious wrong was directly committed to the creditors of the company. This ruling in *GAMMA* is therefore in line with *Trihotel* because it does not contradict the latter's holding that purely reflective wrongs and losses cannot be claimed by creditors. Further judgments have since confirmed the holdings of *Trihotel* and *GAMMA*.²³² In one of them, the BGH ruled that it could amount to "annihilating interference" and hence shareholder liability (under section 826 of the BGB) to the company when a shareholder prevented the company from pursuing its legitimate claims against him.²³³ Here again, the court confirmed that shareholders might be personally liable for their actions, but generally not to creditors of the company, but to the company itself.

Veil-piercing for commingling of corporate and private assets

Legal writing almost uniformly supports veil-piercing in cases where shareholders commingle the company's assets with their own. By doing so, shareholders disregard the company's separate legal identity in financial matters. In terms of the exact requirements that justify such an exception to the principle of limited liability, however, academic commentators have not been able to reach an agreement.

The BGH has repeatedly supported this category of corporate veil-piercing and helped to shape its contours. In a 2005 ruling, the BGH defined the requirements for personal liability resulting from comingling of corporate and personal assets in disregard of principles of capital maintenance. It held that payment transactions among the company, its shareholder(s) and third parties must lack transparency to the extent that it becomes impossible to attribute them to the company and that, consequently, the corporate assets become indistinguishable from the shareholder's personal assets.²³⁴ It thereby confirmed previous judgments that had arrived at the same conclusions.²³⁵ Any personal liability resulting from such conduct may only affect the shareholder(s) responsible for the situation, and no other shareholders who simply happen to be members of the company during the time when such comingling occurs. This type of veil piercing therefore most commonly applies to sole or majority shareholders.²³⁶

As a result, German courts pierced the veil in cases in which shareholders commingled corporate and private assets. Commingling presently represents the

232. BGH II ZR 252/10, Apr. 23, 2012 (*Wirtschafts-Akademie*), 2012 NZG 667.

233. *Sanitary*, 2009 NZG 545.

234. BGH II ZR 178/03, Nov. 14, 2005, 2006 NZG 350 ¶ 15. On these judgments, see also ROTH & KINDLER, *supra* note 173, at 67.

235. BGH II ZR 16/93, Apr. 13, 1994, 1994 NJW 1801; BGH II ZR 275/84, Sep. 16, 1985 (*Autokran*), 1986 NJW 188.

236. BGH Nov. 14, 2005, 2006 NZG 350 ¶ 17.

only situation in which German courts still rely on the principles of veil-piercing to hold shareholders directly liable to the creditors of a company. Notwithstanding the principle that civil law judges do not make law, veil-piercing in these commingling cases is a judge-made legal rule that fills a gap left by statutory law. Its doctrinal basis is abuse of the corporate form²³⁷ that results in the loss of the privilege of limited liability and instead leads to the application of section 128 of the Commercial Code (*Handelsgesetzbuch*) that holds all general partners of commercial partnerships personally liable.²³⁸ It is strictly separate from all other scenarios in which shareholders' actions result in losses for the company. These other cases are at present resolved by application of general principles of law, be it the statutory provisions of liability for tortious acts (as discussed above) or principles of contract law (as explained below). As emphasized repeatedly, such application of general principles of the law may result in shareholders' internal liability, i.e., damages owed to the company, not in any direct liability owed to the company's creditors.

To distinguish these two scenarios, i.e., veil piercing with consequential personal liability to the company's creditors on the one hand and breaches of the law resulting in shareholders' liability vis-à-vis the company on the other, the BGH emphasized that improper accounting is not a sufficient basis for veil-piercing. While it certainly amounts to a breach of the law which may therefore give rise to damages by the company against the directors, this does not justify an exception to the principle of limited liability.²³⁹

It should be added that embezzlement of corporate assets results in shareholder liability under sections 30 and 31 of the GmbHG, and may also amount to "annihilating interference" but is not a basis for veil-piercing under the commingling exemption.²⁴⁰ As explained above, shareholders are liable for repayment to the company under sections 30 and 31 of the GmbHG when they receive payments when the company's legal capital is not intact. A transfer of assets outside a formalized distribution process such as distribution of dividends, capital reduction or share buybacks is subject to an arm's length test. If a diligent director would not have agreed to the conditions granted to the shareholder in a transaction with an unaffiliated third party, then the transaction with the shareholder is deemed a "hidden allotment of corporate assets" (*verdeckte Vermögenszuwendungen*) and constitutes a breach of the duty of good faith generally owed by shareholders to the company under German law. Such a

237. Called *Objektiver Rechtsmissbrauch*, see HUECK & WINDBICHLER, *supra* note 176, at §24 Rdn 30.

238. HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE], § 128. The courts apply this section of the commercial code 'by analogy' when they pierce the corporate veil, see BGH Nov. 14, 2005, 2006 NZG 350 ¶ 10.

239. BGH Nov. 14, 2005, 2006 NZG 350 ¶ 15.

240. Fastrich, *supra* note 224, § 13 Rdn 45.

breach can result in claims by the company for restitution and damages.²⁴¹ In addition, the shareholders may also be liable for “annihilating interference” under section 826 of the BGB as discussed earlier.

It is not the element of intent that distinguishes commingling from these other situations that give rise to claims against shareholders because sections 30 and 31 of the GmbHG and “hidden allotment of corporate assets” do not require the company or creditors to experience any intentionally committed harm. For the remedy of restitution that results in the return of assets to the company, no subjective mental element is necessary. Only when the company additionally claims damages do these subjective elements such as knowledge play a role. Instead, commingling is an exceptional situation where the financial situation of the company is so muddled that applying the principles of depletion of assets and the consequential claims for their return to the company is of no use. The drastic situation that corporate assets are indistinguishable from shareholders’ personal assets justifies the harsh consequence that the shareholders responsible for commingling are personally and directly liable to the company’s creditors.

These principles of commingling have not been rendered obsolete by the (slightly later) decisions on personal liability to the company resulting from “annihilating interference.” The BGH emphasized in its judgment of November 14, 2005 that the newly-contoured cases on liability for “annihilating interference” leave the principles of veil-piercing under the commingling exception intact,²⁴² although this statement was made at a time when the BGH still recognized that a shareholder’s direct liability could result from such “annihilating interference.” Such direct liability has since been ruled out. Regardless of this immense swing in doctrinal analysis, the BGH clarified in *Trihotel* that the principles applied in situations of commingling remain applicable.²⁴³

A different type of commingling must be distinguished from the one just discussed. Under the term *Sphärenvermischung*, academic commentators have discussed whether a shareholder should be held personally liable when he commingles his own affairs with those of the company, i.e., commingles the two separate spheres. Such an issue occurs when the shareholder conceals from third parties that the company and himself are different legal persons, e.g., by using similar names, the same premises and employees. In an old case, where the sole shareholder-director of a GmbH negotiated with creditors and did so as a director of the company in some instances and as a private person in others, the BGH

241. CHRISTIAN HOFMANN, DER MINDERHEITSSCHUTZ IM GESELLSCHAFTSRECHT 315–17 (2011) (on the principles of “hidden allotment of corporate assets”); *id.* at 25–67 (providing a comparative analysis of the principle of good faith in German company law and the role of fiduciary duty in US company law). On good faith in German company law, *see also* BGH II ZR 205/94, Mar. 20, 1995 (*Girmes*), 1995 NJW 1739.

242. BGH Nov. 14, 2005, 2006 NZG 350 ¶ 14.

243. BGH *Trihotel*, 2007 NJW 2689 ¶ 27.

held this shareholder personally liable and applied the principle of good faith in section 242 of the BGB. The court reasoned that the shareholder had acted as one and the same person in all instances, which justified not distinguishing between his position as a legal representative of the company and an independent sole proprietor, so as to hold him personally liable for all obligations under the legal relationship with the third party.²⁴⁴

The case has remained an outlier, and the BGH abstained from using any terminology that is commonly related to veil piercing. Instead, it relied on the principle of good faith, which supports the argument that it was not a case of veil-piercing. The BGH disapproved in more general terms of the shareholder's conduct and relied on the general principle of good faith to reach a result that seemed fair in the circumstances.²⁴⁵ These findings blend in with some of the earlier suggestions made in the discussion of the US position. At common law, it may on occasion be more fruitful to rely on concepts such as estoppel or misrepresentation rather than veil piercing.

Further scenarios that may be regarded as veil-piercing in other jurisdictions

The above discussion reflects the cases decided by German courts. As demonstrated, veil-piercing in Germany only applies in one scenario, the commingling of assets, while the courts analyzed a number of other situations on the basis of tort law, the principles of good faith, or by relying on provisions in the GmbHG. However, what about all other scenarios well-known from case law in the common law jurisdictions? American, English and Singaporean case law covers a wider range of situations, and the question arises of how German law would deal with them.

The answer reads: all other instances in which third parties have rights against shareholders are not considered exceptions to the principle of limited liability. Instead, the principles of the law of obligations as well as teleological interpretations of statutory provisions and widely-understood contractual terms apply and protect third party interests. In all these instances, the shareholder is held liable for what he did or promised to the third party, but not because of his role in the company. The role of the company in such scenarios is that of a silent bystander.

The following provides a few illustrative examples. If a company is used as a scheme to trick third parties into contracting because they would never contract

244. BGH VII ZR 9/57, Jan. 8, 1958, 1958 WERTPAPIER-MITTEILUNGEN: ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT [WM] 463 ¶ 22.

245. Commentators that are generally supportive of veil-piercing categorize this case as one of commingling of spheres, *see* Lutter & Bayer, *supra* note 201, at ¶ 24, while others who are less supportive of this doctrine do not include it in the list of decisions dealing with veil-piercing, *see* Fastrich, *supra* note 224, § 13 Rdn 46.

with the shareholders of the company, e.g., because they are convicted bankrupts or fraudsters, German law applies general principles of private law to free the third parties from any obligations they entered into. It may also grant them damages against the shareholders, not because the corporate veil was pierced, but because of a wrong they directly committed to such third parties.

The fact that the shareholders incorporated and used the company as part of their fraudulent scheme represents the very wrong for which they are held liable. Section 123 BGB²⁴⁶ entitles third parties to avoid the contract, rendering it void *ab initio*. The other party to the contract is the company and not the shareholder, but in cases when the shareholder commits deceit, the company must accept that the deceived party can avoid its declaration of consent to the contractual agreement if the company knew or should have known of the deceit. Since in such scenarios the fraudster shareholders are inevitably also the directors of the company, their knowledge is attributed to the company based on section 166 BGB. The knowledge of the directors is the knowledge of the company, and their mistakes are the mistakes of the company.²⁴⁷ In addition, the shareholders are liable to the deceived parties under tortious principles, particularly in the application of sections 826 and 823(2) BGB read with section 263 StGB, the provision of the Criminal Code that sanctions fraud. In addition, a shareholder may be liable if he breaches duties of care and diligence in his role as the legal representative of the company and as part of a fraudulent scheme. Such liability requires that the shareholder enjoys a high degree of trust from the deceived party and substantially influences the pre-contractual negotiations between that party and the company.²⁴⁸ Under these preconditions, a so-called “legal relationship without primary obligations” exists between the shareholder and the third party and may lead to the shareholder’s liability for breaches of the duties of care and diligence under sections 311(2), 241(2), 280(1) BGB.²⁴⁹

A second example involves a shareholder who is bound by a non-competition clause with his former employer that states that the employee is prevented from

246. BGB, § 123 reads:

(1) A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration.

(2) If a third party committed this deceit, a declaration that had to be made to another may be avoided only if the latter knew of the deceit or ought to have known it. If a person other than the person to whom the declaration was to be made acquired a right as a direct result of the declaration, the declaration made to him may be avoided if he knew or ought to have known of the deceit.

247. On these generally accepted principles of attribution, see Wolfgang Zöllner & Ulrich Noack, GMBHG § 35 Rdn 146 (Adolf Baumbach & Alfred Hueck eds. 20th ed. 2013); HUECK & WINDBICHLER, *supra* note 176, § 9 Rdn 3.

248. These are requirements under the BGB: BGB, § 311 para. 3.

249. Such legal relationships are very common in German law and have no direct equivalent in French or common law. In the context of this article, they result from the situation where a third party involved in contractual negotiations dominates the negotiations or enjoys a high level of trust by the parties, a situation typical of agents and organs of a company.

running a business in the same district where the employer is based. In order to avoid liability under the clause, he incorporates a company which becomes the owner of a business that competes with the shareholder's former employer.²⁵⁰ German courts or scholars would never consider this a case of veil-piercing. If a party to a contract is held to a valid non-competition clause,²⁵¹ this party is prevented from engaging in any activity that falls under the respective clause. Sections 133 and 157 BGB require contracts to be interpreted as required by good faith, taking customary practice into consideration, and to ascertain the true intention rather than adhering to the literal meaning of the declaration. The courts have always applied an objective test that interprets declarations of parties to a contract in the way that a prudent third person would have understood it.²⁵²

These principles of interpretation would lead to the understanding of the non-competition clause in a broad way. The prudent third party would have understood that the former employer can operate free from any disadvantage that might result from the former employee using his professional knowledge and experience in the employer's district, be it by running his own business, i.e., as a sole proprietor, or by forming any type of business entity that engages in such a business and which the former employee supports with his expertise. The scenario of a company whose director-shareholder the former employee becomes would clearly be covered by the non-competition clause, and since the employee himself is found in breach of his contractual agreement with the former employer, the employer could successfully seek a prohibitory injunction under sections 823(1) and 1004(1) BGB. The same would apply if the former employee only had a contract of employment with another company that placed him in a position of some materiality, such as being a director or having some other management position. On the other hand, there would be no breach if the shareholder was merely a passive investor in a business, even if that business was in competition with his former employer.

These two examples show that the principles of veil-piercing are not needed in Germany to deal with scenarios in which a shareholder tries to hide behind the principle of limited liability and which are commonly discussed as veil-piercing cases in other jurisdictions. It has been shown that the courts disregard the principle of limited liability and allow creditors of the company to pursue claims directly against shareholders in one narrow situation only: when shareholders commingle the company's assets with their own. The climate in Germany is increasingly becoming hostile against any attempts to pierce the corporate veil.

250. As in *Gilford* [1933] Ch 935 where the corporate veil was pierced.

251. Such clauses are sometimes considered invalid as contrary to public policy when they disproportionately limit a person's occupational freedom as guaranteed by the constitution: BGB, § 138 paras. 1–2; GRUNDGESETZ [GG] [BASIC LAW], art. 12 para. 1, *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0071.

252. Sections 133 and 157 BGB as generally interpreted by the courts, *see e.g.*, BGH X ZR 37/12, Oct. 16, 2012, 2013 NJW 598 (599 at ¶ 17).

Many commentators argue that the concept should be abandoned altogether,²⁵³ and the BGH's change of heart in the "annihilating interference" cases shows that it might well be moving in that direction.²⁵⁴

As explained, German company law relies heavily on principles of initial capitalization and strict capital maintenance rules. It follows that the question whether the principle of limited liability should be disregarded in instances where shareholders adhere to capital maintenance rules but seek to take advantage of the corporate veil in other ways should be answered in the negative. Not corporate law, but general principles of the law as found in tort law and the law of obligations stand ready to deal with these situations. Consequently, it is submitted here that even in the situation involving commingled assets the Court could apply principles of tort law and hold the shareholders liable when they overstep the line drawn by section 826 BGB. It is not evident why the law should look less favorably at a shareholder who may be disorganized or unsophisticated and has therefore indistinguishably commingled his and the company's assets than another who systemically strips the company of its assets.

People's Republic of China

As mentioned earlier, China (unusually) has a specific legislative provision that provides an exception to separate personality and limited liability. Article 20 of the 2005 Company Law,²⁵⁵ after restating the general principle that the shareholders of a company should not abuse shareholders' rights, the company's legal person status, or shareholders' limited liability, provides in the third paragraph:

"Any of the shareholders of a company who abuses the independent legal person status of the company and the limited liability of the shareholders to evade the payment of the company's debts, thus seriously damaging the interests of the company's creditors, shall bear joint liabilities for the debts of the company."²⁵⁶

Article 20 establishes a four-pronged legal test, or a standard comprising four elements, for judicial application of the doctrine.²⁵⁷ First, it must be proven that

253. See e.g., Fastrich, *supra* note 224, § 13 Rdn 44.

254. Lord Neuberger of the UK Supreme Court was sympathetic to such a view, see *Prest* [2013] 3 WLR 1 [79].

255. There was a revision to the legislation in 2013. All references to China's Company Law are to the 2013 revised legislation unless otherwise stated.

256. Hui Huang, *Piercing the Corporate Veil in China: Where Is It Now and Where Is It Heading?*, 60 AM. J. COMP. L. 743, 744 (2012) (describing this as "a bold move" to codify "a common law doctrine renowned for its complexity and amorphousness."):

257. The standard has been articulated in different ways by judges of China's Supreme People's Court in their scholarly writing. See Judges XI XIAOMING (奚晓明) and JIN JIANFENG (金剑锋), GONGSI SUSONG DE LILUN YU SHIWU WENTI YANJIU 公司诉讼的理论与实务问题研究 (CORPORATE LITIGATION: THEORIES AND PRACTICES) [Beijing: People's Court Press, 2008], pp. 562-564; Judge JIANG BIXIN (江必新) et al, ZUIGAO RENMIN FAYUAN ZHIDAOXING ANLI CAIPAN GUIZE LIJIE YU SHIYONG (GONGSI JUAN) 最高人民法院指导性案例裁判规则理解与适用 (公司卷) [THE UNDERSTANDING AND APPLICATION OF JUDGING RULES IN

the shareholder concerned has abused the company's legal person status and the shareholder's limited liability. The abuse of the company's legal personality and that of shareholder limited liability are not separate acts, but rather understood as two sides of the same coin.²⁵⁸

Second, the purpose of the aforesaid abuse must be to "evade" the payment of debts to the company's creditors. This has been interpreted by some judges of China's Supreme People's Court ("SPC") as the use of corporate personality to "avoid" contractual or legal obligations.²⁵⁹ Another SPC judge, Yu Zhengping, maintained that the wording of Article 20 "undoubtedly requires the existence of a subjective intent" to evade debts.²⁶⁰

Third, the interests of the creditors must be damaged "seriously" (*yanzhong*). Needless to say, Company Law does not define "seriously," and courts will interpret its meaning on a case by case basis. Zhou suggests that the court should consider three factors when determining whether the damage is serious enough to activate veil piercing: (1) the actual damage to the creditors; (2) the debt-paying ability of the company; and (3) the subjective intent of the shareholder concerned.²⁶¹

Fourth, there must be a causal link between the shareholder's abusive behavior and the damage/losses suffered by the creditors.²⁶²

Since 2006, when the new Company Law took effect, Chinese courts have decided hundreds of veil piercing cases, and researchers within and outside China are producing a growing body of academic literature.²⁶³ Thus far, the

GUIDANCE CASES OF THE SUPREME PEOPLE'S COURT (VOLUME OF CORPORATION LAW), Beijing: China Legal Publishing House (2012), p. 87.

258. Liu Junhai (刘俊海), *Xiandai Gongsifa* (现代公司法) [MODERN CORPORATIONS LAW] 665 (2015).

259. See Li Guoguang (李国光) & Wang Chuang (王闯), *Shenli Gongsi Susong Anjian de Ruogan Wenti – Guanche Shishi Xiudinghou Gongsifa de Sifa Sikao* (审理公司诉讼案件的若干问题 – 贯彻实施修订后公司法的司法思考) [*Several Questions on Corporate Litigation: Judicial Thoughts on Implementing the Revised Company Law*] reprinted in *Zuigao Renmin Fayuan Sifa Guandian Jicheng* (最高人民法院司法观点集成) [THE COLLECTION OF THE SUPREME PEOPLE'S COURTS' JUDICIAL VIEWS] 286 (2005).

260. Yu Zhengping (虞政平), *Zhongguo Gongsifa Anli Jingdu* (中国公司法案例精读) [RESEARCH INTERPRETATIONS ON SELECTED CHINESE CORPORATE LAW CASES] 146 (2016).

261. Zhou Yousu (周友苏), *Xin Gongsifa Lun* (新公司法论) [NEW SURVEY ON CORPORATIONS LAW] 105 (2006).

262. See Xi and Jin, *supra* note 257, at 564; Jiang, *supra* note 257, at 87.

263. See e.g., Mark Wu, *Piercing China's Corporate Veil: Open Questions from the New Company Law*, 117 YALE L.J. 329 (2007); Ge Weijun (葛伟军), *Lun Zuidi Ziben yu Jiekai Gongsi Miansha* (论最低资本与揭开公司面纱) [*On Minimum Registered Capital and Piercing Corporate Veil*], 13 上海财经大学学报 (哲学社会科学版) [JOURNAL OF SHANGHAI UNIVERSITY OF FINANCE AND ECONOMICS] 34 (2011); Huang, *supra* note 256; Shuangge Wen, *The Ideals and Reality of a Legal Transplant – The Veil Piercing Doctrine in China*, 50 STAN. J. INT'L L. 319 (2014); Kimberly Bin Yu & Richard Krever, *The High Frequency of Veil Piercing in China*, 23 ASIA-PAC. L. REV. 63 (2015); Colin Hawes et al, *Lifting the Corporate Veil in China: Statutory Vagueness, Shareholder Ignorance and Case Precedents in a Civil Law System*, 15 J. CORP. L. STUD. 341 (2015); and Hu Gairong (胡改蓉), *Ziben Xianzhu Buzu Qingxingxia Gongsifa Renge Founen Zhidu de Shiyong* (资本显著不足情形下公司法人格否认制度的

literature, including both empirical studies and doctrinal analyses, seems to overwhelmingly suggest that Chinese courts have been enthusiastic in piercing the corporate veil, or, at least, “Chinese judges are clearly much more willing to pierce a company veil and shift liability to its owners on the basis of statutory authority than their common law counterparts relying on judicial doctrines.”²⁶⁴ The literature also suggests that Chinese courts practiced “judicial activism” in veil piercing cases.²⁶⁵

The evolution of the veil piercing doctrine in China

To fully understand veil piercing in Chinese law, it is necessary to appreciate the position prior to the 2005 Company Law, as veil piercing was not officially recognized in Chinese law prior to this. There was, however, a loosely crafted legal framework to allow veil piercing under limited circumstances. This ambiguous and confusing framework was established through “judicial practice,” or *sifa shijian*, which refers to the practice of the judiciary to develop jurisprudence and legal doctrines, mainly through the SPC’s issuance of judicial interpretations and selected case reports, as well as the legal enactments of the State Council, China’s Central Government.²⁶⁶ It has been stated: “[a]lthough the 1993 Company Law did not include veil-piercing doctrine, the Chinese judiciary cautiously applied it even without a clear statutory basis before its codification in 2005.”²⁶⁷

The introduction of the veil piercing doctrine started with a regulation issued by the State Council on 12 December 1990, titled *Guanyu Qingli Zhengdun Gongsi zhong Bei Chebing Gongsi Zhaiquan Zhaiwu Qingli Wenti de Tongzhi* (*Circular on Questions relating to the Claims and Debts of Companies Dissolved or Merged with Others in the Campaign for Sorting Out and Consolidating Companies*) [关于清理整顿公司中被撤并公司债权债务清理问题的通知]. Some people believe that the 1990 Circular is the first law to offer an exception to the doctrine of limited liability, which was well established in China through various regulations but not codified yet into a national company law. It provided that investors or incorporators of the company should directly assume the debts of the company but that such liability was limited to the extent that the

适用) [*Disregarding Corporate Personality in Cases of Undercapitalization*], Faxue Pinglun (法学评论) [LAW REVIEW] 163 (2015).

264. Yu & Krever, *supra* note 263, at 81.

265. Hawes et al, *supra* note 263, at 363–68.

266. On the roles and functions of the various legal institutions in China (including their legislative functions), see generally Jiangyu Wang, *Legal Reform in an Emerging Socialist Market Economy*, in *LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS, AND INNOVATIONS* 24–61 (E. Ann Black & Gary F. Bell eds. 2011).

267. WANG, *supra* note 66, at 80.

investors/incorporators benefited from the company's operations or misappropriated the company's assets.²⁶⁸

The first judicial interpretation on veil piercing by the SPC is believed to have taken place in 1994 in a reply to a question submitted by the Higher People's Court of Guangdong Province (Zuigao Renmin Fayuan Guanyu Qiye Kaiban de Qiye bei Chexiao huo Xieye hou Minshi Zeren Chengdan Wenti de Pifu (最高人民法院关于企业开办的企业被撤销或歇业后民事责任承担问题的批复) [Reply of the Supreme People's Court on the Civil Liability of Enterprises Whose Subsidiaries were Revoked or Shut Down]). This judicial interpretation made an effort to strengthen the traditional mandate of limited liability, as it first required the investing enterprise to undertake civil liability to the extent of the unpaid capital contributions in the subsidiary's registered capital, and "if no capital was actually contributed to the terminated company, or the amount was not sufficient according to the law, then the company will be determined not to be a legal person and its full civil liability will be assumed by the enterprise that established the company."²⁶⁹

The SPC issued two judicial interpretations in 2001 and 2003 to further develop the piercing doctrine. The 2001 judicial interpretation, captioned Guanyu Shenli Jundui, Wujing Budui, Zhengfa Jiguan Yijiao, Chexiao Qiye he yu Dangzheng Jiguan Tuogou Qiye Xiangguan Jiufen Anjian Ruogan Wenti de Guiding (关于审理军队、武警部队、政法机关移交、撤销企业和与党政机关脱钩企业相关纠纷案件若干问题的规定) [*Provisions of the Supreme People's Court on Several Issues on the Trial of Cases concerning Enterprises transferred by the Army, Armed Police Force and Judicial Bodies, Enterprises Whose Licenses have been Revoked, and Enterprises Which Have been Disconnected from Party and Government Agencies*], mainly addressed legal issues relating to business enterprises owned by the army, armed police force, and judicial bodies, and provided that a shareholder/investor was no longer liable if it made its legal or contractual obligations with respect to capital contributions. It is important to note that this interpretation was aimed to clarify a confusion caused by the 1994 Reply which had encouraged many lower courts to impose unlimited liability improperly on shareholders.²⁷⁰

268. See Jin Jianfeng (金剑锋), Gongsì Faren Foureñ Lilun Jiqi zai Woguo de Shìjian (公司法人否认理论及其在我国实践) [*The Doctrine of Disregarding Corporate Personality and Its Adoption in China*], 2005 Zhongguo Faxue (中国法学) [CHINA LEGAL SCIENCE] 117–25 (2005).

269. David M. Albert, *Addressing Abuse of the Corporate Entity in the People's Republic of China: New Thoughts on China's Need for a Defined Veil Piercing Doctrine*, 23 U. PA. J. INT'L ECON. L. 873, 883 (2002). A historical analogy may be drawn with the pre-incorporation joint stock companies that were not legal entities but partnerships and therefore the "shareholders" were ultimately liable for any shortfall in the assets of the joint stock company. Given that Chinese law did recognize the doctrine of limited liability, this is a somewhat strange judicial interpretation.

270. See Jin, *supra* note 268, at 123 (noting that, after the 1994 Reply, some courts asked the investing shareholders to repeated "making up for the differences" in their capital contribution because of the lack of a definition about capital in the 1994 Reply).

The 2003 judicial interpretation, titled *Guanyu Shenli yu Qiye Gaizhi Xiangguan de Minshi Jiufen Anjian Ruogan Wenti de Guiding* (关于审理与企业改制相关的民事纠纷案件若干问题的规定) [*Provisions of the Supreme People's Court on Several Issues concerning the Trial of Cases of Civil Disputes Related to Enterprise Restructuring*], offered a relatively more precise legal test for veil piercing in the context of a merger and acquisition transaction. Article 35 provided that the holding or parent enterprise shall be responsible for the debts of the subsidiary where the subsidiary's inability to pay off its debts was caused by the holding enterprise's own acts to withdraw capital from the subsidiary to evade its debts, if the holding enterprise achieved its controlling stake through a merger and acquisition.²⁷¹

The veil piercing rule eventually codified into the 2005 Company Law was certainly built upon the aforesaid judicial interpretations, but it differs from the SPC's interpretations in at least two ways. First, the consequence for the court's application of the veil piercing rule merely means that the effects of corporate personality are not applicable to the extent determined judicially. The shareholders concerned will be held liable for the debts in the case in question, but the company will still be a going concern and keep its legal personality with limited liability. In contrast, the judicial interpretations issued before 2005 aimed to hold the shareholders and investors liable in the course of a company's liquidation, which would lead to the company's termination. The rationale was that the business license was issued by the national or local Administration for Industry and Commerce and hence an administrative act. While the court would normally respect such acts, the court is not bound by it if it discovers that the conditions provided for in the national laws or administrative regulations were not met. In comparison, under Article 20 of the Company Law the court orders veil piercing as an isolated case to ask the shareholder to bear joint and several liability for the debts owned by the company to the creditor(s) who brought the veil piercing lawsuit. It requests the responsible shareholders to pay for company debts but will not terminate the company by any means.

Second, prior to the Company Law, the extent of the liability of the shareholders or investors was confined to their unpaid capital contributions to, or undeserved benefits received from, the company; in other words, liability was confined to what was due to the company or benefits improperly obtained from the company. For example, an investor or shareholder would be responsible for the debts of the company to the extent it received money or other assets, without proper consideration, from the company. Likewise, it was responsible to the extent of the money and assets it had illegally withdrawn from or transferred out of the company or hidden from outsiders.²⁷² Such liability to make compensation

271. Wang, *supra* note 66, at 80.

272. Jin, *supra* note 268, at 124.

was fault-based. However, in the case of veil piercing under the Company Law, fault is not necessarily an element for applying Article 20.²⁷³

The broader historical background of the above-mentioned judicial interpretations is also of notable importance. As clearly suggested by the stated purpose and explicit language in those judicial rules, the rudimentary veil piercing framework then was largely developed to address the abuse of power by shareholders or investors, especially state investors, in the subsidiaries established by them.²⁷⁴ The intention of the SPC was to strike a balance between the rights of shareholders and creditors. As noted, the application of the judicial interpretations would lead to the termination of the subsidiary enterprises concerned. In this process, they would hold accountable not only the shareholders or investors, but also government agencies which approved the establishment of the enterprises.²⁷⁵ This is further indication that the main targets of the judicial interpretations were abusive state-owned enterprises. On the other hand, the veil piercing doctrine seems thus far to have been rarely invoked against state owned enterprises since it was adopted in the 2005 Company Law.

Grounds for veil piercing in judicial practice

While Article 20 of the Company Law sets out a general principle, scholarly writing has suggested the following circumstances that are capable of giving rise to sufficient abuse to warrant veil piercing.²⁷⁶

The first is undercapitalization, where either the shareholder did not make adequate contributions to the company's registered capital or that such capital, including corporate cash and assets, was improperly withdrawn from the company by the shareholder. The second is where the company has been used as a device to evade contractual obligations. This occurs when the shareholder, who has to refrain from doing something under a non-competition agreement or

273. Fault or even negligence is especially not considered in veil piercing cases concerning comingling of assets of corporate affairs. *See* Jiang Bixin et al, *supra* note 257. In a veil piercing case adopted by the PRC Supreme Court as a Guiding Case with binding force on lower courts, it was ruled by the Jiangsu High People's Court veil piercing should be ordered simply because the three defendants had commingled personalities in terms of "commingled personnel", "commingled business" and "commingled finances". *See* Xugong Jituan Gongcheng Jixie Gufen Youxian Gongsi Su Chengdu Chanjiao Gongmao Youxian Zeren Gongsi Deng Maimai Hetong Jiufen An (徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案) [XCMG Construction Machinery Co., Ltd. v. Chengdu Chuanjiao Industry and Trade Co., Ltd. et al., A Sale and Purchase Contract Dispute], (2011), adopted as the Supreme People's Court Guiding Case No. 15 on 31 January 2013, available at <http://www.court.gov.cn/fabu-xiangqing-13321.html>. English information about this case is available at Stanford Law School's China Guiding Case Project at <https://cgc.law.stanford.edu/guiding-cases/guiding-case-15/>.

274. *See generally* Wen, *supra* note 263.

275. Jin, *supra* note 268, at 124.

276. Wang, *supra* note 66, at 81–82; *See also* Liu, *supra* note 258, at 668–71; Xi and Jin, *supra* note 257, at 560–62.

confidentiality agreement, incorporates a company to evade his obligations.²⁷⁷ Another example is when a shareholder uses the company to defraud creditors. A third situation arises in circumstances where the company is a device to evade statutory restrictions and involves illegal activities such as tax evasion or money laundering. Finally, it has been suggested that veil piercing can take place where there has been a lack of formality or confusion of affairs. In such cases, the shareholder himself disregards the separate legal personality of the company and makes the company an alter ego of the shareholder. This could include the control of the company so that the decision-making of the company is entirely dominated by the shareholder, or there is confusion or intermingling of the assets, business, affairs, and even management personnel of the company and the shareholder. It is clear that these instances where veil piercing may take place have parallels in other jurisdictions discussed previously.

Although it would appear that there are many instances of veil piercing in China, the exceptional nature of the doctrine has also been articulated. For example, two former prominent judges of the SPC have noted:²⁷⁸

The fact that the doctrine of piercing corporate veil only serves to complement [the principle of separate legal personality of the company law] determines that the application of the doctrine must be exceptional Our country's Company Law has to establish the system of corporate veil piercing because of practical needs. However, it must be emphasized that the courts must be firmly cautious when applying this system and always be mindful of any abuse of it. Cautious application of the doctrine means, whenever a problem can be solved by the normal rules in the civil law, the piercing corporate veil rule must be avoided so as to protect the principles of independent legal personality and limited liability of modern corporate law. The application of the veil piercing doctrine must be the last resort, not a regular tool for the court.

This cautionary statement should be contrasted with the sometimes made assumption that undercapitalization is the most important ground for piercing in China.²⁷⁹ Xi and Jin, on the other hand, express that undercapitalization should not be the only reason to pierce the corporate veil, stating that “only in the case where the company's capital was extremely inadequate should the court disregard corporate personality on the ground of undercapitalization.”²⁸⁰ One empirical study has found that undercapitalization was the least important reason for veil piercing. Huang examined court decisions in a five-year period from 2006 to 2010 and found ninety-nine cases on veil piercing. Chinese courts ordered piercing in sixty-three cases, leading to a high frequency of 63.64%.²⁸¹ It was further found, of the 118 requested grounds for veil piercing, seventy-four

277. This seems similar to the cases in England on evasion, see *Gilford* [1933] Ch 935.

278. See Xi & Jin, *supra* note 257, at 559. Again there are parallels with judicial statements elsewhere.

279. For example, see Liu, *supra* note 258, at 667–670.

280. Xi & Jin, *supra* note 257, at 560.

281. Huang, *supra* note 256, at 748–49.

involved commingling or confusion of assets, business or personnel; thirty-two concerned fraud or other improper conduct; eleven were about undue control; while only one case was based on undercapitalization. Even in that single case, the court rejected the request and refused to lift the veil on the ground of undercapitalization.²⁸²

The case of *China Orient Asset Management Co Ltd v. The Xi'an High-Tech Area Branch of China Construction Bank*²⁸³ may illuminate the approach towards the ground of undercapitalization. In this case, China Construction Bank made a loan to a company named Jinling Co. Jinling, however, failed to repay the China Construction Bank. The debt was eventually transferred by the bank to the plaintiff, China Orient Asset Management Co Ltd. (COAMC). COAMC brought a lawsuit against several shareholders of Jinling, asking them to be jointly liable for the debt, because four of the shareholders made false capital contributions and one shareholder withdrew RMB2 million from Jinling. At first instance, the Xi'an Intermediate People's Court upheld the plaintiff's allegation. It said:²⁸⁴

According to paragraph 3 of Article 20 of the Company Law of the People's Republic of China, shareholders of a company who have abused the company's independent legal person status and shareholders' limited liability, evade the payment of the company's debt so as to harm the interests of the company's creditors, should be jointly liable for the company's debt. On this basis, the request of COAMC to ask the shareholders to be jointly liable to the extent of their false capital contributions should be upheld.

However, the appellate court – in this case the Shan'xi Higher People's Court, disagreed with such legal reasoning. The appellate court ruled that the application of the veil piercing doctrine was wrong. On this point, the Higher Court opined:²⁸⁵

Undercapitalization as a ground for piercing the corporate veil does not mean that a court can simply make such determination by comparing the company's existing capital to the minimum registered legal capital prescribed in the Company Law. Instead, it means the company's actual capital is excessively lower than the risks that are generated by the business nature of the company. Thus, in this case, the court cannot apply the piercing corporate veil rule simply on the grounds that the shareholders had made false capital contribution or withdrawn capital from the company.

In the end, the appellate court still ordered the shareholders to compensate the plaintiff for the same amounts, but it was fashioned on a different legal basis,

282. *Id.* at 760–61.

283. Zhongguo Dongfang Zichan Guanli Gongsi Xi'an Banshichu Deng yu Zhongguo Jianshe Yinhang Gufen Youxian Gongsi Xi'an Gaoxin Jishu Chanye Kaifaqu Zhihang Jiekuan Jiufen Zaishen'an (中国东方资产管理公司西安办事处等与中国建设银行股份有限公司西安高新技术产业开发区支行借款纠纷再案) [Retrial of Loan Dispute between China Orient Asset Management Co Ltd et al and the Xi'an High-Tech Area Branch of China Construction Bank], (2010) Shan Min Zai Zi Di 00013 Hao, Shaan'xi Higher People's Ct. Apr. 7, 2011, available at www.pkulaw.cn.

284. *Id.*

285. *Id.*

namely that the shareholders were held to have the liability of *buchong peichang*, or complementary liability.²⁸⁶

The difference between the Chinese and German positions is notable. At one time, both countries adopted a similar approach.²⁸⁷ However, as discussed above, Germany now no longer considers undercapitalization that does not involve a breach of the capital maintenance requirements as capable of leading to shareholder liability to third party creditors. The BGH considers such an approach to be inconsistent with limited liability. Interestingly, both the aforementioned first instance and appellate courts in China ordered the shareholders to compensate COAMC to the extent of the false capital contributions and wrongful withdrawal of capital. It is suggested respectfully that care should be exercised in fashioning such a remedy, as the court must be reasonably satisfied that there are no other creditors of the company which appeared to be effectively insolvent. Payment by the shareholders of the capital they should have injected or not withdrawn ought to be a complete discharge of their obligations which would leave other creditors of the company without a remedy. This seems particularly unfair if the capital should have belonged to the company in the first place and therefore distributed to creditors on a *pari passu* basis. The application of a ‘proper plaintiff’ rule in this context seems apposite.

Based on the opinion of the Shan’xi High People’s Court, veil piercing based on undercapitalization in China need not be limited to the statutory minimum required by law. Where payment is ordered to be made directly to some creditors where there are other possible creditors, the risk is that, from a practical standpoint, the latter may not be able to recover meaningfully if the shareholders’ assets are depleted from earlier judgments. It places well-resourced and better-informed creditors in a superior position. This note of caution applies not only to China. Where undercapitalization gives rise to a remedy and has also led to insolvency, it may be more optimal to explore means to facilitate a corporate claim—the success of which will benefit the creditors collectively—rather than to allow veil piercing actions by individual creditors.

Leaving aside undercapitalization, the other three grounds of commingling, undue control, and fraud or other improper conduct, mentioned by Huang as grounds for veil piercing, are matters that would support veil piercing in some other jurisdictions as well. It would appear, nevertheless, that a success rate of 63.64% of veil piercing cases over a five-year study period seems significantly

286. Wen, *supra* note 263, at 344 states that under Article 23(2) of the Company Law, a required precondition of incorporation is having capital contributions of shareholders reach the statutory minimum amount of capital. If shareholder’s capital contributions fail to meet the minimum legal threshold, the company will never be duly incorporated and thus will not have separate personality in the first place. Such cases should not be regarded as veil piercing cases but some courts have mistakenly relied on Article 20.

287. Alting, *supra* note 79, at 210.

higher than that found in major common law jurisdictions.²⁸⁸ Another survey of published cases from 2006 to the end of 2012 found that the court lifted the veil in 75.27% of cases.²⁸⁹ Yet Huang rightly states that caution should be exercised in drawing conclusions, as the numbers may be affected by several contextual factors such as the stage of economic development and the number of firms in each jurisdiction.²⁹⁰ Some indication of the former may be seen by the fact that a substantial percentage of piercing cases were brought in economically less developed regions of China, and cases from such regions were more likely to have high rates of veil piercing. Abuse of the corporate form is possibly more prevalent in economically less developed regions due to lesser knowledge of corporate law and thus a higher level of corporate irregularities.²⁹¹ If Huang's finding is true, it also raises the question of whether judges in such regions have the same appreciation of corporate law as their brethren in more economically sophisticated regions do.²⁹²

One reason for the higher rate of piercing in China may be that judges in some cases have been overly enthusiastic in their approach towards veil piercing. This can be seen by analyzing some of the commingling cases which constitute the largest number of cases brought and where veil piercing occurred.²⁹³ Commingling has certain aspects and is distinguished from misappropriation. Where shareholders (or the corporate parent) do not properly distinguish between corporate assets and their assets, it raises the issue of whether the shareholders treated the corporation as a mere extension of themselves. By not recognizing the integrity of the corporate entity as a matter of fact, the court may infer that the real parties to the apparent corporate transactions were the shareholders and not the corporation itself. Using the language of Lord Sumption in *Prest v. Petrodel*,²⁹⁴ the shareholders were merely concealing their true involvement. Another aspect of commingling is that the financial affairs of the company and that of another person, usually a shareholder, are such a "mess" that it is impossible to distinguish which person is the owner of the assets in question. Whatever the approach, the essence of commingling is that no distinction is made or can be made between the assets of the company and that of its shareholders. They are therefore to be treated as one and the same for this purpose. If this is the correct conclusion, no part of the commingled assets should be regarded as

288. Huang, *supra* note 256, at 748. However, the system of law reporting in China is by no means as comprehensive as that found in major common law jurisdictions and therefore there is a danger of reading too much into this statistic.

289. Hawes et al, *supra* note 263, at 350.

290. Huang, *supra* note 256, at 748.

291. *Id.* at 751.

292. *Contra* Hawes et al, *supra* note 263, at 351–52 which found no significant distinction between economically developed and less-developed regions, or between lower-level and higher-level courts.

293. Huang, *supra* note 256, at 760.

294. *Prest* [2013] 3 WLR 1 [28].

having ever properly been owned by the company, given that the company's involvement is merely illusory,²⁹⁵ or it is impossible to make any distinction between corporate and personal assets. In some instances, the court may even conclude that the company simply held the assets on trust for the shareholders.²⁹⁶ There is a subtle but real difference between commingling and the misappropriation of corporate assets by the company's shareholders. In the latter, the shareholders recognize that the assets belong to a separate entity but improperly/dishonestly withdraw such assets. The corporation may therefore maintain a claim for the recovery of its assets. Misappropriation is a form of theft that can also give rise to criminal prosecution and, in this context, requires a particular mental state involving some element of dishonesty.²⁹⁷

In *Wuhan Vegetables Co. v. Wuan Jiutian Trade Development Co.*,²⁹⁸ the plaintiff transferred its equity interest in Baishazhou LLC to Tianjiu Co. Tianjiu never fully paid the plaintiff for this transfer. Tianjiu later transferred part of this equity interest to Mrs. Wang Xiuqun, making her a shareholder with a 70% interest in Baishazhou. Two subsequent transfers then occurred. First, Mrs. Wang transferred her equity interest in Baishazhou to China Velocity Group Limited, and subsequently she transferred her equity interest of 96% in Tianjiu to two individuals, Huang Yi and Tao Xin. The court allowed the corporate veil to be pierced against Mrs. Wang. In the court's view, the aforementioned acts of Mrs. Wang, the majority shareholder who had absolute control of Tianjiu, coupled with the fact that she did not have evidence to prove that consideration was duly paid to the plaintiff for the transfer of its equity interest, indicated that Mrs. Wang had successfully "escaped" from Tianjiu by transferring her equity ownership in Tianjiu to others. The court concluded that she had negatively affected the realization of the debt claims of the plaintiff as a creditor of Tianjiu. Accordingly, Mrs. Wang was jointly liable for Tianjiu's debts under Article 20(3) of the Company Law. One way of analyzing this case is that it is an example of a shareholder abusing the corporate form to defraud creditors. Another explanation is that the defendant, Mrs. Wang, had misappropriated the assets the company had purchased from the plaintiff. This single act of misappropriation was held to constitute evidence of commingling of assets, thus justifying veil piercing.²⁹⁹ If this is the correct explanation of the case, in addition to the point

295. See also Tan, *supra* note 77, at 23–26.

296. See e.g., *Asteroid Maritime Co Ltd v The owners of the ship or vessel "Saudi al Jubail"* [1987] SGHC 71; *Gencor ACP v Dalby* [2000] All ER (D) 1067.

297. See e.g., section 403 of the Singapore Penal Code (Cap. 224) and section 1 of the UK Theft Act 1968.

298. Wuhan Shi Shucai Jituan Youxian Gongsi Su Wuhan Tianjiu Gongmao Fazhan Youxian Gongsi deng Guquan Zhuanrang Hetong Jiufen An (武汉市蔬菜集团有限公司诉武汉天九工贸发展有限公司等股权转让合同纠纷案) [*Wuhan Vegetables Co v Wuan Jiutian Trade Development Co.*], (2009) Wu Min Shang Chu Zi No. 66, Wuhan Intern. People's Ct., December 25, 2009, original judgment available at www.pkulaw.cn.

299. Huang, *supra* note 256, at 765.

made earlier regarding the distinction between commingling and misappropriation, it is difficult to see how a single act such as this could have amounted to commingling. Commingling usually requires a pattern of activity that demonstrates unequivocally that the separate personality of the corporation was not respected.

Another decision where the same criticism can be made is *Yueyang Shenyu Grease Trading Ltd. v Lin and Others*,³⁰⁰ a decision of the Yueyang Municipality Intermediate Court. In this case, the defendant company had two shareholders, Mr. Liu and Mr. Hu. The company hired Mr. Xu as the CEO and Mr. Peng as the finance manager. It was orally agreed that Messrs Liu, Xu and Peng would be the shareholders of the company holding 40%, 40% and 20% respectively. Notwithstanding this agreement, Mr. Liu and Mr. Hu remained the only shareholders on record, although Messrs. Liu, Xu and Peng were regarded within the company as the actual shareholders and controllers. The plaintiff made a number of payments to the company for purchases of cotton. The finance manager deposited these payments into his personal bank account to minimize the company's income for tax purposes. When the cotton that the plaintiff ordered was not delivered, the plaintiff brought a claim against the company and joined its shareholders as defendants, as the company did not have sufficient assets.

At first instance, the court ruled that the three shareholders who were regarded as actual shareholders, namely Messrs Liu, Xu and Peng, had abused the company's independent legal personality by commingling personal assets with corporate property. They were therefore held jointly liable for the company's debts. Mr. Hu, on the other hand, was not liable. The appellate court revised the first instance decision. It ruled that Mr. Liu, as the company's legal representative and a registered shareholder, had indeed abused the company's separate personality and harmed the interests of creditors. The corporate veil was therefore correctly lifted in relation to him. As Mr. Hu was also a shareholder, he too was liable for the company's debts. The finance manager, on the other hand, was not a shareholder and therefore veil piercing was inapplicable. The court did not consider Mr. Xu's case as he had accepted the first instance decision.

If the purpose for placing the monies in the finance manager's bank account was tax evasion, the characterization of the case as one involving commingling may not be correct. Rather, it is a case of shareholders recognizing that they were removing corporate assets with a view to under-declaring the company's income. The proper remedy would appear to lie with the company for the recovery of its

300. *Yueyang Shenyu Youzhi Maoyi Youxian Gongsideng yu Lin XX deng Zhaiquanren Liyi Zeren Jiufen Shangsu An* (岳阳神禹油脂贸易有限公司等与林XX等债权人利益责任纠纷上诉案). (2010) Yue Zhong Min San Zhong Zi Di 276 Hao, Yueyang Interme. People's Court, September 30, 2011, available at www.pkulaw.cn.

assets against the finance manager and possibly other persons engaged in the scheme as co-conspirators or joint tortfeasors.³⁰¹ The finding of liability against Mr. Hu seems particularly harsh given that he was not an active shareholder, presumably because it was intended that at some point there would be a transfer of his shares. It is difficult to see how in this context he could be regarded as a shareholder who had abused the independent legal status of the company.³⁰² It would seem over-inclusive and contrary to the public policy underlying incorporation to impose liability on shareholders who are merely passive investors and therefore not involved in any abusive conduct.

The position regarding commingling in the Chinese context is also unusual in the context of one-person companies. The burden of proof in the case of such companies is that the shareholder must establish that the property of the company is independent of his own. If he cannot do so, he becomes personally liable for the debts of the company. This is set out in Article 64 of the Company Law:³⁰³

Where the shareholder of a one-person company with limited liability cannot prove that the property of the company is independent of his own property, he shall assume the joint and several liability for the debts of the company.

It has been argued that it is extremely difficult for a defendant shareholder to discharge the burden.³⁰⁴ If this is correct, it provides another explanation of why veil piercing takes place more frequently in China. Yu and Kraver go further and suggest that beyond single-shareholder companies the courts have appeared to shift the burden of proof from creditors to companies and their shareholders more than the legislative language implies and this is the most plausible explanation for the higher frequency of veil piercing in China. This shift of onus in veil piercing cases is allied to the absence in Chinese veil piercing cases of the responsibility of creditors to protect themselves.³⁰⁵

However, this argument lacks support from cases. The cited support for this broad proposition is not compelling. The case of *Shanghai Zhongbo Company (Appellant) v. Anhui Water Conservancy Construction Engineering Corporation*

301. For example, at common law joint tortfeasance may be established by showing that Messrs Liu and Xu procured or authorized the finance manager to commit the wrongful act, *see e.g., Mentmore Manufacturing Co v National Merchandise Manufacturing Co* (1978) 89 DLR (3d) 195; *C Evans & Son Ltd v Spritebrand Ltd* [1985] 1 WLR 317; *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649.

302. Hawes et al, *supra* note 263, at 364 state that the finance manager had purchased the shares from the seller, presumably Mr Hu, but the share transfer had not been registered. This may not be entirely accurate. While the oral agreement contemplated that the finance manager would be made a shareholder, there was no sale of Mr Hu's shares to the finance manager.

303. Translation from http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384124.htm (accessed on September 6, 2017).

304. Huang, *supra* note 256, at 765–66, citing as an example the case of Zhao Yongying Su Quzhou Weini Huagong Shiye Youxian Gongsi deng Maimai Hetong Jiufen An (赵庸英诉衢州威尼化工实业有限公司等买卖合同纠纷案) [*Zhao Yongying v Quzhou Weini Chemical Industrial Ltd Co*], (2010) Qu Shang Chu Zi No. 1130, People's Court of Qujiang District of Quzhou City of Zhejiang Province, 2010. *See also* Yu & Kraver, *supra* note 263, at 76, 80–81.

305. Yu & Kraver, *supra* note 263, at 82–84.

*and Others (Respondents)*³⁰⁶ is cited as a typical example of the tendency to shift the burden of proof away from creditors. The shareholders' argument was that debts could not be paid in the course of liquidation and the liquidation process was taking a lengthy period of time because of *inter alia* complications from partial ownership of assets and difficulties dealing with competing claims from other creditors. The appellate court did not require the plaintiffs to show abuse; rather, the court indicated that the defendants had failed to provide proof of the reasons offered for the delay and treated the non-payment for an extended period as abuse. It is said that in the same fact situation, a common law court might very well have come to a similar conclusion, but first, such a court would have required the creditor plaintiffs to prove abuse by showing there were no legitimate reasons for extending the liquidation period for such a long time.³⁰⁷

However, it is difficult to expect creditors in all instances to prove that there were no legitimate reasons for the length of the liquidation period. These may not be matters particularly within the knowledge of creditors. Given that the liquidation process had already been going on for five years, together with the defendant company's lack of cooperation during the process, a common law court might have concluded that there was some *prima facie* evidence of unreasonable delay such that the burden of proving that the delay was justifiable had shifted to the defendant. Issues relating to the burden of proof are not static³⁰⁸ and can shift where, as in this case, the objective facts call for an explanation that only the defendant can reasonably provide. If the defendant cannot do so, it is not unreasonable for a court to only attribute the fault for delay to the defendant. Whether this should amount to abuse is a separate issue. There are at least two possibilities. First, it may be arguable that if a defendant company and its shareholders were intransigent in the liquidation process, the court could infer from the circumstances as a whole that the corporate structure had been used in an abusive manner. The decision, however, proceeded on the second possible mode of analysis, namely that responsibility for the failure to complete the liquidation process ought to be placed on the shareholders. The trial preferred the first possibility, while the appellate court preferred the second one. Relying on Article 20 of the Company Law, the court ruled that, based on the evidence available (including evidence provided by the parties which also comprised the repeated applications from the company to delay the first-instance trial), it was clear that the shareholders intended to abuse the independent corporate personality of the company and the shareholders' limited liability, with the

306. Shanghai Zhongbo Jingguan Luhua Yuanyi Youxian Gongsi yu Anhuisheng Shuili Jianzhu Gongcheng Zonggongsi deng yu Gongsi Youguan de Jiufen Shangsus An (上海仲伯景观绿化园艺有限公司与安徽省水利建筑工程总公司等与公司有关的纠纷上诉案), (2011) Wan Min Er Zhong Zi Di 00007 Hao, Higer People's Court of Anhui Province, March 28, 2011, available at www.pkulaw.cn (hereinafter the "*Shanghai Zhongbo case*")

307. Yu & Krever, *supra* note 263, at 83.

308. See also Wen, *supra* note 263, at 352 on the dynamic nature of the burden of proof.

consequence that the company's veil should be lifted.³⁰⁹ On either analysis, there is no basis to state that the courts have illegitimately shifted the onus of proof from creditors to shareholders.

Beyond whether Chinese judges have adopted an overly broad view of commingling, and if the burden of proof has been unfairly shifted from creditors to shareholders, it has also been suggested that loopholes regarding shareholder performance in corporate liquidation may have led judges to use veil piercing to play a gap-filling role. It is argued that, unlike many other jurisdictions that have rules to prevent the liquidation process from being unduly influenced by shareholders, many of these rules are scarce in China's company law context. Rather than independent liquidators who are insolvency professionals, Chinese company law allows shareholders of a limited liability company to form a liquidation group, the composition of which must be determined by the shareholders' meeting. This has led to courts using veil piercing to impose liability on shareholders where the liquidation process is not completed or does not proceed reasonably.³¹⁰

If this is one of the reasons that have led to a more liberal approach towards veil piercing in China, it appears unjustified. Two points can be made. First, it is undoubtedly true that under the Company Law creditors do not have a general right to initiate a corporate winding up through the appointment of a liquidator or equivalent institution. Pursuant to Article 180 of the 2013 Company Law, a company is to be liquidated if: (1) the circumstances for liquidation provided for in the articles of association of the company occur; (2) the shareholders' meeting passes a resolution to liquidate; (3) a corporate merger or division compels liquidation; (4) the company's license has been revoked or the company is ordered to close in accordance with the law; (5) shareholders who own at least 10% of the ownership of the company request it in cases involving a corporate deadlock.

Corporate creditors are relegated to a secondary role. For example, where a company is dissolved as a result of factors (1), (2), (4) and (5) in the preceding paragraph, the company shall, within 15 days from the date when the reasons for dissolution prevail, set up a liquidation team to begin the process. Where a company fails to do so, its creditors may apply to the court to designate relevant people to form a liquidation team.³¹¹ Creditors may also petition the court to develop a liquidation team in other circumstances such as when a liquidation team has been developed but has deliberately delayed the liquidation, or when a wrongful liquidation may seriously damage the interests of the creditors or shareholders.³¹²

309. See *Shanghai Zhongbo* case, *supra* note 306.

310. Wen, *supra* note 263, at 354–55.

311. PRC Company Law, art. 183.

312. SPC Company Law Interpretation (II), Article 7.

It is understandable that where shareholders are in control of the liquidation process, such control ought not to be unqualified as it can lead to prejudice to other stakeholders, in particular, creditors. Accordingly, in addition to creditors being allowed to file a petition to the court in certain circumstances, there are also instances where shareholders can be held directly liable to creditors. First, if a company does not form a liquidation team within the statutorily prescribed period of 15 days and this has caused the depreciation, loss, damage or disappearance of corporate assets, the creditors can ask the court to hold the responsible shareholders liable for compensation to the extent of the value of the said assets.³¹³ Second, if the failure in performing the aforesaid obligations has caused the loss of essential documents and accordingly made it impossible for the liquidation to proceed, the court, at the request of the creditors, can additionally hold the responsible shareholders jointly liable for the company's debts.³¹⁴ Third, creditors can ask the court to make the shareholders liable to provide compensation if the shareholders (and directors in joint stock limited companies) maliciously disposed of corporate assets and caused losses to the creditors after the company's dissolution, or if the shareholders wrongly caused the companies registration authority to deregister the company without it being lawfully liquidated.³¹⁵ Also, if the company does not have sufficient assets to satisfy the claims of the creditors at the time of its dissolution, the creditors can ask the court to hold the shareholders liable to the extent of their unpaid capital contributions.³¹⁶

Members of the liquidation team, which may include shareholders, can also be liable to creditors when they do not discharge their obligations properly, such as when they fail to give notice to all known creditors of the company's liquidation; the liquidation team implements a liquidation scheme that is not confirmed by shareholders or the court as the case may be; or there has been violation of laws, administrative regulations, or the company's articles of association, thereby causing loss to creditors or the company.³¹⁷

While the application of these rules may lead to shareholder liability, it is incorrect to regard them as veil piercing cases. Insofar as the shareholders are liable to creditors, the liability arises when the company is liquidated for dissolution and deregistration. The legal test of Article 20 of the Company Law does not apply in these circumstances. The shareholders will be held liable to provide compensation to creditors jointly and severally for the debts of the company if, in the course of and related to the liquidation process, they were directly or indirectly involved in acts that made the company unable to repay its

313. Company Law Interpretation (II), Article 18(2).

314. Company Law Interpretation (II), Article 18(3).

315. Company Law Interpretation (II), Articles 19 and 20.

316. Company Law Interpretation (II), Article 22.

317. Company Law Interpretation (II), Articles 11, 15 and 23.

debts, including non-payment of outstanding capital contributions. Liability is premised on the liquidation having been conducted improperly and is different from shareholders' abuse of the independent legal status of corporate personality and shareholders' limited liability as required by Article 20 of the Company Law. The relevant rules in the aforesaid judicial interpretations are not aimed at clarifying Article 20, and hence are not interpretations about the doctrine of veil piercing.

The second point is that there is another legislation that allows creditors to initiate the liquidation of a company. The PRC Enterprise Bankruptcy Law 2006 governs bankruptcy issues of all legal business persons including companies established under the Company Law. Under the law, where a company fails to repay its debts and its assets are not sufficient to pay all debts that are due, or the company is obviously incapable of paying its debts, its creditors can petition the court for revival (re-organization), compromise, or bankruptcy liquidation.³¹⁸ Even if the liquidation process under the Company Law has commenced, creditors are free to petition the court to initiate the bankruptcy procedure under the Enterprise Bankruptcy Law as long as it can be established that the conditions of Article 2 are met. These two forms of liquidation found in different Chinese legislation are not unusual and can be broadly equated with voluntary and creditor windings-up in Commonwealth jurisdictions such as the UK and Singapore. It is sensible for a liquidation regime to allow shareholders to liquidate a company in certain circumstances, for instance, where the objectives set out in the constitution have been fulfilled, or the requisite majority of shareholders pass such a resolution while allowing creditors to do so if the corporation becomes insolvent. This is because where a company is insolvent, its remaining assets effectively belong to creditors since they are the ones who are entitled to the residue in priority to shareholders. Therefore, creditors should have the right to commence liquidation to ensure an orderly distribution of corporate assets.

Given the above, if cases in the insolvency setting have contributed to the greater than average percentage of successful veil piercing cases, the number of such cases has been overstated by the inclusion of cases that ought not to involve piercing at all. In addition, if veil piercing has taken place because of a perceived gap in the insolvency framework, this is also not justified. One example of the former is *Hengsheng Co. Ltd v Xianglan Co. Ltd*.³¹⁹ Hengsheng had purchased RMB 2.2 million worth of electric cables from Xianglan from 2000 to 2003. Hengsheng failed to repay Xianglan. In March 2003, the parties reached a

318. PRC Enterprise Bankruptcy Law 2006, art. 2.

319. Hengsheng Gongsi yu Xianglan Gongsi Jiekuan Hetong Jiufen Zhixing An (恒生公司与橡缆公司借款合同纠纷执行案) [*Hengsheng Co. Ltd v Xianglan Co. Ltd* on Enforcing a Lending Contract], (2015) Yang Hui Zhi Zi Di 393 Hao (2015), Yanggu Basic People's Court, June 30, 2015, available at www.pkulaw.cn.

repayment agreement under which Hengsheng was obliged to make payment in full before 2007. Hengsheng's business license was revoked by the local Administration of Industry and Commerce on May 30, 2005 because it failed the government's annual inspection of business enterprises. According to Article 184 of the Company Law, the shareholders of Hengsheng, Mr. Zheng, Mr. Li and Mr. Zhang, should have initiated liquidation of the company within 15 days.

Hengsheng failed to make payment as had been agreed, and Xianglan brought legal action in 2011. An order was made in favour of Xianglan, and it applied to enforce the order. On June 30, 2015, the Court issued its enforcement decision, in which Article 20(3) of the Company Law and Article 18 of Company Law Interpretation (II), among others, were relied upon as the legal basis on which the court ordered that the aforementioned Messrs. Zheng, Li, and Zhang were persons against whom the agreement could be enforced. The court held that the corporate veil should be pierced against them, as their failure to liquidate the company constituted an abuse of corporate personality and limited liability. Although Article 18(2) of Company Law Interpretation (II) was also properly invoked, it is questionable if veil piercing should have been relied upon.

SOME CONCLUDING OBSERVATIONS

This paper goes beyond the traditional functional method in comparative law, which mainly looks at how different legal systems offer solutions to the same problems.³²⁰ Undoubtedly, the doctrine of veil piercing has been adopted in all the jurisdictions under comparison in this paper, and there is also a striking similarity in the notion of abuse that is said to underlie the disregard of the corporate form to hold shareholders personally liable for corporate debts. In addition, the history of how corporate law came into existence is a factor that has influenced the shape of the doctrine. The law in Singapore for example demonstrates the effect of transplantation with strong similarities with the legal approach in England. China, on the other hand, appears to resemble the United States more closely. This is not surprising given the more recent influence of US corporate law in China and that it has a specific statutory provision that recognizes veil piercing, thereby implying a broader role for the doctrine.

By critically examining the relevant statutory provisions as well as judicial reasoning in veil piercing cases against the doctrine's underlying conceptual framework we can see how the doctrine is used, arguably misused, or even sidelined in the jurisdictions under comparison. In particular, we caution against the indiscriminate use of veil piercing where more appropriate legal tools are available. Veil piercing can be a blunt and simplistic instrument to achieve perceived justice without addressing the real policy issues that are at the heart of

320. ZWEIGERT & KÖTZ, *supra* note 183, at 34.

other areas of the law. We find, for example, that the doctrine has become largely unnecessary in Germany because of other remedies that provide more direct and effective solutions. In England (and perhaps Singapore if the courts adopt the approach advocated by Lord Sumption), veil piercing may follow the same route, given that before *Prest v. Petrodel* the approach towards veil piercing in both jurisdictions was in any event conservative. Lord Sumption's approach leaves very little room for the veil piercing doctrine to operate.³²¹ It is interesting to observe that both countries are highly mercantilist in outlook, which may (at least partially) explain the strong tendency not to disregard corporate personality as evidenced by the paucity of veil piercing cases. Judicial policy is inclined towards giving businesses certainty.

On the other hand, the United States, also a common law country, is significantly more liberal in piercing the veil even though its courts articulate that this should be done exceptionally. Similarly, the Chinese courts also adopt a more liberal approach towards veil piercing, and we believe that our analysis of the veil piercing doctrine in Chinese company law offers an original perspective of how this doctrine is misunderstood and applied by Chinese courts through judicial interpretations and judgments. The evolution of the doctrine in China to its final codification into the Company Law (and the approach taken by the other jurisdictions discussed) is one indication of the strong trend of convergence of corporate law across the world. Yet the doctrine's application by Chinese courts is also a demonstration of a material degree of divergence. Formal law which has converged in this area, and the law in practice, can be very different in China and elsewhere. Where China is concerned, divergence in practice is partly caused by the uniqueness of the business context which, because of its stage of economic development, is less attuned to developed notions of governance. We also argue that some of the interpretations by Chinese courts are doctrinally questionable, which partly explains the significantly higher number of successful veil piercing cases, though we disagree with some of the reasons advanced by others for this. As the doctrine is a relatively new transplant to China, it is understandable that it will take some time before the law "settles."

321. Indeed, Lord Neuberger in *Prest* [2013] 3 WLR 1 [79] was initially strongly attracted by the argument that the veil piercing doctrine "should be given its quietus".